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A TREATISE
ON
THE LAW
OF
EXECUTORS AND ADMINISTRATORS

BY
THE RIGHT HONOURABLE
SIR EDWARD VAUGHAN WILLIAMS
(LATE ONE OF THE JUDGES OF HER MAJESTY'S COURT OF COMMON PLEAS).

Fifth Edition

BY
THE HONOURABLE
SIR ROLAND L. VAUGHAN WILLIAMS, KNT.,
(ONE OF THE JUSTICES OF HER MAJESTY'S HIGH COURT OF JUSTICE).

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BOOK THE THIRD.

OF THE DUTIES OF AN EXECUTOR WITH RESPECT TO LEGACIES.

HAVING thus considered the office of an executor in regard to the payment of debts according to the order prescribed by law, it now becomes necessary to treat of the duties which next demand his attention, *viz.*, those which respect the payment of legacies.

A legacy is defined to be "some particular thing or things given or left, either by a testator in his testament wherein an executor is appointed, to be paid or performed by his executor, or by an intestate in a codicil or last Will, wherein no executor is appointed, to be paid or performed by an administrator" (a).

Definition of
legacy.

CHAPTER THE FIRST.

WHO IS CAPABLE OF BEING A LEGATEE: AND HEREWITH OF BEQUESTS TO CHARITABLE USES.

SECTION I.

Who is capable of being a Legatee.

The subject of the present Section has been in some degree anticipated, by the inquiry as to the capability for

(a) Godolman, Pt. 3, c. 1, s. 1. every "legatee" under his Will
Where a testator directed that should contribute £1 per cent. out

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the office of executor. The same rule applies in both matters, that every person is capable, excepting such as are expressly forbidden (*b*).

Bankrupt.

A bankrupt may be a legatee; but where a legacy belongs to, or is vested in, a bankrupt at the commencement of his bankruptcy, or is acquired by, or devolves on, him before his charge, it vests in the trustee in his bankruptcy and is divisible amongst his creditors (*c*).

Alien.

Subscribing witness,
1 Vict. c. 26.

An alien may be a legatee (*d*).

By stat. 1 Vict. c. 26, s. 15 (which, however, does not extend to any Will made before January 1st, 1838 (*dd*), it is enacted, "that if any person shall attest the execution of any Will [or testament or codicil or any other testamentary instrument] to whom, or to whose wife or husband, any beneficial (*e*) devise, legacy, estate, interest, gift (*f*), or

of their "legacies" to Mrs. W. and her children, it was held that specific legatees and annuitants and residuary legatees were bound to contribute: *Ward v. Grey*, 26 Beav. 485.

(*b*) *Ante*, p. 183.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (1). It must be observed, however, that legacies the payment of which is by the terms of the gift made conditional upon the legatee not being or becoming a bankrupt do not in the event of the legatee's bankruptcy pass to the trustee. See *post*, p. 1131.

(*d*) See the Naturalization Act, 1870, 33 & 34 Vict. c. 14, s. 2.

(*dd*) A legacy, however, to a subscribing witness to a will or codicil of *personally* before this date is a good legacy. *Brett v. Brett*, 3 Add. 210. *Emanuel Constable*, 3 Russ. Ch. C. 436. *Foster v. Banbury*, 3 Sim. 40. Such a legacy would not be good

in the case of a will or codicil of real estate even before the above date: *Brett v. Brett* (*ubi sup.*).

(*e*) The interest must be a *beneficial* interest to the witness to render the bequest void. Therefore where an attesting witness was made universal legatee in trust for the testator's widow, it was held that the bequest was not null and void under this statute: In the goods of *Ryder*, Prerog. 2 Notes of Cas. 452. *Cresswell v. Cresswell*, L. R. 6 Eq. 69.

(*f*) A solicitor was one of the attesting witnesses of a Will. The will declared that he should be entitled to charge and receive payment for all professional business to be done by him under the Will, in the same manner as he might have done had he not been the executor. It was held that he was prohibited by this section from receiving that which was not a debt of which payment could be enforced at law, but a *beneficial gift*

appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby (g) given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns such person attesting the execution of such Will, or the wife or husband of such person, or any person claiming under such person or wife or husband (gg), be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such Will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such Will."

which could only be claimed by virtue of the direction in the Will. *Re Barber*, 31 C. D. 665. *Re Pooley*, 40 C. D. 1.

(g) *i. e.* by the same instrument which is attested. Therefore a bequest of a legacy by a Will is not void because the legatee attests a codicil which gives him nothing; nor does a residuary legatee of a share of a residue lose it by attesting a codicil which, by revoking legacies, increases the residuary share: *Gurney v. Gurney*, 3 Drewr. 208. *Tempest v. Tempest*, 2 Kay & J. 635. *Accord.* A testatrix by her Will gave a share of her residuary real and personal estate to the husband of one of the attesting witnesses of the Will. By a codicil which was attested by other witnesses, the testatrix after a direction to her executors to allow an extended time for payment of a debt due to her from one of the legatees, confirmed her Will in other respects. It was held that the duly attested codicil had the effect of republishing and incorporating the Will so as to render the gift

to the husband valid notwithstanding the attestation of the Will by his wife. *Anderson v. Anderson*, L. R. 13 Eq. 381.

(gg) A testator left by Will all his real and personal estate to his wife for life, and after her death to be equally divided between such of his children as should be living at her death, and in the event of any of his daughters being married at his wife's decease such proportion as they might be entitled to should be left to them and their children exclusively, and should in no way be controlled by their husbands. At the death of the testator's widow one of his daughters was living who had several children. Her husband had been one of the attesting witnesses of the Will. Held that the gift to the daughter was void under this section, but that her children were not to be disappointed by her disability, but took an immediate interest in her share as tenants in common. *Re Clark*, 31 C. D. 72. *Jull v. Jacobs*, 3 C. D. 703.

This clause follows almost verbatim the language of the stat. 25 Geo. II. c. 6, except that the stat. of Geo. II. did not contain the words "or to whose wife or husband" in the earlier part, or the words "or to prove the validity or invalidity thereof," towards the close of the section. Consequently the case of *Doe v. Mills* (h), which was decided upon the earlier statute, appears to be an authority applicable to the construction of the statute of Victoria. It was there held by Lord Denman and Bolland, B., as Judges of the Court of Common Pleas at Lancaster, that the statute of Geo. II. makes void a devise to an attesting witness, although there be three other attesting witnesses to the Will.

And accordingly it was afterwards held, by Wood, V.-C., in *Wigan v. Rowland* (i), in the construction of the statute of Victoria, that where the execution was attested by two marksmen, and signed also by two other persons as witnesses, the signatures of the latter must be deemed to have been affixed likewise in attestation of the Will, and not as merely verifying the attestation of the marksmen; and therefore that a legacy to the wife of one of them failed (k).

Wife of
testator.

It may be observed, that although a man could not before the Married Women's Property Act make a grant to his wife, nor enter into a covenant with her (for such grant would have been to suppose her separate existence, and to covenant with her would have been to covenant with himself), yet he might bequeath anything to her by Will; since that could not take effect till after the coverture was determined by death (l).

(h) 1 Mood. & Rob. 288.

(i) 11 Hare, 157.

(k) But it has been decided that where a Will has been executed in the presence of two witnesses, and in addition to their signatures the signature of a third person who is also a legatee, appears at the foot of the Will, the Court will receive evidence to explain why such signature was written, and if it be satisfied that it was

not written with the intention of attesting the signature of the deceased, it will order it to be omitted from the probate. In which case the validity of the legacy would not be affected. In the goods of Sharman, L. R. 1 P. & D. 661. *Randfield v. Randfield*, 8 H. L. C. 225, 228, note (c).

(l) 1 Black. Comm. 442. Co. Lit. 112.

The marriage, after attestation of a Will, of a devisee to one of the attesting witnesses does not affect the validity of the devise (*m*).

Effect of marriage of a devisee to one of attesting witnesses.

SECTION II.

Of Bequests to Superstitious and Charitable Uses.

All bequests to *superstitious* uses are illegal and void; but bequests to *charitable* uses are not only legal and valid, but are, in some measure, favoured in our law, provided that they are of personal property, in no way connected with land.

With respect to what shall be regarded as superstitious uses, the effect of the statute 1 Edw. VI. c. 14 (although it relates only to superstitious uses of a particular description, existing at the time it passed) (*n*), has been taken to be, that if any real or personal property whatever shall have been, or shall be, given, assigned, limited, or appointed to have continuance, for ever, or for a time only, towards or for the finding or maintenance of a stipendiary priest, or for the maintenance of an anniversary or obit, or of any light or lamp in any church or chapel, or other like intent, these and such like gifts and dispositions as these, are to be accounted within the superstitious uses intended to be suppressed by the Act (*o*).

Bequests to superstitious uses.

Other bequests to superstitious uses, not mentioned by the Act, are deemed void by the general policy of the law: As a devise for the good of the soul of the devisor (*p*).

(*m*) *Thorpe v. Bestwick*, 6 Q. B. D. 311.

(*n*) See *Cary v. Abbot*, 7 Ves. 495, and *Doe v. Hawthorn*, 2 B. & A. 103.

(*o*) *Duke on Charitable Uses*, 106, p. 349, Bridgman's edition. *West v. Shuttleworth*, 2 M. & K. 684: So it was held by Lord Langdale, in *Attorney-Gen. v. The Fishmongers' Company*, 2 Beav.

151, that establishments or foundations for securing prayers for the souls of the dead are to be deemed superstitious, and within the statute of Edw. VI. And this decision was affirmed by Lord Cottenham, 5 M. & Cr. 11. See also *Heath v. Chapman*, 2 Drewr. 426.

(*p*) *R. v. Lady Portington*, 1 Salk. 162. However, in *Thornton v. Howe*, 31 Beav. 14, Lord Romilly

So, before the passing of the statute of 2 & 3 Wm. IV. c. 115, it was held that a bequest for the education of persons in the Roman Catholic faith was invalid (*q*). But that statute appears to put persons professing the Roman Catholic religion upon the same footing with respect to their schools, places for religious worship, education and charitable purposes, as Protestant Dissenters: And, therefore, since the passing of the Act (which has been held to be retrospective) (*r*), a legacy given to trustees to appropriate the money in such way as they may judge best calculated to promote the knowledge of the Roman Catholic Christian religion among the poor and ignorant inhabitants of a particular district was held to be valid (*s*); but this statute does not render valid a bequest of sums of money to be paid to certain Roman Catholic priests and chapels as soon as possible after the death of the testator that he may have the benefit of their prayers and masses (*t*): nor, perhaps, a bequest in trust to apply the proceeds of a fund in printing and promoting the circulation of a treatise in a foreign language which inculcates the doctrine of the absolute and inalienable supremacy of the Pope in Ecclesiastical matters (*u*).

held that a trust for the promulgation of the doctrines of Joanna Southcote could be supported as a charitable gift as intended for the benefit of the public. Compare *Doe v. Hawthorn*, 2 B. & Ald. 103. Formerly a bequest of a fund to be applied for a *Jesuba* or assembly for reading the Jewish law and instructing the people in the Jewish religion, was held invalid. *Da Costa v. De Paa*, Ambler, 228. *Pickering v. Stamford*, 2 Ves. 272, 274, 276. *Moggridge v. Thackwell*, 7 Ves. 36, 76. But in *Straus v. Goldsmid*, 8 Sim. 614, it was held by Sir L. Shadwell, V.-C., that a bequest to make persons professing the Jewish religion

observe its rites is good. And now Jewish charities by stat. 9 & 10 Vict. c. 59 (which is retrospective) are placed on the same footing as those of Dissenters. *Re Michel's Trusts*, 28 Beav. 39.

(*q*) *Cary v. Abbot*, 7 Ves. 490.

(*r*) *Bradshaw v. Tasker*, 2 M. & K. 221.

(*s*) *West v. Shuttleworth*, 2 M. & K. 684. See further as to Roman Catholic charities, stat. 23 & 24 Vict. c. 134.

(*t*) *West v. Shuttleworth*, 2 M. & K. 684. See also *Accord*, *Heath v. Chapman*, 2 Drew. 417. *Re Blundell's Trust*, 30 Beav. 360.

(*u*) *De Themmines v. De Bonneval*, 5 Russ. 288.

With respect to bequests relating to Protestant Dissenters, the Court will administer a fund given to maintain a society of Protestant Dissenters promoting no doctrine contrary to law, although such as may be at variance with the doctrine of the Established Church (x). So in *The Attorney-General v. Hickman* (y), a legacy was established, which was given for encouraging such non-conforming preachers as preach God's word in places where the people are not able to allow them a sufficient and suitable maintenance, and for encouraging the bringing up some to the work of the ministry who are designed to labour in God's vineyard among the Dissenters, leaving the particular mode to the trustees (z).

There is a distinction, with respect to the application of the fund bequeathed, between bequests made in favour of uses comprised within the statute 1 Edw. VI. and bequests of the nature above mentioned, which are merely void as bequests to superstitious uses. That statute provides that the bequests made void by it shall vest in the Crown beneficially (a): But where the bequest, although not within the statute, is merely void, as being to superstitious uses, the King shall not take it beneficially; yet if it be of a *charitable* nature, it shall not be so far void, as that it shall result to the heir or next of kin of the testator; but the King, by sign

Distinction between superstitious uses within stat. 1 Edw. VI. and those void irrespective of it.

(x) *Attorney-Gen. v. Pearson*, 3 Meriv. 353, by Lord Eldon: cited by Lord Cottenham, *West v. Shuttlesworth*, 2 M. & K. 684, 696.

(y) 2 Eq. Cas. Abr. 193.

(z) See further on the subject of bequests relating to Dissenters, *Attorney-Gen. v. Baxter*, 1 Vern. 248. *Waller v. Childs*, Ambl. 524. *Doe v. Aldridge*, 4 T. R. 264. *Doe v. Copestake*, 6 East, 328. *Moggridge v. Thackwell*, 7 Ves. 36. *Attorney-Gen. v. Fowler*, 15 Ves. 85. *Attorney-Gen. v. Wansay*, *ibid.* 231. *Davis v. Jenkins*, 3 Ves. & B.

158. *Attorney-Gen. v. Pearson*, 7 Sim. 290. *Attorney-Gen. v. Shore*, 11 Sim. 592. *Shore v. Wilson*, 9 Cl. & F. 355. *Attorney-Gen. v. Wilson*, 16 Sim. 210. *Shrewsbury v. Hornby*, 5 Hare, 406. *Attorney-Gen. v. Lawes*, 8 Hare, 32. *Re Barnett*, 29 L. J. Ch. 871.

(a) Where the gift is for the benefit of the poor, but connected *indivisibly* with superstitious uses, made void by the Act, the whole goes to the Crown: *Attorney-Gen. v. Fishmongers' Co.*, 5 M. & Cr. 15, 16.

manual directed to the Attorney-General, may order to what charitable purpose it shall be disposed (*b*): Where, however, there is nothing of charity in the object of a legacy, which, not being within the terms of the statute of Edw. VI., fails merely on account of its illegality (as in the instance put above of money to be paid to Roman Catholic priests, in order that the testator's soul may have the benefit of their prayers and masses), the next of kin are entitled to the benefit of the failure (*c*).

Bequests to charitable uses where death of testator on or before August 5, 1891.

51 & 52 Vict. c. 42 (Mortmain and Charitable Uses Act).

With respect to bequests to charitable uses, testamentary dispositions to charitable or public purposes, of money or other personal estate, not connected with real property, are valid. But with regard to bequests of land, or affecting land, in cases where the testator died on or before 5th August, 1891 (*d*), the Mortmain and Charitable Uses Act, 1888, which amends and consolidates the former law, which was chiefly contained in the Act 9 Geo. II. c. 36, enacts, Part II. (*dd*), s. 4, sub-s. (1): "Subject to the savings and exceptions contained in this Act, every assurance of land (*e*) to or for the benefit of any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, shall be made in accordance with the requirements of this Act and, unless so made, shall be void. (2)

(*b*) *R. v. Lady Portington*, 1 Salk. 162. *Da Costa v. De Pas*, Ambl. 228, and *infra*, p. 925. But the testator may prevent the application of this rule by a proviso in his Will that if the trusts should be held void, the trustees should stand possessed in trust for his executors or administrators: *De Themmines v. De Bonaeval*, 5 Russ. 288.

(*c*) *West v. Shuttleworth*, 2 M. & K. 684. *Heath v. Chapman*, 2 Drewr. 417.

(*d*) As to wills of testators dying after this date, see 54 & 55 Vict.

c. 73, *post*, p. 927.

(*dd*) Part I. of the Act provides by s. 1 for the forfeiture to Her Majesty of land assured to or for the benefit of, or acquired by or on behalf of, any corporation in mortmain, otherwise than under the authority of a licence from Her Majesty or of a statute. Section 2 gives power to Her Majesty to grant licences in mortmain.

(*e*) "Land" includes tenements and hereditaments corporeal and incorporeal of whatsoever tenure, and any estate and interest in land (section 10).

The assurance must be made to take effect in possession for the charitable uses to or for the benefit of which it is made immediately from the making thereof. (3) The assurance must, except as provided by this section, be without any power of revocation, reservation, condition, or provision for the benefit of the assurator, or of any person claiming under him." Sub-s. (4) permits (provided that the assurance reserves the same benefits to persons claiming under the assurator as to the assurator himself), (i.) the grant or reservation of a peppercorn or other nominal rent; (ii.) the grant or reservation of mines or minerals; (iii.) the grant or reservation of any easement; (iv.) covenants or provisions as to the erection, repair, position, or description of buildings, the formation or repair of streets or roads, drainage or nuisances, and covenants or provisions of the like nature for the use and enjoyment as well of the land assured as of any other adjacent or neighbouring land; (v.) a right of entry on non-payment of such rent or on breach of any such covenant or provision; and (vi.) any stipulations of the like nature for the benefit of the assurator or any person claiming under him. After a provision as to the consideration where the assurance is made in good faith on a sale, sub-s. (6) continues: "If the assurance is of land, not being land of copyhold or customary tenure, or is of personal estate, not being stock in the public funds, it must be made by deed executed in the presence of at least two witnesses." By sub-s. (7) "If the assurance is of land, or of personal estate, not being stock in the public funds, then, unless it is made in good faith for full and valuable consideration, it must be made at least twelve months before the death of the assurator, including in those twelve months the days of the making of the assurance and of the death." If the assurance is of stock in the public funds there is a like provision for its transfer six months before the death, and by sub-s. (9) "If the assurance is of land, or of personal estate other than stock in the public funds, it must, within six months after the execution thereof, be enrolled in the Central Office of the Supreme Court of Judicature, unless in the case of an assurance of land to or for the benefit of charitable uses, those uses are declared by a

separate instrument; in which case that separate instrument must be so enrolled within six months after the making of the assurance of the land." (f)

Part III. sect. 6 of the Act exempts from its provisions, subject to certain limitations (g), assurances of land and assurances by will of personal estate to be applied in or towards the purchase of land for the purposes only of a public park, a school-house for an elementary school, or a public museum (h) : " Provided that a Will containing such an assurance, and a deed containing such an assurance and made otherwise than in good faith for full and valuable consideration (i), must be executed not less than twelve months before the death of the assurer, or be a reproduction in substance of a devise made in a previous Will in force at the time of such reproduction, and which was executed not less than twelve months before the death of the assurer, and must be enrolled in the books of the Charity Commissioners within six months after the death of the testator, or in case of a deed the execution of the deed " (ii). Part II. of the Act (k) is not to apply in the case of assurances for the Universities of Oxford, Cambridge, London, Durham, and the Victoria University, or their colleges, or to the Colleges of Eton, Winchester, and Westminster, for the better support and maintenance of the scholars on the foundation of such last mentioned colleges or to Keble College (s. 7) (l). The Act does not extend to Scotland or Ireland, nor does it affect the operation or validity of any charter, licence, or custom in force at the passing of the Act

(f) Section 5 gives power to remedy omissions to enrol within the requisite time, and by section 10 "assurance" is stated to include "a gift, conveyance, appointment, lease, transfer, settlement, mortgage, charge, incumbrance, devise, bequest, and every other assurance by deed, will, or other instrument; and 'assure' and 'assuror' have meanings corresponding with 'assurance,' and 'Will' includes codicil."

(g) In a Will not exceeding twenty acres for a park, two acres for a public museum, and one acre for a schoolhouse.

(h) For definitions of these terms, see s. 6, sub-s. 4.

(i) Defined s. 10 (iv.).

(ii) And see 55 Vict. c. 11.

(k) Sections 4 and 5.

(l) These exemptions are not affected by the Act of 1891, see sec. 10, *post*, p. 927.

(18th August, 1888) enabling land to be assured or held in mortmain (ss. 11 & 12). The Act 53 & 54 Vict. c. 16, provides that Parts I. and II. of the Mortmain and Charitable Uses Act, 1888, shall not apply to assurances of land or personal estate to be laid out in land for the purpose of providing dwellings for the working classes in any populous place (*ll*).

Land for working-class dwellings excepted from 51 & 52 Vict. c. 42.

Under the repealed Mortmain Act, 9 Geo. II. c. 36, as under this statute, there was no restriction upon any one from having a sum of money, or any other estate purely personal, to charitable uses (*m*), yet, not only devises of land, copyhold (*n*) as well as freehold, and bequests of money to be invested in land, were held void, but also such bequests as in any manner affect or relate to interests in real property. Thus, bequests to charities of money charged on real estate (*o*), or of money to arise from the sale of real estate (*p*), even

To what sort of property the Mortmain Acts apply.

(*ll*) The quantity of land that may be assured by Will must not exceed five acres, and the Will must be enrolled within six months after probate. "Populous place" is defined, sec. 1. And see also 55 & 56 Vict. c. 29, s. 10, for a further exemption for land required for Technical and Industrial Institutions.

Attree v. Hawe, 9 C. D. 337, 345.

(*n*) *Arnold v. Chapman*, 1 Ves. Sen. 108. *Doe v. Waterton*, 3 B. & A. 149.

(*o*) *Arnold v. Chapman*, 1 Ves. Sen. 108. See *Attorney-Gen. v. Harley*, 5 Madd. 321. *Brook v. Badley*, L. R. 4 Eq. 106.

(*p*) *Attorney-Gen. v. Weymouth*, Amb. 20. *Waite v. Webb*, Madd. & Geld. 71. So a legacy payable out of personality, and of the proceeds of the sale of real estate cannot, whilst it remains unpaid, be bequeathed by the legatee for charitable purposes. Nor can there be any apportionment, so as to make that part of the legacy which would be paid out of personality available for the charitable bequest. *Brook v. Badley*, L. R. 3 Ch. 672. *Ashworth v. Munn*, 15 C. D. 363. *Re Watts*, 27 C. D. 318; 29 C. D. 947. In the case of *Re Hills' Trusts*, 16 C. D. 173, however, *Malins, V.-C.*, held that there must be an apporportion-

(*m*) By Lord Hardwicke, in *Soresby v. Hollins*, Highm. 174, 9 Mod. 221, in which case his Lordship afterwards observed—"As it is often said in old books, that 'I was by at the making of the Act of Parliament, and the meaning and intention of it was then said to be this or that,' so I was by at the making of this statute, and it was at that very time said by the legislators, that it would not hinder any charitable disposition of a personal estate." "There is no prohibition of any amount of testamentary charity confined to pure personal property," per James, L.J., in

though such real estate is partnership property (*q*), or the proceeds of growing crops (*r*), bequests of terms for years (*s*), or of money due on mortgage (*t*), or of money secured on turnpike tolls (*u*), or of money secured upon the poor or county rates (*x*), or by assignment of the rates under a

ment: a decision which was not followed in the more recent case above cited.

(*q*) *Ashworth v. Munn*, 15 C. D. 363.

(*r*) *Symonds v. Marine Society*, 2 Giff. 325.

(*s*) *Attorney-Gen. v. Graves*, Ambl. 155. *Attorney-Gen. v. Tomkins*, Ambl. 216. *Johnston v. Swann*, 3 Madd. 457. But fixtures in a house will pass by a bequest to a charity: *ibid*.

(*t*) *Attorney-Gen. v. Meyrick*, 2 Ves. Sen. 44. *Attorney-Gen. v. Caldwell*, Ambl. 635. *White v. Evans*, 4 Ves. 21. *Johnston v. Swann*, 3 Madd. 457. *Alexander v. Braine*, 30 Beav. 153. *Re Watts*, 29 C. D. 947, in which case it was held that a sum secured by a mortgage of an interest under a settlement, the funds, the subject of which are invested on mortgage of land, confers an interest in land.

(*u*) *Knapp v. Williams*, 4 Ves. 30, note. So as to Harbour Tolls: *Ion v. Ashton*, 28 Beav. 379. These cases, however, were questioned in the case of *Re Christmas*, 33 C. D. 332, and the Court seemed to think that they could only be supported if the security included a mortgage of land on which the tolls were secured or the tolls the subject of the mortgage were themselves an incorporeal hereditament issuing out of land, and went on to hold, overruling *Chitty, J.*, that a bond granted by Harbour Commissioners, assigning the duties which

they were empowered to levy on ships entering and leaving the haven or loading and unloading in the roads was not an interest in or affecting the land, within the Mortmain Act, 9 Geo. II. c. 36, or an incorporeal hereditament issuing out of land, and distinguished the case of *Att.-Gen. v. Jones*, 1 M. & G. 574, from the case under consideration, on the ground that the right given to levy tolls on all passing ships was in that case a franchise inseparably connected with land, viz., the Skerries Lighthouse. But in *Re David*, 43 Ch. D. 27, bonds of the Swansea Harbour Trustees issued under the powers of their Special Act, and which included among other things tolls levied upon persons, cattle, and carriages passing over certain bridges belonging to the trustees, were held to be within the statute, on the ground that the tolls, being paid for passing over the land of the trustees, were an interest in land.

(*x*) *Finch v. Squire*, 10 Ves. 41. *Ashton v. Lord Langdale*, 4 De G. & Sm. 402. *Thornton v. Kempson, Kay*, 592. But the authority of these cases has been much shaken since the decision in *Attree v. Hawe*, 9 C. D. 337, which Malins, V.-C., in *Jervis v. Lawrence*, 22 C. D. 202, regarded as overruling them. In the last-mentioned case the V.-C. decided that an assignment by way of mortgage of a proportion of rates

Local Paving and Lighting Act (*y*), or a grant by the Crown of the right to lay chains in part of the river Thames to moor ships (*z*), or of a judgment due to a testator, which, in his lifetime, has been reported, in a creditor's suit, to be an incumbrance affecting the real estate of the debtor (*a*), are void. So, where a testator, who has given his personal estate to charitable uses, contracts to sell real estate, but the sale is not completed in his lifetime, his lien upon the estate for the amount of the purchase-money is an interest in land, and the purchase-money will not pass by his Will to the charity (*b*). Nor will the unpaid premium payable for the lease of a house which is in the nature of purchase-money and for which there is a lien upon the land (*c*). But policies of assurance, by which the directors engage to "pay out of the funds," or "that the funds shall be liable," or that "a share of the funds shall be paid," are not so connected with land as to fall within the Act, although the assets of the assurance company consist partly of real estate. And the rule is the same, though by the policy, sealed with the company's corporate seal, the assured becomes a member (*d*).

To what sort of property the Mortmain Acts do not apply.

arising under an Improvement Act to secure the repayment of a sum advanced by the assignee did not create an interest in the land within the Act. And Jessel, M.R., in the case of *Re Harris*, 15 C. D. 561, held that a sum of money borrowed by justices of the peace under and for the purpose of the Acts, 2 & 3 Vict. c. 93 and 3 & 4 Vict. c. 88, and charged by them by a bond or instrument of charge upon the police rates of a division of a county, is, having regard to the Act 7 & 8 Vict. c. 73, pure personality. But it is to be observed that by the last-mentioned Act the police rates in question had ceased to be leviable by the justices, who could only issue a precept to the

guardians calling on them to pay the rate made by the justices, and then the guardians were to raise the money by a rate.

(*y*) *Thornton v. Kempson*, Kay, 592. But as to the authority of this case, see *ante*, note (*x*).

(*z*) *Negus v. Coulter*, Ambler, 367.

(*a*) *Collinson v. Pater*, 2 Russ. & M. 344.

(*b*) *Harrison v. Harrison*, 1 Russ. & M. 71. But the arrears of rent due to him at his decease will pass: *Edwards v. Hall*, 11 Hare, 6.

(*c*) *Shepherd v. Beetham*, 6 C. D. 597.

(*d*) *March v. Attorney-Gen.*, 5 Beav. 433.

So it was held that shares in Joint-Stock Companies, as canal, dock, railway, water-works, gas-light, and banking companies, and the like, were not within the Georgian statute, notwithstanding real estate forms part of their property (*e*), and whether the company be a corporation or not (*f*). And so of a debenture or bond (not amounting to a mortgage) given by such a company to secure a debt (*g*), and also of debenture stock in such a company (*h*), and so of a sum of money borrowed by Justices of the Peace under and for the purposes of the Acts 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88, and charged by them by a bond upon the police rates, which were not leviable by the justices who, under 7 & 8 Vict. c. 73, could only issue a precept to the guardians (*i*), and of a mere debt due from the testator, though in the event it was in part payable out of the proceeds of land (*k*).

The real question is, whether an interest in land is attempted to be given. Thus, in *Attree v. Hawe* (*l*), the question was whether debenture stock gave the holder an interest in land, and the Court of Appeal held that it did not,

(*e*) *Thompson v. Thompson*, 1 Coll. 381. *Hilton v. Giraud*, 1 De G. & Sm. 183. *Sparling v. Parker*, 9 Beav. 450. *Walker v. Milne*, 11 Beav. 507 (overruling *Tomlinson v. Tomlinson*, 9 Beav. 459). *Re Langham*, 10 Hare, 446. *Edwards v. Hall*, *coram* Lord Cranworth, 6 De Gex, M. & G. 74. *Hayter v. Tucker*, 4 Kay & J. 243.

(*f*) *Myers v. Perigal*, 2 De Gex, M. & G. 599. And it makes no difference that the railway has been demised to another company for 1,000 years, with power to purchase: *Linley v. Taylor*, 1 Giff. 67.

(*g*) *Walker v. Milne*, 11 Beav. 507. *Burting v. Marriott*, 19 Beav. 163. *Holdsworth v. Davenport*, 3 C. D. 185. *Re Mitchell's*

Estate, 6 C. D. 655. But Hall, V.-C., was of opinion that a gift of Metropolitan Board of Works Consolidated Stock to a charity was void. *Cluff v. Cluff*, 2 C. D. 222.

(*h*) *Attree v. Hawe*, 9 C. D. 337.

(*i*) *Re Harris*, 15 C. D. 561. Such a case as this is distinguishable from *Finch v. Squire*, 10 Ves. 41, where the rates were chargeable in respect of the ownership of the land, and could be levied by distress, while in this case the parties who charge the rates have nothing to do with the land, and all that they can do is to call on other persons to pay.

(*k*) *Re Robson*, 19 Ch. D. 156.

(*l*) 9 C. D. 337.

on the principle that "debenture stock is a charge on the net profits and earnings of a trading corporation, and is no more land tenement or hereditament, or any interest in land tenement, or hereditament, or charge or incumbrance affecting land tenement, or hereditament, than the share stock in such corporation is, or a bond or other debt due from a man who has got real property is." The question is not whether the interest in land is direct or indirect. There must, however, be an interest, and what is given is not an interest in land merely because the donee may by some legal proceedings acquire an interest in land (*m*).

Again, in *Re Parker* (*n*), where, in the judgment of

(*m*) *Re Watts*, 29 Ch. D. 947. In that case, which approved the case of *Brook v. Badley*, L. R. 3 Ch. 672, it was decided that where a testator was entitled to 800*l.* secured by the mortgage of the life interest of a widow held on the trusts of her marriage settlement, and at the date of the mortgage and of the testator's death, part of these funds was invested under a power in the settlement on mortgage of real estate, the 800*l.* was an interest in land within the meaning of 9 Geo. II. c. 36, and could not be given by Will to a charity, and that there could not be any apportionment so as to make part of the sum available for charity even though part of the funds, the subject of the settlement, was pure personality. Whereas in *Re Robson*, 19 C. D. 156, where a settlor by deed covenanted to pay within 12 months the sum of 20,000*l.* to trustees on trust for his wife for her life, with remainder to the settlor for his life, with remainder as his wife should appoint, and the wife by her will appointed the

20,000*l.* to trustees upon trust to pay certain legacies thereout, and to pay the residue to such persons and for such purposes as she should by deed poll direct, and by deed poll directed the trustees to pay the residue of the 20,000*l.* to certain persons for charitable purposes, it was held that the 20,000*l.* was a mere debt from the settlor's estate, and though it would be in part payable to the trustees for the charity out of the proceeds of land, the gift of the residue to charitable uses was not void in any part under the Mortmain Act. And the case of *Jeffries v. Alexander*, 8 H. L. C. 594, was distinguished, 1st, because in that case there was a plain device to apply real assets to charitable purposes, and 2ndly, because in that case no action could be brought in the covenantor's lifetime.

(*n*) [1891] 1 Ch. 682. The ground of the decision is that the mortgages in question were in substance mortgages of "the undertaking" within the decisions in *Gardner v. London, Chatham & Dover Ry. Co.*, L. R. 2 Ch. 201,

Stirling, J., the authorities are collected and considered, mortgages issued by the Corporation of Preston as the Local Board of Health, comprising "such proportion of the rents, rates, and waterworks," authorised by their Acts as the principal sum bore to the whole sum borrowed, were held not to confer an interest in land, the mortgage debt being consequently pure personalty.

To what sort
of bequests
the Mortmain
Acts apply.

The Georgian statute having in terms prohibited bequests of money to be laid out in the purchase of land for any charitable use, it was held that a gift to *erect* a school, or almshouses, or other building of that kind, is, generally speaking, void, because it involves an express direction to purchase land for that purpose (*o*). Section 6, however, of the Act of 1888 permits a gift of land, not exceeding one acre, for a schoolhouse for an elementary school as defined by the Act. So if a testator gives money to legatees, on condition they will provide land for effecting his charitable purpose, the bequest is void: for this is, in substance and effect, a direction to purchase land (*p*).

and Holdsworth *v.* Davenport, 3 C. D. 185, and not of the specific items of property mentioned.

(*o*) A bequest of money to *establish* a school, &c., may, in the proper construction of the Will, bear a similar import: Attorney-Gen. *v.* Hull, 9 Hare. 647. Longstaff *v.* Rennison, 1 Drewr. 28. *Re* Clancy, 16 Beav. 295. *Lunn v. Bownas*, 1 Kay & J. 596: though it does not necessarily signify that a school, &c., is to be built: Attorney-Gen. *v.* Williams, 2 Cox, 387. Compare *Hawkins v. Allen*, L. R. 10 Eq. 246. But a gift of money for the *support* of a school does not necessarily imply that it is to be laid out in the purchase of lands, &c., so as to be void. *Re* Hedgman, 8 C. D. 156. If the

gift is for the "*supporting or founding*" it is an alternative gift, and may be valid as to *supporting* but void as to "*founding*" the school: *ib.* A bequest to endow a church, built or to be built, is valid. *Edwards v. Hall*, 11 Hare, 1, affirmed by Lord Cranworth, 6 De G. M. & G. 74. *Sinnett v. Herbert*, L. R. 7 Ch. 232. A direction to "*hire rooms*" does not bring a gift within the Mortmain Act. *Re* Robson, 19 C. D. 156.

(*p*) Attorney-Gen. *v.* Davies, 9 Ves. 535. See also *Denton v. Lord John Manners*, 25 Beav. 38. So if a testator gives a real estate to A. he paying a sum of money to the executors, who are to apply the residue of the real and personal estate to a charity, the bequest is

But (although a bequest of money to *exonerate* lands in mortmain is within the statutes (q)) a bequest of money to be applied simply in the *amelioration* of lands in mortmain, or for building upon them, or repairing buildings already erected, was held not within the former statute, the object of which was merely to prevent any addition to the quantity of land already in mortmain (r). And in one case, Lord Hardwicke extended this principle so far as to lay down, that a bequest of money for the erection of a school would be good, if a piece of ground, already in mortmain, could be obtained for the purpose (s). But that opinion has been overruled by a great number of subsequent decisions, and it is now clearly established, that, in order to make such a bequest valid, the testator must point out the land in mortmain on which the erection is to take place (t). Yet, although it is now perfectly well settled by these decisions, that if a testator gives personal

void, and the money will result to the heir, although the land is well charged: *Arnold v. Chapman*, 1 Ves. Sen. 108. Where there was a bequest of leaseholds, on condition to assign part to a charity, *Leach, V.-C.*, held that the legatee took, discharged of the condition: *Poor v. Myal, Maddl. & Geld*, 32.

(q) *Corbyn v. French*, 4 Ves. 418. *Re Lynall's Trusts*, 12 C. D. 211. So a bequest of a sum of money to pay off a debt secured by an equitable charge only on a meeting-house, is void: *Waterhouse v. Holmes*, 2 Sim. 162.

(r) *Attorney-Gen. v. Bishop of Chester*, 1 Bro. C. C. 444. *Attorney-Gen. v. Munby*, 1 Meriv. 327. *Ingloby v. Dobson*, 4 Russ. Ch. C. 342. *Re Hawkins's Trusts*, 33 Beav. 570. *Champney v. Davy*, 11 C. D. 949.

(s) *Attorney-Gen. v. Bowles*, 2 Ves. Sen. 547.

(t) *Att.-Gen. v. Hyde*, Amb.

751. *Chapman v. Brown*, 6 Ves. 404. *Att.-Gen. v. Davies*, 9 Ves. 544. *Pritchard v. Arbouin*, 3 Russ. Chanc. Cas. 456. *Att.-Gen. v. Hodgson*, 15 Sim. 146. *Giblett v. Hobson*, 5 Sim. 651: affirmed, 3 M. & K. 517. *Dunn v. Bownas*, 1 Kay & J. 596, 601. *Re Watmough's Trusts*, L. R. 8 Eq. 272. In this last case, *Malins, V.-C.*, declined to follow the decision of the M. R. in *Booth v. Carter*, L. R. 3 Eq. 757. The rule is now well settled that in order to validate a gift of this kind, you must find in the Will a reference to an existing site on which the building contemplated shall be erected, or you must find words expressly excluding the application of the money given in the acquisition of land. *Pratt v. Harvey*, L. R. 12 Eq. 544, *per Wickens, V.-C.* *Re Cox*, 7 C. D. 204. *Hawkins v. Allen*, L. R. 10 Eq. 246.

property to erect and endow a school or hospital, it must be considered, unless it be otherwise declared, that it was his intention that land should be acquired, and buildings made, as necessary parts of his purpose; yet if he expressly directs that no part of the money bequeathed is to be so applied, the bequest may be good (u). Thus, in the case of *Philpott v. St. George's Hospital* (x) a testator devised to S. a piece of land in N.: he then declared his desire to erect and endow almshouses in N., and he empowered his trustees, "as soon as land in N. shall have been legally dedicated to charitable uses" by some other person within twelve months after his decease, to pay to the trustees of the intended charity a sum of £60,000, to be devoted to the purposes of the charity, *but not to be applied to the purchase of lands for the same*. It was held that this bequest was valid (y).

Bequests with a discretionary power to executors to lay out in land or otherwise :

It has been laid down, that the correct way of judging of a bequest of this kind is to see whether the proper mode of executing the trust would not be to buy land and build thereon the proposed school or other charitable building (z). But it must be observed that a charitable bequest is not void because the trustees *may*, under the terms of it, lay out money in purchasing lands without committing a breach

(u) *Henshaw v. Atkinson*, 3 Madd. 312, by Sir John Leach. As to what is and is not a sufficient direction to exclude the acquisition of land, see *Edwards v. Hall*, 11 Hare, 1, and *Mather v. Scott*, 2 Keen, 172, in which latter case the charitable bequest was accompanied by a wish that the trustees would entreat the Lord of the Manor to grant some land suitable for the proposed building: and Lord Langdale held that the bequest was void on the ground that there was nothing in the Will which excluded the power of the trustees to buy.

(x) 6 H. L. C. 338.

(y) This case finally settles the law on the subject. It dissents from the decision in *Trye v. Corporation of Gloucester*, 14 Beav. 173, that a charitable gift is void because it manifestly contemplated *not directly but indirectly* the bringing of land into mortmain, and in effect overrules that case. The various decisions on the subject are referred to in detail in these two cases of *Philpott v. St. George's Hospital* and *Trye v. Corporation of Gloucester*.

(z) *Re Clancy*, 16 Beav. 295. *Longstaff v. Rennison*, 1 Drewr. 28.

of trust: The gift is only void where from its nature, the money must necessarily be laid out in buying land or for other purposes obnoxious to the Law of Mortmain (a). The rule has long been established, that if the words of the Will as to laying out the money in land are mandatory or directory, the bequest is void (b); but where the words of the Will leave sufficient room for the Court to say that there is a discretionary power in the trustees to lay out the money either in land or otherwise, the bequest will be good; upon the principle that if the language of a Will is in the disjunctive, and leaves to the executors or trustees two methods to do a particular thing, one lawful and the other prohibited, the lawful bequest shall be preserved and take effect (c). Accordingly, in the case of *The Mayor of Faversham v. Ryder* (d), a bequest of money to a municipal corporation, to be applied by them in such manner and for such purposes as they should judge to be most for the benefit and ornament of their town, was held valid; for that the gift did not necessarily involve either the purchase of land or expenditure on it, inasmuch as the corporation, in their discretion, might apply the fund for purposes of benefit and ornament without contravening the law by either buying land or spending any of the money upon land; and if the law allows one mode of application of a trust fund and dis-

(a) *Dunn v. Bownas*, 1 Kay & J. 600, 601, *per* Wood, V.-C.

(b) *English v. Ord*, Highm. 181. *Grieves v. Case*, 4 Bro. C. C. 67. *Kirkbank v. Hudson*, 7 Price, 212.

(c) *Soresby v. Hollins*, Highm. 175. *Grimmett v. Grimmett*, AmbL 212. *Curtis v. Hutton*, 14 Ves. 537. *Atty.-Gen. v. Goddard*, 1 Turn. & R. 348. *Johnston v. Swann*, 3 Madd. 457. *Edwards v. Hall*, 6 De Gex, M. & G. 74. *Baldwin v. Baldwin*, 22 Beav. 413. *London University v. Yarrow*, 23 Beav. 159. *Hartshorne v. Nichol-*

son, 26 Beav. 58. *Dent v. Allcroft*, 30 Beav. 335. *Graham v. Paternoster*, 31 Beav. 30. *Re Beaumont's Trusts*, 32 Beav. 191. *Levins v. Allenby*, L. R. 10 Eq. 668. *Wilkinson v. Barber*, L. R. 14 Eq. 96. *Re Hedgman*, 8 C. D. 156. But see also *Mann v. Burlingham*, 1 Keen, 235. *Atty.-Gen. v. Hodgson*, 15 Sim. 156. *Baker v. Sutton*, 1 Keen, 224.

(d) 5 De Gex, M. & G. 350, affirming the decision of the M. R., 18 Beav. 318.

allows another, the trustees must apply the fund in the mode the law allows, and not in that which it prohibits (*e*).

In case of a devise by a freeman of London, of land within the city, the former statute did not apply: for by the custom of London, freemen may devise in mortmain lands within the city (*f*), and by section 12 of the Act of 1888 nothing therein shall affect the operation or validity of any charter, licence, or custom in force at the passing of the Act enabling land to be assured or held in mortmain.

Covenant to
invest upon
charitable
trusts:

In the great case of *Jeffries v. Alexander* (*g*), an instrument under seal contained a covenant with trustees, that the covenantor in his lifetime, or his executors within twelve months after his decease, would invest 60,000*l.* in the names of trustees upon charitable trusts: It was held by the House of Lords that this deed, so far as it was necessary to resort to real estate or estates of a real nature, was void under the statute (*h*).

what are
charitable
uses within
the Mortmain
Acts,

It remains to consider what the law deems charitable uses, so as to be subject to the restriction of the Mortmain Acts. Requests to any of the purposes specified in the

(*e*) See also *Church Building Society v. Barlow*, 3 De Gex, M. & G. 120. *Carter v. Green*, 3 Kay & J. 591. *Salisbury v. Denton*, 3 Kay & J. 529; and the cases collected in note (*e*) *supra*.

(*f*) *Middleton v. Cater*, 4 Bro. C. C. 409. *Bac. Abr. Customs of London* (A.).

(*g*) 8 H. L. C. 594.

(*h*) And see *Fox v. Lownds*, L. R. 19 Eq. 453, where it was held that a voluntary covenant to secure by will the payment of a sum of money to be applied for charitable purposes cannot be satisfied out of the impure personality of the covenantor, and the debt created by the covenant must, like a legacy, abate in the proportion of the im-

pure to the pure personality. In the later case of *Re Robson*, 19 C. D. 156, a settlor covenanted to pay a sum of money to trustees on certain trusts with remainder as his wife should appoint, and she by deed appointed the same to charitable uses and died before the settlor. The settlor died without having paid the money. It was held that the money was a mere debt from the settlor's estate, and, though it would be payable to the trustees of the charity in part out of the proceeds of land, it was not in any part void. The case of *Jeffries v. Alexander* was much discussed by the learned Judges in their judgment in this case and distinguished by them.

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statute 43 Eliz. c. 4, or to any purpose of a similar nature (*m*), were considered as bequests to charitable uses, within the statute 9 Geo. II. c. 36. The statute of 1898 repeals 43 Eliz. c. 4, but by sect. 13 (2), after reciting the preamble to that Act, which mentions gifts for relief of aged, impotent, and poor people, for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, for education and preferment of orphans, for relief, stock or maintenance for houses of correction, for marriages of poor maids, for support, aid, and help of young tradesmen, handicraftsmen and persons decayed, for relief or redemption of prisoners or captives, for aid or ease of any poor inhabitant concerning payment of fifteens, setting out of soldiers and other taxes, it provides as follows: "Whereas in divers enactments and documents reference is made to charities within the meaning, purview and interpretation of the said Act (*n*): Be it therefore enacted that references to such charities shall be construed as references to charities within the meaning, purview and interpretation of the said preamble."

Under 9 Geo. II. c. 36, not only bequests for the education or relief of the poor, as by means of schools (*o*) or hospitals (*p*), or to the poor inhabitants, not receiving alms, of a particular parish (*q*), or to the widows and children of the seamen belonging to a particular place (*r*), but also all bequests for public pur-

(*m*) See *Turner v. Ogden*, 1 Cox, 317.

(*n*) *I.e.*, 43 Eliz. c. 4.

(*o*) *Atty.-Gen. v. Hyde*, Ambl. 750. *Atty.-Gen. v. Nash*, 3 Bro. C. C. 588, subject to s. 6 of the Mortmain Act, 1888.

(*p*) *Masters v. Masters*, 1 P. Wms. 420. *Pelham v. Anderson*, 1 Bro. C. C. 444, note. *Foy v. Foy*, 1 Cox, 163. It was decided in *Burnaby v. Barsby*, 4 H. & N. 690, that a conveyance of land to churchwardens and overseers of a

parish for the purpose of building a workhouse under powers conferred on them by s. 8 of 59 Geo. III. c. 12, was not within the description of charitable uses as enumerated in the statute of 43 Eliz. *Kay, J.*, however, in *Webster v. Southey*, 36 C. D. 9, seems to think this decision difficult to reconcile with a series of decisions in Equity cited in his judgment.

(*q*) *Atty.-Gen. v. Clarke*, Ambl. 422.

(*r*) *Powell v. Atty.-Gen.*, 3

poses, whether local or general (*s*), were held bequests to charitable uses. So the Royal Society and the Royal Geographical Society are charitable institutions (*t*), as are the Society for the Protection of Animals liable to Vivisection and the Home for Lost Dogs (*u*). So also a bequest to the British Museum (*x*), or for the improvement of a particular city (*y*), or for the establishment of water-works for the use of the inhabitants of a particular town (*z*), or of a perpetual botanical garden for the public benefit (*a*); and, likewise, bequests for the promotion of the Protestant religion, as for the advancement of the Christian religion among infidels (*b*), or for the establishment of a preacher in a particular chapel (*c*), or for the benefit of the poor dissenting ministers residing in any of the counties in England (*d*), or a bequest for keeping in repair the fabric or the ornaments of a parish church, or a memorial window, or a monument *in it* (*e*), or for the repair of a

Meriv. 48. See also Atty.-Gen. *v.* Comber, 2 Sim. & Stu. 93. As to the cases where bequests to poor relations are considered as bequests to charitable uses, see White *v.* White, 7 Ves. 423. Atty. Gen. *v.* Price, 17 Ves. 371. Gillam *v.* Taylor, L. R. 16 Eq. 581. See and compare Isaac *v.* Defriez, Ambl. 599, and Atty.-Gen. *v.* Northumberland, 7 C. D. 745.

(*s*) See Atty.-Gen. *v.* Pearce, 2 Atk. 88. Atty.-Gen. *v.* Corporation of Shrewsbury, 6 Beav. 220.

(*t*) Beaumont *v.* Oliveira, L. R. 4 Ch. 309, affirming the decision of Stuart, V.-C., in L. R. 6 Eq. 534.

(*u*) *Re* Douglas, 35 C. D. 472, but *quære* whether the Society for the Total Suppression of Vivisection is a charity, *ib.*

(*x*) British Museum *v.* White, 2 Sim. & Stu. 594.

(*y*) Howse *v.* Chapman, 4 Ves. 542. Mitford *v.* Reynolds, 1 Phill. Ch. C. 185. Mayor of Faversham

v. Ryder, 18 Beav. 318. 5 De Gex, M. & G. 350.

(*z*) Jones *v.* Williams, Ambl. 651. Atty.-Gen. *v.* Heelis, 2 Sim. & Stu. 67. Atty.-Gen. *v.* Eastlake, 11 Hare, 205.

(*a*) Townley *v.* Bedwell, 6 Ves. 194.

(*b*) Atty.-Gen. *v.* Virginia College, 1 Ves. 243.

(*c*) Grieves *v.* Case, 4 Bro. C. C. 67. S. C. 1 Ves. 548. Thornber *v.* Wilson, 3 Drewr. 245. 4 Drewr. 350; but see Doe *v.* Aldridge, 4 T. R. 264. Doe *v.* Copestake, 6 East, 328.

(*d*) Waller *v.* Childs, Ambl. 524. Atty.-Gen. *v.* Fowler, 15 Ves. 85. See also Atty.-Gen. *v.* Lawes, 8 Hare, 32.

(*e*) Hoare *v.* Osborne, L. R. 1 Eq. 585; but a gift for the perpetual repair of a grave or vault *not within* the church is not a charitable legacy: *ib.* *Re* Vaughan, 33 C. D. 187.

parsonage (*f*), or a bequest of an annual sum to the clerk of a parish to keep the chimes in repair, to play certain psalms (*g*), or to the vicar or curate of a particular place, for preaching an annual sermon on a certain day (*h*), or to build an organ gallery in a parish church (*i*), or to be paid on a certain day to the singers sitting in the gallery of the church (*k*); were deemed bequests to charitable uses within the Statute of Mortmain. The same has been held of a gift "for the benefit and advancement and propagation of education and learning in every part of the world, as far as circumstances will permit" (*l*); and of a gift for the increase and encouragement of good servants (*m*). A pious use is not necessarily a charitable use (*n*).

So, before the statute 43 Geo. III. c. 107, bequests to the corporation of Queen Anne's bounty, for the augmentation of poor vicarages (*o*), or small livings (*p*), were holden to be charitable bequests (*q*); but by the provisions of that statute, a devise of real estate, as well as of any goods and chattels, for the benefit of Queen Anne's bounty, is rendered valid.

Again, bequests for building churches are regarded as charitable uses (*r*). But by statute 43 Geo. III. c. 108, it is enacted, that all persons may, by Will executed three months

(*f*) *Atty.-Gen. v. Chester*, 1 Bro. C. C. 444.

(*g*) *Turner v. Ogden*, 1 Cox, 316.

(*h*) *Soresby v. Hollins*, Highm. 171. S. C. 9 Mod. 221. *Durour v. Motteux*, 1 Ves. Sen. 320. *Turner v. Ogden*, 1 Cox, 316.

(*i*) *Adnam v. Cole*, 6 Beav. 353.

(*k*) *Turner v. Ogden*, 1 Cox, 316.

(*l*) *Whicker v. Hume*, 14 Beav. 509. 1 De Gex, M. & G. 506. 7 H. L. C. 124.

(*m*) *Loscombe v. Wintringham*, 13 Beav. 87. A great many authorities on this subject will be found collected in the Reporter's note to the above case. See also *Heath v. Chapman*, 2 Drewr. 417. A trust for publishing and propa-

gating "the sacred writings of Joanna Southcote," was held a good charitable trust: *Thornton v. Howe*, 31 Beav. 14.

(*n*) *Heath v. Chapman*, 2 Drewr. 417.

(*o*) *Widmore v. Woodroffe*, Ambl. 636.

(*p*) *Middleton v. Clitherow*, 3 Ves. 734.

(*q*) In these cases bequests of money were held void, on the ground that the corporation was bound by its rules to lay it out in land.

(*r*) *Pritchard v. Arbouin*, 3 Russ. Chanc. C. 456. See *Doe v. Hawthorn*, 2 B. & A. 96.

at least before death, bequeath all their estate in real property, not exceeding five acres, or goods and chattels, not exceeding in value 500*l.*, for the erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the Liturgy of the Church of England shall be used, or any mansion-house for the residence of any minister of the Church of England officiating in such church or chapel, or any out-buildings, churchyard or glebe for the same respectively (*s*). The Act proceeds to provide that any gift, exceeding five acres, or 500*l.*, is to be reduced by order of the Chancellor on petition: And that no glebe containing upwards of fifty acres shall be augmented by more than one acre (*t*).

A bequest of money, to be raised out of real estate for the purpose of erecting a monument to the testator's memory, is not a charitable use (*u*). Nor is a trust to repair, and, if need be, rebuild, a vault and tomb for the testator and his family (*x*). And it is established that a gift merely for the purpose of keeping up a tomb or a building, which is of no public benefit, and only an individual advantage, is not a charitable use but a perpetuity, and therefore void (*y*).

(*s*) *Champney v. Davy*, 11 C. D. 949. *O'Brien v. Tyssen*, 28 C. D. 372. See *Dixon v. Butler*, 3 Y. & Coll. 677. A gift of the proceeds of land is not within the protection of this Act: *Incorporated Church Building Society v. Coles*, 5 De Gex, M. & G. 324. Where a gift of pure and impure personalty is made to trustees to erect or endow a church they are entitled to 500*l.* out of the impure personalty as well as to all the pure personalty. *Sinnett v. Herbert*, L. R. 7 Ch. 232. *Champney v. Davy*, *ubi sup.*

(*t*) It is also provided by sect. 1 that the Act shall not extend to enable any person within age or of non-sane memory, nor women covert without their husbands, to

make any such gift, grant or alienation. This proviso has been held not to be affected by the provisions of sect. 1, subs. 1 of the Married Women's Property Act, 1882. *Re Smith's Estate*, 35 C. D. 589.

(*u*) *Mellick v. The Asylum*, 1 Jacob. 180. *Adnam v. Cole*, 6 Beav. 353. See *Mitford v. Reynolds*, 1 Phill. C. C. 185. 16 Sim. 105.

(*x*) *Doe v. Pitcher*, 6 Taunt. 359. However, Lord Ellenborough expressed an opinion that, although it was not a charitable use, with respect to the party's own interment, it was so with respect to that of his family. *Sed quare*, and see *infra*, note (*y*).

(*y*) *Thompson v. Shakespear*, 1

Again, a gift to one of the chartered companies in the city of London, for an increase of their stock of corn for the service of the market in London, is a donation for the benefit of the company and its revenues, and not a charitable use (z). Whether a bequest to a Friendly Society in aid of its funds is or is not a bequest to charitable uses seems an open question (a).

With regard to the exception in favour of the Universities, and the colleges of Eton, Winchester, and Westminster, it was under the Georgian statute held that the legislature meant to except such devises only as were really and *bonâ fide* for the benefit of the colleges, and not those in which the legal interest only passes to the college, in trust for other charitable purposes (b). The Act of 1888 does not extend to Scotland or Ireland (sect. 11), nor, as it is local, will it extend to prohibit dispositions of real estate, or personal property connected with real estate, in the West Indies, or other colonies (c). But bequests of personal estate, connected with real estate in England, to be laid out in land in Scotland, Ireland, &c., for charitable uses, are void (d). And in the case of *Atty.-Gen. v. Mill (e)*, where a Scotchman, by Will in the English form,

The exceptions of the statute, as to the Universities :

bequests of land in Scotland, Ireland or the Colonies :

bequests of proceeds of land, &c., to be laid out in Scotland :

Johns. 612. *Carne v. Long*, 2 De Gex, F. & J. 75. *Rickard v. Robson*, 31 Beav. 244. *Hoare v. Osborne*, L. R. 1 Eq. 585. *Dawson v. Small*, L. R. 18 Eq. 114. *Re Williams*, 5 C. D. 735. *Re Birkett*, 9 C. D. 576. *Re Vaughan*, 33 C. D. 187. *Secus*, as to a tomb or monument *within the church*: *Hoare v. Osborne*, *ubi sup.*, ante, p. 920.

(z) *Atty.-Gen. v. Haberdashers' Company*, 1 Mylne & K. 420.

(a) *Re Clark's Trusts*, 1 C. D. 497. *Pease v. Pattinson*, 32 C. D. 15a.

(b) *Atty.-Gen. v. Tancred*, 1 Eden. 15. *Atty.-Gen. v. Munby*, 1 Meriv. 327. See also *Atty.-Gen. v. Whorwood*, 1 Ves. Sen. 534. It was said by Lord Northington, in *The Atty.-Gen. v. Tancred*, that the

exception extends only to colleges established in the University at the time of the statute: but this distinction was doubted by Lord Loughborough: *Atty.-Gen. v. Bowyer*, 3 Ves. 728.

(c) *Atty.-Gen. v. Stewart*, 2 Meriv. 143. Nor to the East Indies: *Mayor of Lyons v. E. I. Comp.*, 1 Moo. P. C. 175, 298. *Mitford v. Reynolds*, 1 Phill. C. C. 185, 192. *Whicker v. Hume*, 7 H. L. C. 124.

(d) *Curtis v. Hutton*, 14 Ves. 537.

(e) 3 Russ. Chanc. C. 328. 5 Bligh, N. C. 593. The gift would have been good if the trustees had had an option of buying the lands, &c., either in Scotland or in England.

made in England, gave the residue of his personal estate to trustees, of whom some, but not all, were resident in Scotland, upon trust, to lay out the same in the purchase of lands, or rents or inheritance in fee simple, for the intent expressed in an instrument of even date with his Will; and by that instrument he directed the trustees of his Will to pay the rents annually to certain other trustees who at all times were to be persons residing within twenty miles of Montrose, to be by them applied to the relief of indigent ladies in Montrose, or within twenty miles of that town: it was holden by Lord Lyndhurst, and afterwards by the House of Lords, that the bequest was void.

cases of
bequests to
legatees,
accompanied
by bequests
to charity:

It is necessary to advert to a class of bequests on which the Georgian statute was held not to operate. This class consists of cases where there is a bequest to particular legatees, to which the statute does not apply, accompanied by a disposition void by the operation of the statute: In these cases the rule is, that if the two objects are not inseparably blended, the bequest in favour of the unobjectionable purpose will be supported, although the charitable disposition shall fail (*f*): but if the unobjectionable bequest be so mixed up with the purpose of the charity, as to be dependent on it, the bequest must be considered indivisible and void (*g*).

Gift over if
the previous
gift should be
void under the
statute.

A gift over to take effect if the previous gift should be adjudged void by the Law of Mortmain, is valid (*h*).

Bequests to charitable uses, made void by the statute

(*f*) *Blandford v. Fackerell*, 4 Bro. C. C. 394. *Doe v. Aldridge*, 4 T. R. 234. *Atty.-Gen. v. Stepney*, 10 Ves. 22. *Waite v. Webb*, Madd. & Geld. 71. *Doe v. Pitcher*, 6 Taunt. 359. *Doe v. Wrighte*, 2 B. & A. 710. *Doe v. Harris*, 16 M. & W. 517.

(*g*) *Durour v. Motteux*, 1 Ves. Sen. 323. *Atty.-Gen. v. Goulding*, 2 Bro. C. C. 428. *Atty.-Gen. v. Whitechurch*, 3 Ves. 141. *Atty.-Gen. v. Davies*, 9 Ves. 535. *Atty.-*

Gen. v. Hinxman, 2 Jac. & Walk. 170. *Limbrey v. Gurr*, Madd. & Geld. 151. See also *Morice v. Bp. of Durham*, 10 Ves. 538. *Mitford v. Reynolds*, 1 Phill. Ch. C. 185, 196. 16 Sim. 105. *Smith v. Oliver*, 11 Beav. 481. *Re Cox*, 7 C. D. 204.

(*h*) *Carter v. Green*, 3 Kay & J. 591. *Warren v. Rudall*, 4 Kay & J. 603. *Hall v. Warren*, 9 H. L. C. 420.

devolve on the testator's heir (*i*), or his next of kin (*k*), or the residuary legatees, according to the nature of the property bequeathed, and the language of the Will (*l*).

On whom the bequests void by the statute devolve.

It must be observed in conclusion, that purposes of liberality and benevolence, or *private* charity, do not amount to "charitable uses," in the sense in which that expression is used in the Courts of Law and Equity, with reference to the present subject: Thus, a bequest in trust for such objects of "benevolence and liberality" as the trustee in his own discretion shall most approve (*m*), is not a legacy to a charitable use. So it was held by the Court of King's Bench (*n*), that a devise to trustees of a reversion in land, to be applied by them and their successors, and the officiating ministers for the time being of a Methodist congregation, as they should think fit to apply the same, was not a devise to charitable uses within the stat. 3 Geo. II. c. 36. Again, a bequest for such "benevolent purposes," as the trustees in their integrity and discretion may agree on (*o*), or "to be given in private charity" (*p*) is not to be considered a bequest to charitable uses (*q*).

Indefinite bequests for liberal or benevolent purposes, or private charity, not charitable uses.

(*i*) *Arnold v. Chapman*, 1 Ves. Sen. 108. *Gibbs v. Rumsey*, 2 V. & B. 294.

(*k*) *Howse v. Chapman*, 4 Ves. 542.

(*l*) See *ante*, p. 585. *Cooke v. Stationers' Company*, 3 Myln. & K. 262. *Henchman v. Atty.-Gen.*, 3 M. & K. 485.

(*m*) *Morice v. Bp. of Durham*, 9 Ves. 399. 10 Ves. 527.

(*n*) *Doe v. Copestake*, 6 East, 328.

(*o*) *James v. Allen*, 3 Meriv. 17. As to cases where the disposition of a fund for charitable purposes is left to the discretion of legatees in trust, see *Waldo v. Caley*, 16 Ves. 206. *Down v. Worrall*, 1 M. & K. 561. *Horde v. Lord Suffolk*, 2 M. & K. 59. *Ellis v. Selby*, 1 Mylne & Cr. 286. *Baker v. Sulton*, 1

Keen, 224. *Nightingale v. Goulburn*, 5 Hare, 484. 2 Phill. Ch. C. 594. *Townshend v. Carus*, 3 Hare, 257. *Kendall v. Granger*, 5 Beav. 300. *Salisbury v. Denton*, 3 Kay & J. 529. *Wilkinson v. Lindgren*, L. R. 5 Ch. 570.

(*p*) *Ommanney v. Butcher*, 1 Turn. & Russ. 260. See also *Vezey v. Jamson*, 1 Sim. & Stu. 71. *Nash v. Morley*, 5 Beav. 177.

(*q*) Where a Will contained a direction that debts and legacies (other than charitable legacies) should be paid out of impure personality and charitable legacies out of pure personality and a bequest to each of ten poor clergymen of the Church of England to be selected by a friend of the testator's, it was held by Malins, V.-C., that these were not charit-

This distinction is attended with important consequences, inasmuch as the rule is completely established, that where a *charitable purpose* (in the technical sense) is expressed, however general, the bequest shall not fail on account of the uncertainty or failure of the object; but the particular mode of application will be directed by the King's sign manual in some cases, in others by the Court of Chancery (*r*). But where a bequest is for a purpose of liberality or benevolence, or private charity, not amounting to a "charitable use," and is of a nature so general and undefined as to be incapable of being executed by the Court, it fails altogether, and the heir-at-law, or the next of kin, as the case may be, becomes entitled to the property (*s*), as in the case of bequests void by the statute.

able legacies, but payable out of the testator's general estate. *Thomas v. Howell*, L. R. 18 Eq. 198.

(*r*) By Sir Wm. Grant in *Morice v. Bishop of Durham*, 9 Ves. 405. *Simon v. Barber*, 5 Russ. 112. *Hayter v. Trego*, 5 Russ. 113. *Bennett v. Hayter*, 2 Beav. 81. *Attorney-Gen. v. Lawes*, 8 Hare, 32. *Loscombe v. Wintringham*, 13 Beav. 87. The distinction seems to be that, where there is a general indefinite charitable purpose, not fixing itself on any particular object, the disposition is in the King by the sign manual; but where the gift is to trustees, with general or some objects pointed out, which fail, the Court will take upon itself the execution of the trust: *Ommanney v. Butcher*, 1 Turn. & Russ. 270. *Moggridge v. Thackwell*, 7 Ves. 36. *Atty.-Gen. v. Gladstone*, 13 Sim. 7. *Reeve v. Atty.-Gen.*, 3 Hare, 191. *Pocock v. Atty.-Gen.*, 3 C. D. 342. *Wilkinson v. Lindgren*, L. R. 5 Ch. 570. *Re Jarman's Estate*, 8 C. D. 584. For cases where the Court executed the trust *cy-près*, see *Atty.-Gen. v.*

Ironmongers' Co., 2 M. & K. 576. *Atty.-Gen. v. Boulthbee*, 2 Ves. 380. *Hayter v. Trego*, 5 Russ. 113. *Mayor of Lyons v. Adv.-Gen. of Bengal*, 1 App. Cas. 91. *Biscoe v. Jackson*, 35 C. D. 460. *Re Slevin* [1891], 2 Ch. 236, reversing *Stirling, J.* [1891], 1 Ch. 373. For cases where the Court would not execute the trust *cy-près*, see *Cherry v. Mott*, 1 M. & Cr. 123. *Clarke v. Taylor*, 1 Drew. 642. *Russell v. Kellett*, 3 Sm. & G. 264. *Langford v. Gowland*, 3 Giff. 617. *New v. Bonaker*, L. R. 4 Eq. 655. *Re Prison Charities*, L. R. 16 Eq. 129. *Fisk v. Atty.-Gen.*, L. R. 4 Eq. 521. *Re Ovey*, 29 C. D. 560. *Re White's Trusts*, 33 C. D. 449.

(*s*) *Morice v. Bishop of Durham*, 9 Ves. 399. 10 Ves. 522. *James v. Allen*, 3 Meriv. 17. *Ommanney v. Butcher*, 1 Turn. & Russ. 260. *Vezey v. Jamson*, 1 Sim. & Stu. 71. *Fowler v. Garlike*, 1 Russ. & M. 232. *Ellis v. Selby*, 1 M. & Cr. 286. *Williams v. Kershaw*, 5 Cl. & F. 111. *Kendall v. Granger*, 5 Beav. 300. *Dolan v. Maedermot*, L. R. 5 Eq. 60. L. R. 3 Ch. 676.

It will be seen in the foregoing pages that bequests are sometimes void by reason of their falling within the Mortmain Statute, and sometimes by reason of the uncertainty of the bequest or the failure of the object, and that generally when the bequest is wholly void the heir-at-law or next of kin, as the case may be, becomes entitled to the property. Sometimes, however, questions arise by reason of the bequest being held only partially void, and in such cases the rule would seem to be somewhat as follows, that where there is a gift of money on trust to apply a portion of the income for a definite purpose, and then to apply the surplus for another purpose, if the first gift fails, the whole income falls into the surplus, and that whether or not you can fairly ascertain what is the extreme sum required for the first purpose (t), the principle being that only so much of the fund as is required for the illegal purpose is to be abstracted, and the gift for the illegal purpose being void none is required, and consequently the entire fund remains applicable to the valid purpose (u).

The effect of the Mortmain and Charitable Uses Act, 1888, has been much altered by the Mortmain and Charitable Uses Act, 1891, which provides:—

Sect. 3. "Land in the Mortmain and Charitable Uses Act, 1888, and in this Act, shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land; and the definition of land contained in the Mortmain and Charitable Uses Act, 1888, is hereby repealed."

Sect. 4. "In this Act the word 'assurance' shall have the same meaning as in the Mortmain and Charitable Uses Act, 1888."

(t) *Magistrates of Dundee v. v. Brown*, 6 Ves. 404. *Fowler v. Morris*, 3 Macq. 134. *Fisk v. Fowler*, 33 Beav. 616. *Cramp v. Atty.-Gen.*, L. R. 4 Eq. 521. *Dawson v. Small*, L. R. 18 Eq. 114. *Re Williams*, 5 C. D. 735. *Re Birkett*, 9 C. D. 576. *Re Vaughan*, 33 C. D. 187. Compare *Chapman*

54 & 55 Vict.
c. 73.

Definition of
"land."
51 & 52 Vict.
c. 42.

Meaning of
"assurance."

Land assured
by Will for a
charitable
purpose to be
sold

Sect. 5. "Land may be assured by Will to or for the benefit of any charitable use, but except as hereinafter provided, such land shall, notwithstanding anything in the Will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any Judge thereof sitting at Chambers, or by the Charity Commissioners" (x).

Land after
expiration of
time limited
for sale to be
sold by order
of Charity
Commissioners.

Sect. 6. "So soon as the time limited for the sale of any lands under any such assurance shall have expired without completion of the sale of the land, the land unsold shall vest forthwith in the official trustee of charity lands, and the Charity Commissioners shall take all necessary steps for the sale or completion of the sale of such land to be effected with all reasonable speed by the administering trustees for the time being thereof, and for this purpose the said Commissioners may make any order under their seal directing such trustees to proceed with the sale or completion of the sale of the said land or removing such trustees and appointing others, and may provide by any such order for the payment of the proceeds of sale to the official trustees of charitable funds in trust for the charity, and for the payment of the costs and expenses incurred by the said administering trustees in or connected with such sale, and every such order shall be enforceable by the same means and be subject to the same provisions as are applicable under the Charitable Trusts Act, 1853, and the Acts amending the same, respectively, to any orders of the said Commissioners made thereunder."

16 & 17 Vict.
c. 137.

Personal estate
by will directed
to be laid out
in land not to
be so laid out.

Sect. 7. "Any personal estate by Will directed to be laid out in the purchase of land to or for the benefit of any charitable uses shall, except as hereinafter provided, be held to or for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land."

Power to retain

Sect. 8. "It shall be lawful for the High Court, or any

(x) Land assured for Technical and Industrial Institutions under 55 & 56 Vict. c. 29, is excepted from this section by s. 10 of that Act.

Judge thereof sitting at Chambers, or for the Charity Commissioners, if satisfied that land assured by Will to or for the benefit of any charitable use, or proposed to be purchased out of personal estate by Will directed to be laid out in the purchase of land, is required for actual occupation for the purposes of the charity and not as an investment, by order to sanction the retention or acquisition, as the case may be, of such land." land in certain cases.

Sect. 9. "This Act shall only apply to the Will of a testator dying after the passing of this Act" (*y*). Application of Act.

Sect. 10. "Nothing in this Act contained shall limit or affect the exemptions contained in Part III. of the Mortmain and Charitable Uses Act, 1888, or apply to any land or personal estate to be laid out in the purchase of land acquired under any assurance to which such exemptions or any of them apply, or shall exclude or impair any jurisdiction or authority which might otherwise be exercised by a Court or Judge of competent jurisdiction or by the Charity Commissioners." Saving.

(*y*) The Act applies to all cases in which the testator dies after the date of the passing of the Act, whether the Will was made before or after such date. *R. v. Bridger*, [1893] 1 Ch. 44.

CHAPTER THE SECOND.

OF THE CONSTRUCTION OF WILLS OF PERSONALTY.

SECTION I.

*Of the General Rules of Construction.*General
principle.

IT is obviously not within the scope of this Treatise to enter fully into the general doctrine of the construction of Wills. It may, however, be useful to state briefly some of the most important rules which have been established upon this subject. And it may also be expedient to prefix a statement of the general principle on which Wills are to be expounded.

The question in expounding a Will is not what the testator meant, but what is the meaning of his words: The use of the expression, that the intention of the testator is to be the guide, unaccompanied with the constant explanation that it is to be sought in his words, and a rigorous attention to them, is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do, instead of strictly attending to the true question, which is, what that which he has written means: The Will must be expressed in writing, and that writing only is to be considered. In construing that writing, the rule is to read it in the ordinary and grammatical sense of the words, unless some obvious absurdity or some repugnance or inconsistency with the declared intentions of the writer, to be extracted from the whole instrument, should follow from so reading it (a).

(a) *Abbott v. Middleton*, 7 H. L. C. 114, by Lord Wensleydale. *Gordon v. Gordon*, 5 H. & C. 254. Where the words of a Will are unambiguous, they cannot be de-

parted from merely because they lead to consequences capricious or even harsh and unreasonable; but where they are capable of two interpretations that construction

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1. Technical words are not necessary to give effect to any species of disposition (b). Therefore, where the testator used the words "all my *personal* estates," and it was clear beyond all doubt upon the face of the Will that the testator meant by these words, not what is technically understood by them, but the *real* property over which he had an absolute personal power of disposition, it was holden that the freehold passed by this description (c). So on the other hand, if on the whole Will it clearly appears that the testator's intention was to bequeath leasehold property, in which he had a chattel interest only, under the description of his *real* estate, such intention shall be carried into effect (d).

1. Technical words not necessary.

2. Nevertheless, if technical words are used by the tes-

2. Technical

of them is to be adopted which is in accordance with an intelligible and reasonable, and not a capricious or anomalous, result. *Bathurst v. Errington*, 2 App. Cas. 698. A testator must not be presumed to intend an absurdity; nevertheless, if shown by the context or by the whole Will to have so intended, the intention, if not illegal, must be carried out. *Rhodes v. Rhodes*, 7 App. Cas. 192.

(b) By Lord Kenyon, in *Hay v. Coventry*, 3 T. R. 86.

(c) *Doe v. Tofield*, 11 East, 246. *Roe v. Pattison*, 16 East, 221. *Doe v. Haslewood*, 6 A. & E. 167. *Doe v. Pratt*, *ibid.* 180. And the words "all the rest" have been held in a holograph Will containing no technical words to pass real, as well as personal, property, although there was no prior mention of realty in the Will. *Attree v. Attree*, L. R. 11 Eq. 280.

(d) *Hobson v. Blackburn*, 1 Mylne & K. 571. *Goodman v. Edwards*, 2 Mylne & K. 759. *Read v. Backhouse*, 2 Russ. & M.

546. *Doe v. Cranstoun*, 7 M. & W.

1. *Swift v. Swift*, 1 De Gex, F. & J. 160. A testator devised a farm by the description "my freehold farm and lands situate at E." The Will contained no residuary devise. The farm comprised about seventy-six acres, of which twenty-six were *copyhold*. It was held that the *copyhold* parts of the farm passed under the devise. *Re Bright Smith*, 31 C. D. 314. In this case *Hall v. Fisher*, 1 Coll. 47, and *Stone v. Greening*, 13 Sim. 309, were distinguished on the ground, *inter alia*, that in those cases there was a residuary devise, and there was no room for the operation of the presumption that one who has gone through the form of making a Will does not intend to die intestate. See *Re Harrison*, 30 C. D. 390, 393. By the 26th section of the Wills Act a general devise of the testator's lands shall include *copyhold* and *leasehold* as well as *freehold* lands. As to the construction of this section, see *Butler v. Butler* 28 C. D. 68.

words to be
taken in their
legal sense.

tator, he will be presumed to employ them in their legal sense, unless the context contained a clear indication to the contrary (e). "If words of art," said Lord Alvanley, in *Theellusson v. Woodford* (f), "are used, they are construed according to the technical sense, unless upon the whole Will it is plain that the testator did not so intend." Courts, therefore, have no right or power to say that the testator did not understand the meaning of the words he has used, or to put a construction upon them different from what has been long received, or what is affixed to them by the law (g). But where the intention of the testator is plain, it will be allowed to control the legal operation of words however technical (h).

The rule above stated has been carried so far, that, in some instances, the testator has been presumed to use words and forms of expression in the sense which they have acquired by decided cases, although such sense be different from their ordinary and natural meaning (i).

But it has been laid down by high authority that in construing a Will of personal property, the terms that are used

(e) *Lane v. Lord Stanhope*, 6 T. R. 352, by Lord Kenyon, *Phillips v. Garth*, 3 Bro. C. C. 68, by Buller, J. *Buck v. Norton*, 1 Bos. & Pull. 57, by Eyre, C. J. *Smith v. Butcher*, 10 C. D. 113, 116. A testator devised "all real estate of which he might die *seised*." It was held that "*seised* being a purely technical word must be construed according to its technical meaning, *Leach v. Jay*, 6 C. D. 496. 9 C. D. 42. In construing, however, the autograph Will of an illiterate man, the usual meaning of technical language may be disregarded, but no word which has a clear and definite operation can be struck out. *Hall v. Warren*, 9 H. L. C. 420. Where a testator in a foreign Will expresses him-

self in technical language of the place where made and where he is domiciled, to obtain the intention the technical terms must be interpreted by the meaning put on them in the system of law from which they are borrowed. *Studd v. Cook*, 8 App. Cas. 577.

(f) 4 Ves. 329.

(g) By Buller, J., in *Hodgson v. Ambrose*, Dougl. 341. See also *Milnes v. Slater*, 8 Ves. 306. *Doe v. Perratt*, 6 M. & Gr. 342, *per Parke*, B. *Towns v. Wentworth*, 11 Moo. P. C. 543, *per Lord Kingsdown*.

(h) *Vauchamp v. Bell*, Madd. & Geld. 343. 6 Cruise's Dig. 148, 3rd edit.

(i) *Baines v. Dixon*, 1 Ves. Sen. 41. *Wilmot v. Wilmot*, 8 Ves. 10.

in the Will are to be construed according to the ordinary acceptance of language in the transactions of mankind (*j*).

It may be useful, in this place, to advert to the well-known principle, that where there is a general intent, and a particular one, the particular is to be sacrificed to the general intent (*k*): Which doctrine, perhaps, when rightly understood, amounts to no more than an example of the rule now under consideration, *viz.* that technical words, or words of known legal import, shall have their legal effect, unless, from subsequent inconsistent words, it is *very clear* that the testator meant otherwise (*l*). For instance, if the testator bequeaths real property to a man and the *heirs of his body*, or to a man for life, with a subsequent limitation to the heirs of his body, this creates an estate tail according to the clearly established rules of law; and, therefore, the estate tail so created shall not be cut down into an estate for life, although the Will contains subsequent words expressive of an intention that the heirs of the body of the devisee shall take *as tenants in common* (*m*). It is true that heirs of the body cannot take *as tenants in common*; but it does not follow that the testator did not intend that the heirs of the body should take, because they cannot take in the mode prescribed: This only follows, that, having given to heirs of

Where there is a general intent and a particular intent, the particular is to be sacrificed to the general.

(*j*) By Lord Lyndhurst, in *Parker v. Marchant*, 1 Phil. Ch. C. 360: approved by Wood, V.-C., Kay, 375. *Re Bedson's Trusts*, 28 C. D. 523, 525, *per* Brett, M. R.

(*k*) *Robinson v. Robinson*, 1 Burr. 38. *Jesson v. Wright*, 2 Bligh. 49. *Doe v. Harvey*, 4 B. & C. 620.

(*l*) By Lord Redesdale, in *Jesson v. Wright*, 2 Bligh, 56, 57. *Jenkins v. Hughes*, 8 H. L. C. 571. *Doe v. Gallini*, 5 B. & Adol. 621. *Lees v. Moseley*, 1 Y. & Coll. 389. *Toller v. Attwood*, 15 Q. B. 929, 954. *Towns v. Wentworth*, 11 Moo. P. C. 543, *per* Lord

Kingsdown. *Forsbrook v. Forsbrook*, L. R. 3 Ch. 93.

(*m*) *Jesson v. Wright*, 2 Bligh, 1 (reversing *Doe v. Jesson*, 5 M. & S. 95, and overruling *Doe v. Goff*, 11 East, 668). *Doe v. Featherstone*, 1 B. & Adol. 944. See also *Reece v. Steele*, 2 Sim. 233. *Mortimer v. West*, 2 Sim. 274. *Ward v. Bevil*, 1 Younge & Jerv. 512. *Jack v. Fetherston*, 9 Bligh, 238. *Dunk v. Feiner*, 2 Russ. & M. 566. *Douglas v. Congreve*, 1 Beav. 59. *Tate v. Clarke*, 1 Beav. 100. *Roddy v. Fitzgerald*, 6 H. L. C. 623.

the body, he could not modify that gift in the two different ways which he desired (*n*). The particular intent, then, that the heirs of the body should take as tenants in common, must be sacrificed to the general intent that there should be an estate tail; and therefore the words "as tenants in common," may be rejected (*o*). Nevertheless the words "heirs of the body" will yield to a *clear* particular intent, that the estate should be only for life (*p*).

3. Construc-
tion must be
on the whole
Will:

3. The construction of the Will is to be made upon the entire instrument, and not merely upon disjointed parts of it: and consequently all its parts are to be construed with reference to each other (*q*). So the language of the Will ought to be construed with reference to the codicil; and *vice versa* (*r*).

Hence, general words in one part of a Will may be restrained in cases where it can be collected from any other part of the Will, that the testator did not mean to use them in their general sense (*s*).

same words
occurring
more than
once:

Hence, also, generally speaking, if the same words occur in different parts of the same Will, they must be taken to have been used everywhere in the same sense, unless there appears a clear intention to the contrary (*t*). But this rule does not preclude the Court from putting a different con-

(*n*) By Lord Redesdale, in *Jesson v. Wright*, 2 Bligh, 57.

(*o*) See *Doe v. Harvey*, 4 B. & C. 610.

(*p*) By Lord Eldon, in *Jesson v. Wright*, 2 Bligh, 53. *Jordan v. Adams*, 6 C. B. N. S. 748, 9 C. B. N. S. 483. See also *Jenkins v. Hughes*, 8 H. L. C. 571. *Gummoe v. Howes*, 23 Beav. 184. As to controlling the *prima facie* meaning of the word "issue," by the context, see the cases collected *post*, p. 971 *et seq.*

(*q*) *Turpine v. Forreynier*, 1 Bulst. 101. *Re Bedson's Trusts*, 28 C. D. 523, 525, *per Brett*, M. R. A

codicil is to be taken as a component part of the Will; see *ante*, p. 6.

(*r*) *Darley v. Martin*, 13 C. B. 683. *Hartley v. Tribber*, 16 Beav. 510. See also *Cator v. Cator*, 14 Beav. 463.

(*s*) *Strong v. Teatt*, 2 Burr. 912. *Doe v. Reade*, 8 T. R. 122. *Whitmore v. Trelawney*, 6 Ves. 130. *Crone v. Odell*, 1 Ball & Beat. 466.

(*t*) *Whitmore v. Craven*, 2 Chanc. Cas. 169. *Dalzell v. Welch*, 2 Sim. 319. *Ridgeway v. Munkittrick*, 1 Dr. & W. 93, *per Sugden*, C. Rhodes *v. Rhodes*, 27 Beav. 413.

struction upon the same words, even though used only once in a Will, when applied to different subject-matters. Thus, in *Forth v. Chapman* (u), where the testator devised real and personal estate to A., and if he should die, and leave no issue of his body, then to B.; Lord Macclesfield said, that it might be reasonable enough to take the same words as to the different estates of realty and personalty in different senses, and as if repeated by two several clauses; and that the words, "leave no issue," as applied to the personal estate, should be taken to mean, leave no issue at the time of his death, but as applied to the freehold to mean an indefinite failure of issue: And this case has been considered as an authority in many subsequent instances for a different construction of the same words in a Will as applied to different subjects (x).

It must be further observed, that where there is no connexion by grammatical construction, or direct words in reference, or by the declaration of some common purpose, between distinct bequests in a Will, the rule now under consideration will not justify the drawing in aid the special terms of one bequest to the construction of another, although in its general terms and import similar, and applicable to persons standing in the same degree of relationship to the testator; and, although there is no apparent reason, other than the different wording of the clauses, to presume that the testator had a different purpose in view (y).

when one bequest construed with reference to another.

(u) 1 P. Wms. 667.

(x) *Sheffield v. Lord Orrery*, 3 Atk. 288. *Stafford v. Buckley*, 2 Ves. Sen. 180. *Southby v. Stonehouse*, 2 Ves. Sen. 616. *Doe v. Smith*, 5 M. & S. 131, 132. *Doe v. Ewart*, 7 A. & E. 636, 659. See also *Carter v. Bentall*, 2 Beav. 551. *Byng v. Lord Strafford*, 5 Beav. 558. *Head v. Randall*, 2 Y. & Coll. Ch. C. 231. *Buckle v. Fawcett*, 4 Hare, 536, 542.

(y) *Spirit v. Bence*, Cro. Car.

368. *Doe v. Wright*, 8 T. R. 64. S. C., in C. P., *nomine Doe v. Child*, 1 New Rep. 335. *Right v. Compton*, 267. *Chambers v. Brailsford*, 18 Ves. 368. But where there is a clear omission in a Will reference may be made to a similar gift in the same Will to assist in ascertaining what the omission is. *Mellor v. Daintree*, 33 C. D. 198. And see *Loveday v. Hopkins*, Ambl. 273. *Gittings v. McDermott*, 2 M. & K. 69.

The tendency, however, of modern decisions (and good sense appears to require it) is to read the different clauses in the Will referentially to each other, unless they are clearly independent (z).

4. Effect must be given to every word :

if two parts are irreconcilable, the latter will prevail.

4. The Court is bound to give effect to every word of the Will, without change or rejection, provided an effect can be given to it, not inconsistent with the general intent of the whole Will taken together (a). Thus, if one devises land to A. B. in fee, and afterwards in the same Will devises the same land to C. D. for life, both parts of the Will shall stand ; and in the construction of law, the devise to C. D. shall be first (b). But where it is impossible to form one consistent whole, the separate parts being *absolutely* irreconcilable, the latter will prevail (c).

It must not, however, be understood, that because the testator uses in one part of his Will, words having a clear meaning in law, and in another part, words inconsistent with the former, that the first words are to be cancelled or overthrown (d). A contrary principle is now fully established in the doctrine already considered, that the general intent, although first expressed, shall overrule the particular (e).

5. Words may be transposed, supplied, or rejected, to advance the apparent intention :

5. The Will must be most favourably and benignly expounded to pursue, if possible, the intention of the testator (f).

(z) Ford v. Ford, 6 Hare, 492, by Wigram, V.-C.

(a) Gray v. Minnethorpe, 3 Ves. 105. Constantine v. Constantine, 6 Ves. 102. Doe v. Rawding, 2 B. & A. 448. Hall v. Warren, 9 H. L. C. 420.

(b) Anon. Cro. Eliz. 9. Doe v. Davies, 4 M. & W. 599.

(c) Constantine v. Constantine, 6 Ves. 100. Doe v. Biggs, 2 Taunt. 109. Sim v. Doughty, 5 Ves. 243. Wykham v. Wykham, 18 Ves. 421. Sherratt v. Bentley, 2 Mylne & K.

149. Morrall v. Sutton, 1 Phill. Ch. C. 533. See also 4 Beav. 478. 5 Beav. 100. Shipperdson v. Tower, 1 Y. & Coll. C. C. 441.

(d) By Lord Redesdale in Jesson v. Wright, 2 Bligh, 56.

(e) *Ante*, p. 931.

(f) Touchst. 434. 2 Black. Com. 381. Thus, where a testator by his Will gave a legacy of 7,000*l.* upon trust for the benefit of his married daughter and her children ; and after reciting that he had given a bond for 3,000*l.* for her husband

To effectuate, therefore, the clear intention, as apparent upon the whole Will, words and limitations may be transposed (*g*), supplied (*h*), or rejected (*i*). But the rule is, that

he directed that what should remain due on the bond at his death should be paid out of the legacy: and by a codicil made about twelve months afterwards, the testator recited that he had paid the 3,000*l.* and other sums for which he was bound for the husband to an amount exceeding 5,000*l.* on the whole, and directed that, unless that sum at least should be repaid previously to his decease, the sum of 5,000*l.* should be taken in part payment of the 7,000*l.* And it was admitted that the husband had not repaid 5,000*l.* It was held that the testator intended that what at his decease should be due to him in respect of these sums should to an extent not exceeding 5,000*l.* be deducted from the daughter's legacy, and an account was directed of the amount remaining unpaid of sums advanced by the testator for the daughter's husband. *Re Taylor's Estate*, 22 C. D. 495.

(*g*) *Hudson v. Bryant*, 1 Coll. 681.

(*h*) *Doe v. Micklem*, 6 East, 486, 493, 494. *Kirkpatrick v. Kirkpatrick*, 13 Ves. 476. *Montagu v. Nucella*, 1 Russ. Chanc. Cas. 171, 172. *Abbott v. Middleton*, 21 Beav. 143. 7 H. of L. 68. But see the observations of Wood, V.-C. in *Hope v. Potter*, 3 Kay & J. 206, 209. *Mellor v. Daintree*, 33 C. D. 198. In *Re Redfern*, 6 C. D. 133, a testator directed his trustee to stand possessed of 5 equal 7th parts of the moneys arising from the sale and conversion of his real and personal estate upon trust to

invest, and during the respective lives of his said daughters, Elizabeth, Sarah, Eliza, Mary, and Hannah, to pay the interest to his said daughters respectively for their separate use. He then directed his trustees from and after the death of Elizabeth to stand possessed of one-fifth of the trust securities upon trust for the children of Elizabeth, and from and after the death of Sarah as to another one-fifth upon trust for the children of Sarah; and from and after the death of Eliza as to another one-fifth upon trust for the children of Mary (thus omitting to provide for Eliza's children, and failing to dispose of Mary's one-fifth after her death); and from and after the death of Hannah as to another one-fifth upon trust for the children of Hannah. The Will also contained a power to the trustee until "the part or share of the said trust moneys of the issue of any of my said daughters" should become payable to apply the same in the maintenance of such issue. And it was held that a clause similar in terms to the clauses giving interest to the children of Elizabeth, Sarah, Mary, and Hannah respectively, but giving an interest in one-fifth of the trust securities to the children of Eliza, and disposing of Mary's one-fifth after her death must have been accidentally omitted, and that the Will ought to be read and construed as if such a clause were contained in it.

(*i*) *Jesson v. Wright*, 2 Bligh, 1.

words in a Will are not to be rejected or supplied, unless there cannot be any rational construction of the words as they stand (*k*), or the rejection or insertion is necessary to carry out the manifest intention of the Will (*l*).

"or" construed "and," and *vice versa*:

So, in order to advance the apparent intention of the testator, "or" may be construed "and" (*m*) and *vice versa* (*n*),

Sherratt *v.* Bentley, 2 Mylne & K. 149. Thus the words of a previous bequest will not be affected by an erroneous reference to it in a later part of the Will. *Re* Duke, 16 C. D. 112.

(*k*) By Lord Eldon, in *Chambers v. Brailsford*, 19 Ves. 654. S. C. 2 Meriv. 25. *Peacock v. Stockford*, 3 De Gex, M. & G. 73, 77. *Pride v. Fooks*, 3 De G. & J. 252.

(*l*) *Sweeting v. Prideaux*, 2 C. D. 413. Thus in *Key v. Key*, 1 De G. M. & G. 73, 84. Knight-Bruce, L. J., said: "In common with all men I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter: cases in which it is impossible for a reasonable being upon a careful perusal of an instrument not to be satisfied from the contents that a literal, a strict or an ordinary interpretation given to particular passages would disappoint and defeat the intention with which the instrument read as a whole persuades and convinces him that it was framed. A man so convinced is authorised and bound to construe the writing accordingly." And in *Towns v. Wentworth*, 11 Moo. P. C. 526, 543, Lord Kingsdown said: "When the main purpose and intention of the testator are ascertained to the satisfaction of the Court, if particular expressions are found in the Will

which are inconsistent with such intention though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions must be discarded or modified: and, on the other hand, if the Will shows that the testator must necessarily have intended an interest to be given which there are no words in the Will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator so as to carry into effect as far as possible the intention which it is of opinion that the testator has on the whole Will sufficiently declared."

(*m*) *Richardson v. Spraag*, 1 P. Wms. 434. *Eccard v. Brooke*, 2 Cox, 213. *Lachlan v. Reynolds*, 9 Hare, 796. *Shand v. Kidd*, 19 Beav. 310. *Bentley v. Meech*, 25 Beav. 197. *Greated v. Greated*, 26 Beav. 621. *Greenway v. Greenway*, 2 De Gex, F. & J. 128. *Johnson v. Simcock*, 7 H. & N. 344. *Maude v. Maude*, 22 Beav. 290. The construction of "and" for "or" was *not* allowed in *Gittings v. McDermott*, 2 M. & K. 69. *Mortimer v. Hartley*, 6 Exch. 60. *Barker v. Young*, 33 Beav. 353. *Blundell v. Chapman*, 33 Beav. 648. *Cooke v. Mirehouse*, 34 Beav. 27. *Holland v. Wood*, L. R. 11 Eq. 91. *Wingfield v. Wingfield*, 9 C. D. 658.

(*n*) *Hetherington v. Oakman*, 2

in cases of legacies, as well as devises of real estate. So "if" may be construed "when" for the same purpose (o). So, upon the whole context, the word "paid" may be construed "payable" or "vested" (p). And the words "leaving" any child may be construed "having" (q). And the word "having" may be construed "having had" (r). And the word "payable" may be construed "vested" (s). And the word "survivor" may be construed "other" (t). So the words "not survive" may be construed as equivalent to die in "the lifetime of" (u).

"if" construed
"when :"
"paid" construed
"payable :"
"leaving" construed
"having :"
"having" construed
"having had :"
"payable" construed
"vested :"
"survivor" construed
"other :"

Y. & Coll. C. C. 299. Stapleton v. Stapleton, 2 Sim. N. S. 212. Maynard v. Wright, 26 Beav. 285. This construction was refused in Pearson v. Rutter, 3 D. G. M. & G. 398. Day v. Day, Kay, 703. Coates v. Hart, 32 Beav. 349. Grey v. Pearson, 6 H. L. C. 61. Secombe v. Evans, 28 Beav. 440. Malcolm v. Malcolm, 21 Beav. 225. Hawksworth v. Hawksworth, 27 Beav. 1. "And" may be construed "or" when one member of the compound sentence is included in the other, and would be superfluous unless disjoined; Day v. Day, Kay, 703, 708, by Wood, V.-C. This construction is generally made in favour of vesting, and not to defeat a vested gift: *ibid.*

(o) Smart v. Clark, 3 Russ. Chanc. Cas. 365. But see Bartleman v. Murchison, 2 Russ. & M. 136.

(p) Martineau v. Rogers, 8 De Gex, M. & G. 328.

(q) Kennedy v. Sedgwick, 3 Kay & J. 540. White v. Hill, L. R. 4 Eq. 265. *Re Brown's Trusts*, L. R. 16 Eq. 239. White v. Hight, 12 C. D. 751; this case, however, has been overruled in the Court of Appeal. *Re Ball*, 40 C. D. 11. The principle of construction whereby in the case of a gift over on

death without "leaving" children, the word "leaving" is construed "having," so as not to take away an interest previously vested, will not readily be applied where the subject-matter of the gift is an annuity which *ex vi termini* involves the notion of personal enjoyment. *Re Hemingway*, 45 C. D. 453.

(r) White v. Hill, L. R. 4 Eq. 265. Bryden v. Willett, L. R. 7 Eq. 472.

(s) Haydon v. Rose, L. R. 10 Eq. 224. So "vested" may be read "indefeasible;" *Re Edmondson's Estate*, L. R. 5 Eq. 389. *Greenhalgh v. Bates*, L. R. 2 P. & D. 47. See *post*, p. 1122.

(t) Wilmot v. Wilmot, 8 Ves. 10. Eyre v. Marsden, 4 M. & Cr. 240. Hurry v. Morgan, L. R. 3 Eq. 152. *Re Arnold's Trusts*, L. R. 10 Eq. 252. Waite v. Littlewood, L. R. 8 Ch. 70. *Re Palmer's Trusts*, L. R. 19 Eq. 320. Cross v. Maltby, L. R. 20 Eq. 378. Wake v. Varah, 2 C. D. 348. *Lucena v. Lucena*, 7 C. D. 255. But in *Re Horner*, 19 C. D. 186, the Court refused to construe "survivor or survivors" as "other or others." For other cases to the same effect see *post*, pp. 1332, 1333.

(u) Reed v. Braithwaite, L. R. 11 Eq. 514.

"receivable"
construed
"received:"

"without
having issue"
construed
"without
issue:"

"next sur-
viving son"
read "next
younger sur-
viving son:"

"entitled"
read "entitled
in possession:"

"ascertained"
construed
"made cer-
tain:"

"at their
death" con-
strued, at
their respec-
tive deaths.

Gift to
daughters to
be "settled
upon them
strictly."

Mistake in a
Will.

So the word "receivable" may be construed "received" (v). So "without having issue" may be construed in all respects as the same as "without issue" (w). So "next surviving son" may be construed "next younger" and not "next elder" surviving son (x). So the word "entitled" must be read "entitled in possession" if the context requires it (y). So the expression "in possession" may be read as meaning "entitled to a vested estate tail in remainder" (z). So the word "ascertained" should be construed "made certain" (a). And the words "at their death" should be construed "at the death of each respectively" (b).

In *Lock v. Bagley* (c), where a testator directed that his daughters' shares under his Will should be "settled upon themselves strictly," it was held by Lord Romilly, M. R., that the income of each daughter's share should, during the joint lives of herself and her husband, be paid to her for life for her separate use without power of anticipation; and if she died first, then her share should be paid to her next of kin, exclusively of her husband; and if she survived, then to her absolutely.

But a mistake in a Will cannot be corrected, or an omission supplied, unless it clearly appears by fair inference from the whole Will (d). But a clerical error can be corrected

(v) *Re Dodgson's Trusts*, 1 Drew. 440. *West v. Miller*, L. R. 6 Eq. 59.

(w) *Eastwood v. Lockwood*, L. R. 3 Eq. 487, 495. Where a gift to the children is a vested gift, it will not become divested by the use of the words in case the parent die "leaving no issue": and "leaving no issue," should be construed "having had no issue." *Treharne v. Layton*, L. R. 10 Q. B. 459. *White v. Hight*, 12 C. D. 751, but this case has been overruled. *Re Bell*, 40 C. D. 11.

(x) *Eastwood v. Lockwood*, L. R. 3 Eq. 487.

(y) *Re Clinton's Trusts*, L. R. 13 Eq. 295. *Re Noyce*, 31 C. D. 75.

(z) *Foley v. Burnell*, 1 Bro. C. C. 274.

(a) *Sidebottom v. Sidebottom*, L. R. 2 P. & D. 365.

(b) *Wills v. Wills*, L. R. 20 Eq. 342.

(c) L. R. 4 Eq. 122.

(d) *Philipps v. Chamberlaine*, 4 Ves. 57. *Dent v. Pepys*, Madd. & Geld. 351. As to the application

by a Court of Construction where, if uncorrected, it makes the Will absurd, and the proper correction can be gathered from the context (*e*). And an erroneous statement in fact will be corrected, and will not be binding on a legatee so as to cut down an express gift (*f*). Hence not only in cases of devises of real estate, but also of Wills of personal property, Courts of construction cannot, in their interpretation of the intention of the testator, pay the least regard to any variance between the Will as it stands, and the instructions given for preparing it (*g*).

Again, an express bequest cannot be controlled by the reason assigned: The assigned reason may aid in the construction of doubtful words, but cannot warrant the rejection of words that are clear (*h*). Nor can any express disposition be varied by inference or argument from other parts of the Will (*i*): Much less shall the obvious construction of a Will be controlled by the inconvenient or unmeritorious nature of the bequest (*k*): On the contrary, the Court is bound to correct every inaccuracy and impropriety of terms in advancement of the *manifest* intention of the testator, however undeserving it may be of favour in a Court of Justice (*l*). Where, indeed, the literal force of expressions differs in a Will, it is a true rule to seek for the intention of the testator rather in a consistent and rational purpose, than in a purpose inconsistent and irrational! (*m*).

Bequest not to be controlled by the reason given for it:

nor by inference from other parts of the Will, nor by its unmeritorious nature.

of parol evidence to rectify mistakes in the description of legatees.

See *post*, p. 1012 *et seq.*

(*e*) *Re Northen's Estate*, 28 C. D. 153.

(*f*) *Re Taylor's Estate*, 22 C. D. 495, overruling *Re Aird's Estate*, 12 C. D. 291; but, in *Re Wood*, 32 C. D. 517, *Re Aird's Estate* was said not to have been overruled, and was followed.

(*g*) *Murray v. Jones*, 2 V. & B. 318. See further, on this point, as to Wills of realty, *Webber v.*

Stanley, 16 C. B., N. S. 698.

(*h*) *Cole v. Wade*, 16 Ves. 46.

(*i*) *Collett v. Lawrence*, 1 Ves.

269. *Jones v. Colbeck*, 8 Ves. 42.

(*k*) *Thellusson v. Woodford*, 4 Ves. 329. *Smith v. Streatfield*, 1 Meriv. 358. *Defflis v. Goldschmidt*, 1 Meriv. 419.

(*l*) *Thellusson v. Woodford*, 4 Ves. 311, by Lawrence, J.

(*m*) *Jenkins v. Herries*, 4 Madd 67.

6. Where words are capable of a twofold construction.

6. Where words are capable of a twofold construction, the rule is, even in the case of a deed, and much more in the case of a Will, to adopt such as tend to make it good (*n*).

7. Where intention cannot take effect in part.

7. The intention of the testator is not to be set aside because it cannot take effect to the full extent, but it is to work as far as it can (*o*).

8. Construction of Wills made by testators domiciled in a foreign country.

8. It is a settled rule, that, in the construction of a Will of personalty made by a testator domiciled in a foreign country, the *lex domicilii* must prevail, unless there is sufficient on the face of the Will to show a different intention (*p*).

9. Will speaks from testator's death.

9. A Will of personalty, whether made before or after the Wills Act, speaks from the time of the testator's death (*q*).

SECTION II.

Modes of Description of a Legatee.

The object of this section is to consider what persons are entitled to legacies under particular modes of description.

In general, no rule is better settled, than that legatees must answer the description and character given of them in the Will: but it will appear, from the cases adduced in the course of the present section, that there are many important exceptions to it.

(*n*) By Lord Talbot, in *Atkinson v. Hutchinson*, 3 P. Wms. 260. By Lawrence, J., in *Theilussen v. Woodford*, 4 Ves. 312. *Martelli v. Holloway*, L. R. 5 H. L. 532.

(*o*) *Theilussen v. Woodford*, 4 Ves. 326, by Buller, J.

(*p*) *Story's Conflict of Laws*, ss. 479 *a*, 479 *m*, 490, 491. *Enohin v. Wylie*, 10 H. L. C. 1. *Martin v. Lee*, 14 Moo. P. C. 142. *Crispin v. Doglioni*, 3 Sw. & Tr. 96. S. C. *sub nom.* *Doglioni v. Crispin*, L. R.

1 H. L. 301. *Whicker v. Hume*, 7 H. L. C. 124, 156, 165, 166. *Re Wilson's Trusts*, L. R. 1 Eq. 247. S. C. *sub nom.* *Shaw v. Gould*, L. R. 3 H. L. 55. *Studd v. Cook*, 8 App. Cas. 577. As to what is sufficient to show an intention that a Will should operate according to law foreign to that of the testator's domicile: see *Bradford v. Young*, 26 C. D. 656; 29 C. D. 617.

(*q*) *Ante*, p. 174. *Post*, p. 1299.

(A.) *Who are entitled under the description of* 1. "Children:"

2. "Grandchildren:" 3. "Wife," "Husband:" 4. "Nephews and Nieces:" 5. "Cousins."

1. "Children." Generally speaking, every person who at the time of the testator's death falls within the prescribed class of "children" will be entitled: But where it appears from express declaration, or clear inference upon the Will, that the testator intended to confine his bequests to those only who answered the description at the date of the instrument, such intention must be carried into effect (*r*). A Court of Equity, however, is always anxious to include all children in existence at the time of the death of the testator (*s*): and particularly, when he stands in the relation of parent to the legatees, the Court, presuming that he intended to do his duty in providing for all his children at his death, will lay hold of any general expression to give effect to his presumed intention, and will not permit such general expression to be narrowed by the context (*t*).

1. "Children" in a class:

when confined to those existing at the date of the Will:

The leading principle is, that where a bequest is immediate to "children" in a class, children in existence at the death of the testator, and these alone, are entitled (*u*); (amongst

when confined to those existing at the death of the testator.

(*r*) *Sherer v. Bishop*, 4 Bro. C. C. 55. See also *Crossly v. Clare*, Amb. 397. *Viner v. Francis*, 2 Cox, 191, 192.

(*s*) *Ringrose v. Bramham*, 2 Cox, 384.

(*t*) *Matchwick v. Cook*, 3 Ves. 609. *Freemantle v. Taylor*, 15 Ves. 363. But although, where the effect of postponing the vesting of the shares of children to the period of division would be to leave the family of a child dying before that period without provision, the Court leans strongly in favour of early vesting, yet, where a testator provides for all his issue living at the period of division, his words will not be strained in

order to make the shares vest at an earlier period. *Re Deighton's Settled Estates*, 2 C. D. 783.

(*u*) *Roberts v. Higman*, 1 Bro. C. C. 532, *in notis*. *Viner v. Francis*, 2 Bro. C. C. 658. *S. C.* 2 Cox, 190. *Crone v. Odell*, 1 Ball & Beat. 459. *Davidson v. Dallas*, 14 Ves. 576. *Scott v. Harwood*, 5 Madd. 332. *Ringrose v. Bramham*, 2 Cox, 384. *De Witte v. De Witte*, 11 Sim. 41. *Mann v. Thompson*, Kay, 638. *Coventry v. Coventry*, 2 Dr. & Sm. 470. *Rogers v. Mutch*, 10 C. D. 25. Whenever there are words of immediate bequest used in a Will indicative of a class, the words must be taken to denote the class as it is constituted, either at

which children *en ventre sa mere* are to be considered) (x) : And it will make no difference that the bequest is to children "begotten or to be begotten (y).

Children born after testator's death may be entitled under bequest to "children" in a class.

It must, however, be observed, that children born after the testator's death may be entitled under a bequest to "children" in a class, in cases where the division of the fund among the legatees is deferred until a particular period which takes place after his decease (z). Thus where legacies are given to "the children" of A., when a child or children attain a particular age (a), or to be divided amongst them at the death of

the date of the Will or at the death of the testator : *Parker v. Tootal*, 11 H. L. C. 143, 164, by Lord Westbury. A devise of real estate will be treated as immediate, notwithstanding it is subject to a term to secure annuities, and a child born after the death of the testator, but before the death of the annuitants, will be excluded from the class. *Singleton v. Gilbert*, 1 Bro. C. C. 542 (n.), 1 Cox, 68.

(x) *Doe v. Clarke*, 2 H. Bl. 399. *Rawlins v. Rawlins*, 2 Cox, 425. *Trower v. Butts*, 1 Sim. & Stu. 181. *Pearce v. Carrington*, L. R. 8 Ch. 969. But where a testatrix bequeathed 1000*l.* "to each of the three children of my niece," and at the date of the Will there was a fourth child *in ventre sa mere* which was born before the death of the testatrix, it was held by Hall, V.-C., that the three children born at the date of the Will only were entitled to legacies. *Re Emery's Estate*, 3 C. D. 300.

(y) *Sprackling v. Ranier*, 1 Dick. 344. *Storrs v. Benbow*, 2 M. & K. 46. 3 De Gex, M. & G. 390. *Early v. Middleton*, 14 Beav. 453. *Butler v. Lowe*, 10 Sim. 317. *Mann v. Thompson*, Kay, 638. *Dias v. De Livera*, 5 App. Cas. 123,

134. A different rule prevails as to real estate : See *Gooch v. Gooch*, 14 Beav. 565, 3 De Gex, M. & G. 366. *Locke v. Dunlop*, 39 C. D. 387. As to whether a bequest to children "to be born," or "hereafter to be born," or "that may be born," includes children in existence at the date of the Will, see *Early v. Benbow*, 2 Coll. 342. *Early v. Middleton*, 14 Beav. 453. *Townshend v. Early*, 28 Beav. 429, S. C. 3 De C. x, F. & J. 1. *Almack v. Horn*, 1 Hemm. & M. 630. *Gibbons v. Gibbons*, 6 App. Cas. 471.

(z) See *Oppenheim v. Henry*, 10 Hare, 441.

(a) *Gilmore v. Severn*, 1 Bro. C. C. 582 (recognized per M. R. in *Ringrose v. Bramham*, 2 Cox, 385). *Hoste v. Pratt*, 3 Ves. 730. *Hughes v. Hughes*, 14 Ves. 256. *Curtis v. Curtis*, 6 Madd. 14. *Balm v. Balm*, 3 Sim. 492. *Titcomb v. Bavier*, 3 Sim. 417. *Blease v. Burgh*, 2 Beav. 221. *Gardner v. James*, 6 Beav. 170. *Clarke v. Clarke*, 8 Sim. 59. The age however must be such as not to offend against the rule against perpetuities, i.e., the period of distribution must not be one which may not occur within twenty-one years

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B. (b), any child who falls under the description *at the time when the fund is to be divided*, is entitled to a share, although not born till after the testator's death (c); and although born of a subsequent marriage (d); and whether the gift be vested

after the death of the testator or a life or lives in being: *Williams v. Teale*, 6 Hare, 239. But it is sufficient if one member of the class reach the age of distribution in the lifetime of the testator, because then the maximum of the class would be ascertained in his lifetime by virtue of the rule that no child born after the period of distribution has any claim (see *post*, note (f)); and no gift could possibly vest at a time offending against the rule against perpetuities; *Picken v. Matthews*, 10 C. D. 264.

(b) *Ellison v. Airey*, 1 Ves. Sen. 111. *Atty.-Gen. v. Crispin*, 1 Bro. C. C. 386. *Congreve v. Congreve*, 1 Bro. C. C. 530. *Devisme v. Mello*, 1 Bro. C. C. 537. *Crone v. Odell*, 1 Ball & Beat. 459, 483. *Morse v. Morse*, 2 Sim. 485. *Browne v. Hammond*, Johns. 212, note (a). Where a testator left a fund to be divided amongst the children of his son on the determination of his life estate as and when they should respectively attain the age of twenty-one, with a proviso for the determination of the son's life estate in case of his being adjudicated bankrupt, and that the fund and income thereof should thenceforth immediately go and be payable or applicable to or for the benefit of the child or children in the same manner as if he were naturally dead, and his adjudication happened after the death of the testator, it was held that the

period of distribution remained unaltered, so that children born after the adjudication who attained twenty-one, would be entitled to share. *Re Bedson's Trusts*, 28 C. D. 523.

(c) A child, however, falling under the description at the time when the fund is to be divided born after the time of the testator's death will not be entitled to a share, if so to hold would be a violation of the rule against perpetuities and thus result in an intestacy; but the gift to the class will, notwithstanding the period fixed for division, be treated as an immediate gift to take effect on the death of the testator, although the fund will be divisible only between such of the children living at the death of the testator as attain the requisite age. *Elliott v. Elliott*, 12 Sim. 276. *Re Coppard*, 35 C. D. 350.

(d) *Barrington v. Tristram*, 6 Ves. 345. *Critchett v. Taynton*, 1 Russ. & M. 541. Nor will this be less so because a life estate is interposed before the gift to the children. *Re Emmet's Estate*, 13 C. D. 484. But the interposition of such an estate may, coupled with other grounds, such as the original gift to the children, the gift over, and the clauses for their maintenance and advancement, show that the death of the tenant for life is the period of division. *Berkeley v. Swinburne*, 16 Sim. 275.

or contingent (*e*). But no child born after the period of distribution has any claim (*f*): even where the legacy is given to children "born or to be born" (*g*). And the children are excluded who are born after the fund becomes distributable in respect of any one object or member of the class, or after the vesting in possession of any of the shares (*h*). Cases, however, may occur, where the whole context of the Will displays a manifest intention of the testator to provide for *all* the children an individual may have, although their shares are appointed to be paid at a particular period; and then, although a difficulty may exist in making an appropriation to answer legacies given to an uncertain number of persons, *viz.*, all the children an individual may ever have, yet the intention not to exclude any of them must be complied with (*i*).

(*e*) *Mann v. Thompson*, Kay, 638.

(*f*) *Andrews v. Partington*, 3 Bro. C. C. 402. *Prescott v. Long*, 2 Ves. 690. *Hoste v. Pratt*, 3 Ves. 730. *Godfrey v. Davis*, 6 Ves. 43. *Berkeley v. Swinburne*, 16 Sim. 275. *Gimblett v. Purton*, L. R. 12 Eq. 427. *Re Gardiner's Estate*, L. R. 20 Eq. 647.

(*g*) *Whitbread v. St. John*, 10 Ves. 152. *Gilbert v. Boorman*, 11 Ves. 238. See further as to the admission or exclusion of after-born children, *Graves v. Boyle*, 1 Atk. 509. *Haughton v. Harrison*, 2 Atk. 329. *Middleton v. Messenger*, 5 Ves. 136. *Pulsford v. Hunter*, 3 Bro. C. C. 416. *Ayton v. Ayton*, 1 Cox, 327. *Paul v. Compton*, 8 Ves. 375. *Walker v. Shore*, 15 Ves. 122. *Tebbs v. Carpenter*, 1 Madd. 290. *Clarke v. Clarke*, 8 Sim. 59. *Scott v. Lord Scarborough*, 1 Beav. 154. *Brandon v. Aston*, 2 Y. & Coll. 30.

(*h*) See the judgment of Wigram, V.-C., in *Mainwaring v. Beevor*, 8 Hare, 48, 49, and of Wood, V.-C., in *Mann v. Thompson*, Kay, 638,

641, 642, and in *Re Smith*, 2 J. & H. 601, as to the foundation of the rule and as to the cases when it is and is not applicable. See also *Kevern v. Williams*, 5 Sim. 171. *Elliott v. Elliott*, 12 Sim. 276. *Hagger v. Payne*, 23 Beav. 474. *Bateman v. Grey*, 29 Beav. 447 (reversed L. R. 6 Eq. 215). *Iredell v. Iredell*, 25 Beav. 485. *Gilman v. Daunt*, 3 K. & J. 48. *Armitage v. Williams*, 27 Beav. 346. The rule of convenience, by which in a bequest of an aggregate fund to children as a class payable on attaining a given age, the period of ascertaining the class is the time when the first of the class by attaining the given age becomes entitled to payment, and children coming into being after the period are excluded, is not applicable to similar bequests of income. *Re Wenmoth*, 37 C. D. 266.

(*i*) *Deffis v. Goldschmidt*, 1 Meriv. 417. S. C. 19 Ves. 566. *Hutcheson v. Jones*, 2 Madd. 124. *Evans v. Harris*, 5 Beav. 45. *Eddowes v. Eddowes*, 30 Beav. 603.

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It should be further observed, that in the case of an immediate gift to children, if there is no object *in esse* at the death of the testator, the gift will embrace *all* the children who may subsequently come into existence, by way of executory gift (*k*).

In *Harris v. Lloyd* (*l*), the testator bequeathed a legacy in trust for all and every the child and children of his son E. H.; if more than one to be equally divided between them, share and share alike, the shares of sons to be vested at twenty-one and to be paid or transferred at twenty-five, and the shares of the daughters to be paid or transferred at twenty-one or marriage, with benefit of survivorship as to the shares of children dying under twenty-one, and a direction that until the shares of the children should become payable, the dividends and interest of the trust fund should be applied in their maintenance and education: E. H. *had no children at the death of the testator*: And Lord Eldon, C., held that after-born children would take: and that the interest, till the birth of a child, fell into the residue.

It may be material in this place to observe, that upon an ordinary limitation *by way of remainder* to children, &c. in a class, all who are *in esse* at the time of the death of the testator take vested, and, consequently, transmissible interests immediately upon the testator's death; and all who come *in esse* before the particular estates end, and the limitation takes effect in possession, are to be let in, and take a vested interest as soon as they come *in esse*, and they and their representatives will take as if they had been *in esse* at the testator's death (*m*).

It is a doctrine, with respect to Wills of real estate, Bequest to A. and his children.

(*k*) 2 Jarman on Wills, 4th ed. 167. So in the case of a gift preceded by an anterior interest, if there be no object at the time of the vesting in possession, all the children subsequently born will, it should seem, be let in, unless the terms of the gift restrict it to a narrower class of objects. *Ibid.* 176.

(*l*) 1 Turn. & Russ. 310.

(*m*) 2 Jarman on Wills, 4th ed. 156.

Rule in *Wild's case*. according to what is usually called "the rule in *Wild's case*" (n), that where lands are devised to a man and his children, he having none at the time of the devise, the word "children" must be taken as a word of limitation, and he shall take an estate tail; but if he has any children living at the time of the devise, the word "children" must be taken as a word of purchase (which it naturally is) and they will take a joint estate with him.

Rule inapplicable to Wills of personal estate.

But it would seem that this rule is not applicable to Wills of personal estate (o), as to which it is established, that an absolute interest will pass by terms which, if employed with respect to real property, would create an estate tail (p). The rule appears to have been applied, so as to give the parent an absolute interest, where there have been no children at the date of the Will or the death of the testator (q); though it seems sometimes to have been laid down, that, in such a case, the parent shall take only a life interest, with remainder to his children, if any should be subsequently born (r). And where there have been children living at the date of the Will, they have been held to take the whole interest jointly with

(n) 6 Co. 16 b, 17 b.

(o) See *Stokes v. Heron*, 12 Cl. & Fin. 161. In *Audsley v. Horn*, 26 Beav. 195. 1 De Gex, F. & J. 226, Lord Campbell, C. deliberately held that the rule did not apply to personal estate. The rule is explained in *Webb v. Byng*, 2 Kay & J. 669, and *Byng v. Byng*, 10 H. L. C. 171. It was held in *Grieve v. Grieve*, L. R. 4 Eq. 180, that the rule was not inflexible, where a contrary intention appeared in the Will from there being a gift of furniture to go with the house.

(p) See *post*, p. 966.

(q) *Pyne v. Franklin*, 5 Sim. 458. *Read v. Willis*, 1 Coll. 86. *Scott v. Scott*, 15 Sim. 47. *Snowball v. Proctor*, 2 Y. & Coll. Ch. C.

478. But a bequest of personal estate to Charles "and to his first and other sons after him in the usual mode of succession," is only a gift for life: *Sparling v. Parker*, 29 Beav. 450. But see *Tyrone v. Waterford*, 1 De Gex, F. & J. 613, where it was held on the construction of the whole Will that a gift to "B. and to his children in succession" conferred an absolute interest in the general personality.

(r) *Paine v. Wagner*, 12 Sim. 188, *per Shadwell*, V.-C. 2 Dr. & W. 107, *per Sugden*, C. of Ireland. See also *Bain v. Lescher*, 11 Sim. 397. *Robinson v. Hunt*, 4 Beav. 450. *Audsley v. Horn*, 26 Beav. 195. S. C. 1 De Gex, F. & J. 226.

their parents, and with any other children born before the testator's death (*s*); though in this case also, slight circumstances in the context appear to have been thought sufficient to justify the Court in holding that the parent shall take for life, with remainder to his children (*t*); (which would include all children, both those born before, and those born after the testator's death) (*u*).

It is established, ordinarily speaking, that where provisions are made for younger children to the exclusion of an eldest son, and a younger son becomes an eldest before the time of vesting, or, according to the language used in some of the authorities, before the time of distribution, such younger son is to be excluded (*x*). But the principle of these cases does

"Younger children:"

when a younger child considered eldest and excluded:

(*s*) *De Witte v. De Witte*, 11 Sim. 41. *Pain v. Wagner*, 12 Sim. 184. *Beales v. Crisford*, 13 Sim. 592. *Crockett v. Crockett*, 2 Phill. Ch. C. 555, *per* Lord Cottenham. *Newill v. Newill*, L. R. 7 Ch. 253, reversing the decision of Malins, V.-C., L. R. 12 Eq. 432. If the gift be to A. and B. and their children, A. and B. will take but one share: *Gordon v. Whieldon*, 11 Beav. 170. *Atcheson v. Atcheson*, *ibid.* 485.

(*t*) *Crawford v. Trotter*, 4 Mald. 361. *Jeffery v. Honeywood*, *ibid.* 399. *Morse v. Morse*, 2 Sim. 485. *Vaughan v. Lord Headfort*, 10 Sim. 639. *French v. French*, 11 Sim. 257. *Combe v. Hughes*, L. R. 14 Eq. 415. *Crockett v. Crockett*, 2 Phill. Ch. C. 555, 556, *per* Lord Cottenham: *e.g.* if there be any superadded words which import a desire that the property should be settled: *Mason v. Clarke*, 17 Beav. 126, 131. *Cormack v. Copous*, 17 Beav. 397. *Dawson v. Bourne*, 16 Beav. 29. *Armstrong v. Armstrong*, L. R. 7 Eq. 518. *Re Owen's Trusts*, L. R. 12 Eq. 316.

(*u*) *Leake v. Robinson*, 2 Meriv. 382. *Ante*, p. 945.

(*x*) *Chadwick v. Doleman*, 2 Vern. 528. *Teynham v. Webb*, 2 Ves. Sen. 198, 210. *Hall v. Hewer*, Ambl. 203. *Loder v. Loder*, 2 Ves. Sen. 526. *Broadmead v. Wood*, 1 Bro. C. C. 77. *Lincoln v. Pelham*, 10 Ves. 166. *Bowles v. Bowles*, 10 Ves. 177. *Matthews v. Paul*, 3 Swanst. 334. *Savage v. Carroll*, 1 Ball & Beat. 265. *Davies v. Huguenin*, 1 Hemm. & M. 730. *Wool v. Wood*, L. R. 4 Eq. 48. *Re Bayley's Settlement*, L. R. 6 Ch. 590. The time for ascertaining the eldest son for the purpose of his exclusion would seem to depend on the relation of the testator to the objects of his bounty and the reason of the exclusion. Thus, if the intention of the testator seems to be to provide portions for all children except such as should, as eldest son, take a particular estate, the time for ascertaining the eldest son will be the time of distribution. See *Collingwood v. Stan-*

not apply to a younger son succeeding to the reversion of the settled estates, not under the settlement under which the portions were created, but by descent (*y*). In the case of *Matthews v. Paul* (*z*), where the eldest son was not construed as eldest son entitled to a particular estate, Sir T. Plumer, M.R., was of opinion, that even if the share, by the provisions of the Will, vested in the younger child at the age of twenty-one, and he attained that age, yet, nevertheless, the vesting would be *sub modo* only, subject to be divested, and under the condition of not becoming an eldest son (*a*). But

hope, *per* Hatherley, L.-C., L. R. 4 H. L. 43, 53; in other cases the time of vesting. In the former case "eldest son" will include the series of persons who from time to time take that estate, whereas in the latter case "eldest son" will mean the one individual who at the time of vesting occupies that position. Thus, Kay, J., in *Domville v. Winnington*, 26 C. D. 382, says that if "eldest son" should be read "son entitled to the settled estate," the time for ascertaining the excluded son would be the time of distributing the younger children's portions, or if "eldest son" is to be read according to its natural meaning, the time of vesting is the time for exclusion. But even in cases in which the person excluded is the person answering the description of eldest son at the time appointed for distribution, an eldest son, who has joined with his father in barring the entail and resettling the estate at a time anterior to the distribution of the fund for younger children, will be treated as the eldest son entitled under the Will and thus excluded, although his title to the estate at the period of the distribution depended not on

the Will but on the settlement: *Collingwood v. Stanhope*, L. R. 4 H. L. 43.

(*y*) *Sing v. Leslie*, 2 Henm. & M. 68.

(*z*) 3 Swanst. 340. See *Livesey v. Livesey*, 13 Sim. 33, 43. 2 H. of L. 419.

(*a*) With respect to the divesting of vested shares, see *Chadwick v. Doleman*, 2 Vern. 528; and compare *contra*, *Driver v. Frank*, 3 M. & S. 25 (S. C. in error, 8 Taunt. 468. 6 Price, 41). *Graham v. Londonderry*, cited 2 Ves. Sen. 199. The doctrine of *Chadwick v. Doleman* (*ubi sup.*) as to the exclusion of a younger child who has become an eldest son at the time of distribution, and the divesting thereupon of his share as a younger child does not apply, except in cases where the settlor stands *in loco parentis*. See *Sandeman v. Mackenzie*, 1 J. & H. 613. Where no reason is shown by the settlement for excluding the eldest son, such as his accession to another estate, the share which has vested in the younger son will not be divested by his becoming the eldest: *Re Theed's Settlement*, 3 K. & J. 375. It has been held by

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this case has been doubted by Kay, J., in *Domville v. Win-
nington* (b), who says, "if the case of *Matthews v. Paul* be
taken as a decision that the gift of a vested interest in a
legacy to children other than an eldest son or only son, where
the exclusion is not with reference to an estate, deprives
every son who may become the eldest before the time of dis-
tribution of any share, and that a vested interest of that kind
contains a tacit condition divesting it on the younger becom-
ing an elder before the period of distribution, I confess that I
should have great difficulty in agreeing with such a nstruction.
The doctrine of *Chadwick v. Doleman* (c) applies only
to cases where eldest son means the son entitled to a par-
ticular estate, and the only ground of that doctrine is to
prevent his having both the estate and also a portion, and, as
Mr. Jarman points out (d), in the earlier part of his judgment
Sir T. Plumer treats the case as not being within that class
of decisions." In the case of *Windham v. Graham* (e) it was
held by Lord Gifford, M.R., that a son who, when he attained
twenty-one, was a younger child, but by the subsequent death
of his elder brother, in the lifetime of his parents, had become

Sir J. Romilly, M.R., that the
character of "eldest son" is in
ordinary cases to be ascertained at
the period of vesting and not of
payment: *Adams v. Beck*, 25
Beav. 648. *Adams v. Adams*, 25
Beav. 652: and his Honor held
the same as to the character of
"younger child": *Adams v. Ro-
barts*, 25 Beav. 658. As to the
construction in settlements of
"eldest son" as that son who
under the provisions of the
settlement, comes into possession
of the estate, see *Re Bayley's Set-
tlement*, L. R. 6 Ch. 580.

(b) 26 C. D. 382.

(c) 2 Vern. 528.

(d) Jarman on Wills, 4th ed.,
Vol. 2, pp. 210, 211.

(e) 1 Russ. Chanc. Cas. 331.
But this case recognised the rule
that in cases where "eldest son"
is to be treated as "eldest son
entitled to a particular estate,"
the class of younger children
must generally be ascertained at
the period of distribution; but
held that on the peculiar words
of that case the character of
younger child was to be ascertained
when the portions vested and be-
came payable. See *Re Bayley's
Settlement* (*ubi supra*). See also
Re Prytherch, 42 Ch. D. 590,
where the rule was recognised,
but not applied, owing to the
strong vesting words used in the
Will.

an eldest son before the time fixed for the payment of the younger children's portions, was entitled to his share of portions, which were directed to vest in younger sons at twenty-one, though not payable till after the death of his parents, upon the ground that there was enough in the instrument by which the portions were provided to show that the character of the younger child was to be ascertained by reference to the time when the portions vested, and not to the time when they became payable (*f*).

when an eldest
considered a
younger child
and included.

In some cases the Court has thought itself at liberty to construe terms of seniority and age, when applied by a testator to children, as referring to the child who takes, or does not take, the family estate; though this can only be allowed when there is enough on the face of the Will to justify such a mode of dealing with the words (*g*). For example, an *eldest* daughter destitute of a provision has been considered a younger child, to answer the general intention, though not falling literally, within the description (*h*). So where the only issue of the marriage was a daughter, it was held that she was entitled to a portion provided for younger children, as otherwise she would have been left destitute, the real estate descending in another channel (*i*). So an eldest son will be enabled to claim a portion as a younger child, when the family estate is given from him, or he is otherwise unprovided for (*k*). But this "prodigious

(*f*) See further on the question who is entitled to take as "first son" and "second son," *Lomax v. Holmden*, 1 Ves. Sen. 290, 294. *Hawkins v. Hawkins*, 9 Bingh. 765. *King v. Bennett*, 4 Mees. & W. 36. *Adams v. Bush*, 6 Bingh. N. C. 164. *Langston v. Langston*, 8 Bligh. N. S. 167.

(*g*) *Livesey v. Livesey*, 2 H. L. C. 419, 435, by Lord Cottenham. See also *Wilbraham v. Scarisbrick*, 1 H. L. C. 167.

(*h*) *Beale v. Beale*, 1 P. Wms.

244. *Hall v. Luckup*, 4 Sim. 5.

(*i*) *Butler v. Duncomb*, 1 P. Wms. 449.

(*k*) *Emery v. England*, 3 Ves. 232. *Duke v. Doidge*, 2 Ves. Sen. 203, in a note to *Teynham v. Webb*. See also *Collingwood v. Stanhope*, L. R. 4 H. L. 43. So it has been held, that the representatives of an eldest son, who attained twenty-one and died before the period of distribution, never having become entitled in possession to the settled estate, took a share in the portions

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latitude of construction" (as it has been called) is only allowable when the testator stands in the relation of parent, or *in loco parentis*, to the children (l). "It is founded," said Lord Langdale, in *Peacocke v. Pares* (m), "on the presumption that it was intended to provide for all the children of the marriage; and this presumption ought to be acted upon in all cases in which a loss of provision occurs by an event which can properly be supposed to have been in the contemplation of those by whom the settlement was made, and within their intention to provide for: But none of the cases go the length of deciding, that every disappointment of a child's provision, from whatever cause it may arise, is to be made good by construction upon that presumption" (n).

Another instance, where a child has been regarded as being within a description, which it does not in strictness answer, may be found in the case of a father bequeathing a portion to a child *en ventre sa mère*: for if a father gives a legacy to provide for such a child by the term of a "posthumous child," and he happen to survive its birth, it will still be considered a posthumous child within the meaning of the Will (o).

given to the younger sons: *Ellison v. Thomas*, 1 De Gex, J. & S. 18, reversing the decision in 2 Dr. & Sm. 14. See also *Davies v. Huguenin*, 1 Hemm. & M. 730. *Accord.*

(l) *Hall v. Hewer*, Ambl. 203. *Lyldon v. Ellison*, 19 Beav. 565. However, it is said in 2 Sugden on Powers, p. 293, 6th edit., that this distinction does not appear to be attended to at the present day. But it was acted on by Wood, V.-C., in *Sandeman v. Mackenzie*, 1 Johns. & H. 613.

(m) 2 Keen, 599.

(n) In this case, Lord Langdale proceeded to hold that a second son becoming an eldest son, but prevented from taking under the settlement by a recovery suffered

in the lifetime of the elder brother, was excluded from a share in the portions. But this decision is directly contrary to that of *Spencer v. Spencer*, 8 Sim. 87: and its authority was denied by Wood, V.-C., in *Macoubrey v. Jones*, 2 Kay & J. 684, where his Honor held, that such a case fell within the established rule, that where that intention is clear, that no child shall be left without some provision, the Court is at liberty to admit to a share in the provisions made for younger children a son, who, though he may have become the eldest, does not become entitled to the settled estate.

(o) *Jaggard v. Jaggard*, Prec. Chanc. 177.

"Posthumous child;" when child born in lifetime of father within this description.

"Children:"

grandchildren,
&c., cannot
ordinarily
take under
this descrip-
tion.

The word "children" does not, in its proper signification, extend further than the immediate descendants of the persons named: and consequently grandchildren, or issue generally, are not ordinarily included in that term (*p*).

Their inclusion, however, within the description of "children," has been permitted from necessity when the Will would be inoperative, unless the sense of the word children were extended beyond its natural import: as where there is no child in existence at the date of the Will (*q*).

In *Orford v. Churchill* (*r*), Sir William Grant said, he "never knew an instance where there were children, to answer the *proper* description, that grandchildren were permitted to share along with them."

There are, however, some cases, which must be regarded as qualifying this doctrine: *viz.* those in which it has been held that the testator, by using the words "children" and "issue" indiscriminately, has shown his intention of using the former term in the sense of "issue," so as to entitle grandchildren to take under it (*s*).

"Unmarried daughter."

When a legacy is given by Will to a daughter, who at the date of the Will has never been married, and the gift is made to be conditional upon the legatee being "unmarried" at a given time, the word "unmarried" may properly be construed "a spinster," and not "a widow" (*t*). When a fund is given

(*p*) *Radcliffe v. Buckley*, 10 Ves. 195. *Loring v. Thomas*, 1 Dr. & Sm. 497. *Re Hopkins' Trusts*, 9 C. D. 131, 137.

(*q*) *Crooke v. Brookeing*, 2 Vern. 198. *Fenn v. Death*, 23 Beav. 73. *Berry v. Berry*, 3 Giff. 134. *Re Smith*, 35 C. D. 558.

(*r*) 3 Ves. & Bea. 53.

(*s*) *Wyth v. Blackman*, 1 Ves. Sen. 196. *Gale v. Bennett*, Ambl. 681. *Royle v. Hamilton*, 4 Ves. 437. *Re Crawhall's Trust*, 8 De Gex, M. & G. 480. See *Orford v. Churchill*, 3 Ves. & Bea. 59, for an instance, where the word

"issue" was held not to enlarge the words "children and grandchildren," so as to let in a great-grandchild. Where a testator devised lands to all the children or legal issue of A. in equal shares after the decease of A., it was held that the children of A. living at the death of the testator and those who were born afterwards, took vested interests in fee to the exclusion of the grandchildren. *Holland v. Wood*, L. R. 11 Eq. 91.

(*t*) *Re Saunders' Trusts*, 3 K. & J. 156. *Heywood v. Heywood*, 20 Beav. 9. *Radford v. Willis*, L. R.

to "unmarried daughters" in a class, the class is to be ascertained at the death of the testator (*u*).

Natural children, having acquired the reputation of being the children of a particular person, prior to the date of the Will, are capable of taking under the description of "children" (*x*). And they may take in classes of children "legitimate or illegitimate" (*y*). But the Will itself must show the testator's intention to include them under this description, either by express designation, or by necessary implication (*z*). For otherwise the term child, son, or issue must be understood to mean *legitimate* child, son, or issue (*a*). And no extrinsic evidence can be received, except to prove the fact of illegitimate children having, at the date of the Will, acquired

"Children :"
when *natural*
children are
within this
description.

7 Ch. 7. The word "unmarried" is of flexible meaning, but in the absence of context showing a contrary intention the word "unmarried" must be construed according to its ordinary or primary meaning as "never having been married." *Dalrymp v. Hall*, 16 C. D. 715. *Re Sergeant*, 26 C. D. 575. In *Re Lesingham's Trusts*, 24 C. D. 703, however, North, J., construed "sole and unmarried" as meaning "not having a husband," whether as being a spinster, widow, or divorced. In marriage settlements it has frequently been construed to mean "widow." *Re Norman's Trust*, 3 De G. M. & G. 965. *Re Saunders' Trusts*, 3 K. & J. 152. *Pratt v. Mathew*, 22 Beav. 328. *Clarke v. Colls*, 9 H. L. C. 601. As to the words "without having been married," being sometimes controlled by the context, see *Wilson v. Atkinson*, 4 De G. J. & Sm. 455. *Re Ball's Trust*, 11 C. D. 270. *Upton v. Brown*, 12 C. D. 872. The last two of which cases are disapproved by Jessel, M. R., in *Emmins v. Bradford*, 13

C. D. 493.

(*u*) *Blagrove v. Coore*, 27 Beav. 138.

(*x*) *Wilkinson v. Adam*, 1 Ves. & Beam. 422, 454. *Lepine v. Bean*, L. R. 10 Eq. 160. *Barlow v. Orde*, L. R. 3 P. C. 164. *Crook v. Hill*, L. R. 6 Ch. 311 : affirmed in the House of Lords *sub nom.* *Hill v. Crook*, L. R. 6 H. L. 265. *Laker v. Hordern*, 1 C. D. 644.

(*y*) *Barnett v. Tugwell*, 31 Beav. 232.

(*z*) *Re Standley's Estate*, L. R. 5 Eq. 303. *Hill v. Crook*, L. R. 6 H. L. 265. *Re Humphries*, 24 C. D. 691. *Re Bryon*, 30 C. D. 110. *Re Hastie's Trusts*, 35 C. D. 728. *Re Hall*, 35 C. D. 551. *Re Horner*, 37 C. D. 695. *Re Jodrell*, 44 C. D. 590. S. C. *sub nom.* : *Seale-Hayne v. Jodrell* [1891], A. C. 304.

(*a*) *Cartwright v. Vawdry*, 5 Ves. 530. *Darrant v. Field*, 5 De G. & Sm. 343. *Re Wilson's Trusts*, L. R. 1 Eq. 247. S. C. *sub nom.* *Shaw v. Gould*, L. R. 3 H. L. 55. *Dorin v. Dorin*, L. R. 7 H. L. 568.

the reputation of being the children of the testator, or the person named in the Will (*b*), and that the testator knew that fact, and the state of the family (*c*). Nor can illegitimate children unbegotten at the time of the testator's death under any circumstances be entitled under the description of "child" or "children" (*d*).

Rule that where there are legitimate children to answer description they only will take:

Again, it is a rule (though not an invariable one), that wherever the general description of children in a Will will include legitimate children, it cannot also be extended to illegitimate children; in other words, where there are legitimate children to answer the description of "children," the rule of law is, that legitimate children only will take. Thus in *Bagley v. Mollard* (*c*), a testator devised a leasehold in

(*b*) *Wilkinson v. Adam*, 1 V. & B. 422. *Swaine v. Kennerley*, *ibid.* 469. *Ellis v. Houstoun*, 10 C. D. 236.

(*c*) *Gill v. Shelley*, 2 Russ. & M. 336. Such evidence is not only admissible but it is necessary. *Re Herbert's Trusts*, 1 John. & H. 121. *Hill v. Crook*, L. R. 6 H. L. 265, 283.

(*d*) *Holt v. Sindrey*, L. R. 7 Eq. 170. Hence natural children *unborn at the date of the Will* and described as the children of the testator or of another man to be born of a particular woman cannot take under that description. *Metham v. Duke of Devon.*, 1 P. Wms. 529. See *Arnold v. Preston*, 18 Ves. 288. *Lomas v. Wright*, 2 M. & K. 769. This passage seems quite accurate in cases where the child is described in the Will as the issue of a particular father and takes on that condition; but where the child claims under the description of reputed children it would seem that a child unborn at the date of the Will may take under that description, provided

that the circumstances of its birth are such as to raise the reputation at the time of the death of the testator. *Oceleston v. Fullalove*, L. R. 9 Ch. 147. Sir G. Jessel in *Re Goodwin's Trusts*, L. R. 17 Eq. 345, says: "The principle of the decision of *Oceleston v. Fullalove* is that a gift by a testator or testatrix to one of his or her children by a particular person is perfectly good if the child has acquired the reputation of being such child as described in the Will before the death of the testator or testatrix." But it would seem, as pointed out by Cotton, L. J., in *Re Bolton*, 31 C. D. 542, 552, that *Oceleston v. Fullalove* did not decide this, but only decided that the child came within the description in the Will of "children" whom he might be reputed to have by a particular woman, and as is pointed out by Bowen, L. J., in the same case, although the fact of paternity cannot, yet the reputation of paternity may, be enquired into.

(*e*) 1 Russ. & M. 581. *Megson v. Hindle*, 15 C. D. 198. *Re Hall*,

trust for his "grandchild, Elizabeth, the only surviving child of his son William," and gave the residue of his property, after the death of his wife and daughter, to all the children of his sons James and William, and of his daughter Sarah, in equal shares: Elizabeth was illegitimate, and William had no other child: and it was held by Sir J. Leach, M. R., that Elizabeth did not take any share of the residue. So in *Fraser v. Pigott* (f), John Fraser bequeathed a sum of stock in certain events to his grandchildren, being children of his sons, William and John, whether born in wedlock or not: And after certain specific bequests, he gave the residue of his personal estate to his sons William and John, as tenants in common; but if either of them should die in his (the testator's) lifetime, the moiety of such deceased son should go to his children; but if both of his sons should die in his lifetime, then he gave such residue to and among all their children as tenants in common: The testator's two sons died in his lifetime, one leaving legitimate and illegitimate children, the other illegitimate children only: And it was held by Lord Lyndhurst, C. B., that the legitimate children of the son having both descriptions of children, and the illegitimate children of the other son took the residue, and that the illegitimate children of the first-mentioned son took no interest.

If, however, the testator plainly refers to given individuals, and it be clear, from the language he uses, that they are described by the word "children" (e.g. where in enumerating his children, he names one who is a bastard, and then

except where testator clearly refers to given individuals and describes them as "children."

35 C. D. 551. In the case of *Re Humphries*, 24 C. D. 691, North, J., recognised the rule in *Bagley v. Mollard*, but held that there were other facts beyond the description of the illegitimate child as the eldest daughter of the testator's daughter, which indicated the intention that the illegitimate child should be included in the de-

scription of the children of his daughter.

(f) 1 Younge, 354. Shadwell, V.-C., dissented from this decision, in *James v. Smith*, 14 Sim. 216. And as far as it affirmed the admission of the illegitimate children to a share in the residue, it has been regarded as overruled: *Re Overhill's Trust*, 1 Sm. & G. 362.

makes a gift to his "said children"), there is no rule of law which precludes the Court from giving effect to the intentions of the testator (*g*). So, where the gift was to the "children" of "the late A. B.," who had died leaving two children, of whom one was legitimate, and the other illegitimate, the illegitimate child was held to be included, otherwise it was impossible to give a meaning to the word "children" in the plural (*h*). So, where the gift was to the "children" of one whom the testator mentioned as already dead, and who left none but illegitimate children, they have been deemed to be intended as the objects of the gift; for otherwise there would be nothing for the Will to operate on (*i*).

The principal cases in which, in conformity to the above rules, natural children have been held to be included in the description of "children" (*k*), and those in which the inten-

(*g*) *Evans v. Davies*, 7 Hare, 498. *Meredith v. Farr*, 2 Y. & Coll. Ch. C. 525. *Owen v. Bryant*, 2 De Gex, M. & G. 697. *Hartley v. Tribber*, 16 Beav. 510. *Worts v. Cubitt*, 19 Beav. 421. *Tugwell v. Scott*, 24 Beav. 141. *Allen v. Webster*, 2 Giff. 177. *Cook v. Whitley*, 7 De Gex, M. & G. 494, by Lord Cranworth. It would seem that in these cases the words are treated as a *descriptio personarum* and not as a designation of a class. *Re Wells' Estate*, L. R. 6 Eq. 599; *Barlow v. Orde*, L. R. 3 P. C. 164, 188. But the mere erroneous description of a person in one part of a Will will not enable him to take as if he belonged to a class which is designated by the like description in another part of the same Will. *Re Stanley's Estate*, L. R. 5 Eq. 303.

(*h*) *Gill v. Shelley*, 2 Russ. & M. 336. *Leigh v. Byron*, 1 Sm. & G. 486. *Edmunds v. Fessey*, 29

Beav. 233. *Re Humphries*, 24 C. D. 691. In these cases it should seem that there ought to be extrinsic evidence that the testator knew the state of the family: *Re Herbert's Trusts*, 1 Johns. & H. 121. *Ante*, p. 954, note (*c*).

(*i*) *Woodhouselee v. Dalrymple*, 2 Meriv. 419. 2 De Gex, M. & G. 703. *Dilley v. Matthews*, 11 Jur. N. S. 425. *Hill v. Crook*, L. R. 6 H. L. 265. The construction, it should seem, would be different, if the parent were alive: for then legitimate children might be born before the testator's death. See *Gabb v. Prendergast*, 1 Kay & J. 439.

(*k*) *Wilkinson v. Adam*, 1 Ves. & Beam. 422. S. C. confirmed in Dom. Proc. 12 Price, 470. *Blundell v. Dunn*, cited 1 Madd. 433. *Woodhouselee v. Dalrymple*, 2 Meriv. 419. *Bayley v. Snelham*, 1 Sim. & Stu. 78. *Meredith v. Farr*, 2 Y. & Coll. Ch. C. 525. *Gill v. Shelley*, 2 Russ. & M. 336.

tion of the testator has been held *not* sufficiently manifested in their favour on the Will to admit them (*l*), will be found collected in the notes below.

A natural child cannot take as the issue of a particular father, until it has acquired the reputation of being the child of that person, which cannot be before its birth (*m*).

It has been said in *Pratt v. Mathew* (*n*), and in earlier cases which will be found cited in Lord Selborne's dissentient judgment in *Occleston v. Fullalove* (*nn*), that a prospective gift to future illegitimate children of a woman is wholly void as *contra bonos mores*: but it would seem from the judgment of the majority of the Court in that case that such a gift is not void as *contra bonos mores* provided it be so couched as to avoid any enquiry as to the paternity of the child, *e.g.*, a provision for all the children born of the body of a particular

"Natural child:"

when unborn children can take under this description.

Evans v. Davies, 7 Hare, 498. *Owen v. Bryant*, 2 De Gex, M. & G. 697. *Hartley v. Tribber*, 16 Beav. 510. *Worts v. Cubitt*, 19 Beav. 421. *Leigh v. Byron*, 1 Sm. & G. 486. *Allen v. Webster*, 2 Giff. 677. See also *Barlow v. Orde*, L. R. 3 P. C. 164, 188. *Clifton v. Goodbun*, L. R. 6 Eq. 278. *Holt v. Sindrey*, L. R. 7 Eq. 170, 174. *Crook v. Hill*, L. R. 6 Ch. 311: affirmed, *sub nom.* *Hill v. Crook*, L. R. 6 H. L. 265. *Occleston v. Fullalove*, L. R. 9 Ch. 147. *Re Brown's Trusts*, L. R. 16 Eq. 239. *Re Goodwin's Trusts*, L. R. 1 Eq. 345. *Laker v. Hordern*, 1 C. D. 644. *Re Humphries*, 24 C. D. 691. *Re Bryon*, 30 C. D. 110. *Re Haseldine*, 31 C. D. 511, from which last case it would seem that if the word "children" is held in a Will to include illegitimate children it will have the same meaning in a codicil to that Will. *Re Horner*, 37 C. D. 695.

(*l*) *Curtwright v. Vawdry*, 5 Ves. 530. *Osmond v. Tindall*, 5 Ves. 534, c, 2nd edit. *Godfrey v. Davis*, 6 Ves. 43. *Harria v. Lloyd*, 1 Turn. & Russ. 310. *Mortimer v. West*, 3 Russ. Chanc. Cas. 370. *Bagley v. Mollard*, 1 Russ. & M. 581. *Dover v. Alexander*, 2 Hare, 275. *Re Overhill's Trust*, 1 Sm. & G. 362, which treats *Beachcroft v. Beachcroft*, 1 Madd. 430, as overruled. *Kelly v. Hammond*, 26 Beav. 36. *Mason v. Bateson*, 26 Beav. 404. *Edmunds v. Fessey*, 29 Beav. 233. *Pratt v. Mathew*, 22 Beav. 328. *Re Wells' Estate*, L. R. 6 Eq. 590. *Paul v. Children*, L. R. 12 Eq. 16. *Re Ayles' Trusts*, 1 C. D. 282. *Ellis v. Houstoun*, 10 C. D. 236. *Megson v. Hindle*, 15 C. D. 198. *Re Hall*, 35 C. D. 551. *Re Bolton*, 31 C. D. 542.

(*m*) Co. Lit. 3, b. *Pratt v. Mathew*, 22 Beav. 328.

(*n*) 22 Beav. 328.

(*nn*) L. R. 9 Ch. 147.

woman while cohabiting with the testator. And James, L.J., points out that the addition to the suggested gift of the words "of whom I shall be the reputed father" would not avoid a gift such as that suggested, because it would involve no enquiry into paternity, but only into that reputation which springs from acknowledgment, conduct and life as distinguished from gossip or scandal as to the actual paternity. So where a testator who had formed an illicit connection with M. E. M., made by will a gift to certain illegitimate children by name "and all and every the other children and child which may be born of the said M. E. M. previous to or of which she may be pregnant at the time of my death," it was held that illegitimate children born after the date of the will and *in esse* at the time of the death of the testator were entitled to have the benefit of the gift (o).

So, generally, a legacy to a natural child *en ventre sa mère* at the death of the testator under the description of the child of the testator, or of another man, cannot be supported; because since the identity of the father cannot be proved by reputation, it can only be ascertained by evidence such as, being contrary to the public decency, the law will not admit (p).

If the bequest be to a natural child, of which a particular woman is enceinte, *without reference to any person as the father*, no difficulty exists, and the legacy will be supported (q). So where the testator expresses his *belief* that a natural child *en ventre sa mère* is his, and, proceeding on

(o) *Re Hastie's Trusts*, 35 C. D. 728.

(p) *Earle v. Wilson*, 17 Ves. 528, 532. And see *Wilkinson v. Adam*, 1 Ves. & B. 446. *Wilkinson v. Wilkinson*, 1 Y. & Coll. Ch. C. 657.

(q) *Gordon v. Gordon*, 1 Meriv. 141. *Evans v. Massey*, 8 Price, 22. *Dawson v. Dawson*, 6 Madd.

292. *Crook v. Hill*, 3 C. D. 773. And see the observation of Sir Wm. Grant, in *Earle v. Wilson*, 17 Ves. 532. So also where a testatrix who was never married describing herself as a spinster bequeathed her property in trust for her children. *Clifton v. Goodburn*, L. R. 6 Eq. 278.

such belief, provides for it, the bequest will be sustained ; for in such case, as the testator chooses to *assume* the fact, and to act on the foundation of his *belief*, there is no uncertainty in the object ; since, whether it was or was not the child of the testator, he meant to provide for it, as the child of the mother described (*r*).

A bequest to children of a foreigner must be construed to mean his legitimate children, *i.e.* those legitimate by the Law of their father's domicile (*s*). But a child born before the marriage of its father and mother cannot be legitimated by their subsequent marriage unless the father was domiciled in a country whose laws allowed such legitimation both at the time of the marriage which gave the child the status of legitimacy, and at the time of the birth on which it took from its putative father the potentiality of being legitimated (*t*).

"Children" of foreigner means those legitimate by law of domicile.

2. "Grandchildren:" Lord Northington seems to have been of opinion, in the case of *Hussey v. Berkeley* (*u*), that the word "grandchildren" would, without further explanation, comprehend *great* grandchildren. But the case of *Orford v. Churchill* (*x*) is an authority to the contrary: And it seems but reasonable, that if the word "children" does not include grandchildren (as we have seen), the term "grandchildren" should not comprise children next to them in descent (*y*). The several distinctions which have been mentioned in regard to the enlargement of the word "children" seem applicable to a bequest to grandchildren: so that

2. "Grandchildren:"

when *great* grandchildren included in this description.

(*r*) *Gordon v. Gordon*, 1 Meriv. 141. *Holt v. Sindrey*, L. R. 7 Eq. 170. *Occleston v. Fullalove*, L. R. 9 Ch. 147, 161.

(*s*) *Re Andros*, 24 C. D. 637. And so a child legitimate by the Law of its father's domicile but illegitimate according to English Law, is entitled to a share as one of the next of kin in the personal estate of an intestate dying domiciled in England under the Statute

of Distributions. *Re Goodman's Trusts*, 17 C. D. 266 (reversing the decision of *Jessel, M.R.*, 14 C. D. 619).

(*t*) *Re Grove*, 40 C. D. 216.

(*u*) 2 Eden, 196.

(*x*) 3 Ves. & Beam. 59.

(*y*) See the judgment of Lord Cottenham, in *Sanderson v. Bayley*, 4 Mylne & Cr. 60: and *Waring v. Lee*, 8 Beav. 247.

if it appear from the Will, that the word "grandchildren" was not used in its proper sense, but for the purpose of embracing all the descendants of the persons described, it will have this effect.

Grandchild by marriage.

A grandchild *by marriage* is not entitled under the description of "grandchildren" (z).

3. "Wife."

"Husband."

3. "Wife:" "Husband:" Before the Wills Act it was held that a bequest by a husband to his "beloved wife," not mentioning her by name, applies exclusively to the individual who answers the description at the date of the Will, and is not to be extended to an after-taken wife (a).

(z) *Hussey v. Berkeley*, 2 Eden, 196.

(a) *Garratt v. Niblock*, 1 Russ. & M. 629. It is stated in Jarman on Wills (Vol. I., 4th ed., p. 324), that the distinctions upon the subject deducible from general principles and the authorities there referred to appear to be the following:—First, that a devise or bequest to the wife of A. who has a wife at the date of the Will, relates to that person notwithstanding any change of circumstances which may render the description inapplicable at a subsequent period, and by parity of reasoning is under *all* circumstances confined to her; but that, secondly, if A. have no wife at the date of the Will the gift embraces the individual sustaining that character at the death of the testator; and, thirdly, if there be no such person either at the date of the Will or at the death of the testator, it applies to the woman who shall first answer the description of wife at any subsequent period. And no doubt in most cases under the respective conditions supposed, the respective results indicated would be held to follow, but this is because in most

cases it would be inferred in the 1st and 2nd cases that the testator meant by wife a *persona designata*, and in the 3rd case that he meant any person answering that description. But the true rule would seem to be that in each case you must look at the whole Will and all the circumstances known or presumably known to the testator and ascertain his intention. Thus, in *Re Lyne's Trust*, L. R. 8 Eq. 65, where a testator gave £800 to trustees to pay the dividends to his son for life, and after his decease to transfer the capital unto and equally between the wife of his son in case she should survive him, and all and every the child and children of his son equally, and at the date of the Will the son had a wife and one child but the wife died before the testator, and after the testator's death his son married again and died leaving a widow who claimed to be entitled to a moiety of the fund equally with the only child of the son, it was held that the gift was to a class consisting of all the children and any wife of the son who survived him. *Peppin v. Bick-*

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But this point cannot arise since the Act, for the second marriage would revoke this Will (*aa*). A similar question may however occur in respect of a bequest by a testator to the wife of another person.

It is stated that if a joint estate be made of land to husband and wife, and to a third person, in this case the husband and wife have in law in their right but a moiety, and the third person shall have as much as the husband and wife, viz., the other moiety: and the cause is that the husband and wife are but one person in law (*b*). But it is stated in the judgment of the Privy Council, in *Dias v. De Livera* (*c*), that any indication, however slight, of an intention that each shall take separately, has been held to defeat the application of this doctrine. The cases on the subject are extremely contradictory, and will be found set out and reviewed in the cases of *Re Jupp* (*d*) and *Re Dixon* (*e*), in which Kay, J., and North, J., seem to have arrived at opposite conclusions, the former in favour of a strict application of the doctrine, the latter against it. It seems, however, from the judgment of Cotton, L. J., in *Re March* (*f*) and of Kay, J., in *Re Jupp* (*g*), that the passing of the Married Women's Property Act, 1882, has made no difference in the application of the doctrine, at all events, in the case of Wills made before the passing of that Act (*gg*).

The question whether a woman can take as a legatee by the name of the "wife" of such a one, when in truth she is not his lawful wife, will be considered hereafter (*h*).

ford, 2 Ves. 570, and Longworth v. Bellamy, 40 L. J. Ch. 513, are cases where the description of wife was held to apply to a second wife. Boreham v. Bignall, 8 Ha. 131, and *Re Bryan's Trusts*, 2 Sim. (N. S.) 103, are cases where the testator was held to have intended a *persona designata*. Compare also *Re Parrott*, 33 C. D. 274. Radford v. Willis, L. R. 7 Ch. 7, is a clear authority in favour of Mr. Jar-

man's third proposition in the absence of a controlling context.

(*aa*) See *ante*, p. 160.

(*b*) Co. Litt. 187 a.

(*c*) 5 App. Cas. 123, 136.

(*d*) 39 C. D. 148.

(*e*) 42 C. D. 306.

(*f*) 27 C. D. 166, 170.

(*g*) 39 C. D. 148, 154.

(*gg*) See *post*, p. 1327, note (*z*).

(*h*) *Post*, p. 1015.

Joint estate in land to husband and wife and to a third person.

Cases contradictory.

Effect of Married Women's Property Act.

Sometimes a person who answers the description in the Will has ceased to answer that description at the time of the testator's death, or at the time when the gift was to take effect. Thus, in *Re Morriesson* (i), a testator bequeathed a share of his residuary personal estate in trust for his son for life, and after his decease, in trust to pay unto or permit any wife of his son to receive the annual income of his share during her life. The son married a woman from whom he was afterwards divorced on his petition. He died without having married again. It was held that the woman was not entitled to the income of the son's share. In this case Kay, J., expressed his dissent from *Bullmore v. Wynter* (k), in which case a testator devised property to his daughter for life, and after her death in trust for any husband with whom she might intermarry, if he should survive her for his life. The daughter married the defendant and was divorced from him on his petition, and he married again and survived her, and it was held by Fry, J., that the defendant, although no longer the husband of the daughter, was entitled to the property for his life.

4. "Nephews and nieces."

4. "Nephews and Nieces:" The principles already stated with respect to the restriction and enlargement of the terms "children" and "grandchildren" apply to the words "nephews and nieces." Therefore *great nephews* and *great nieces* are not ordinarily to be considered as comprehended in that description (l): Nor will the expression "grand-nephews and nieces" include the children of grand-nephews and nieces (m). But in these cases also, the more enlarged sense will be attributed to the expression, when the context indicates the intention of the testator so to use it (n). It

(i) 40 C. D. 30.

(k) 22 C. D. 619.

(l) *Falkner v. Butler*, Ambl. 514. *Shelley v. Bryer*, 1 Jacob. 207. 4 Mylne & Cr. 60. *Thompson v. Robinson*, 27 Beav. 480. *Re Blower's Trusts*, L. R. 6 Ch. 351. And the case is not altered where

the testator has used words in the plural, and there happens to be only one person to whom the term is properly applicable: *Crook v. Whitley*, 7 De Gex, M. & G. 490.

(m) *Waring v. Lee*, 8 Beav. 247.

(n) *James v. Smith*, 14 Sim. 214. *Stringer v. Gardiner*, 27 Beav. 35.

includes a child of a brother or sister of the half-blood (*o*). But not the nephews or nieces of the husband of the testatrix (*p*).

However, a bequest of a residue by a married man to his niece, and all other his nephews and nieces on both sides,

4 De G. & J. 468. *Weeds v. Bristow*, L. R. 2 Eq. 333.

(*o*) *Grieves v. Rawley*, 10 Hare, 63.

(*p*) *Smith v. Lidiard*, 3 K. & J. 252; *Merrill v. Morton*, 17 C. D. 382; notwithstanding the testatrix has, in another part of the Will, called a legatee her niece, who was only her husband's niece. See also *Thompson v. Robinson*, 27 Beav. 486. *Wells v. Wells*, L. R. 18 Eq. 504. In *Grant v. Grant*, L. R. 5 C. P. 380, 727, the Court of Common Pleas held that the word "nephew" might include the son of the testator's wife's brother, and, there being a nephew of the same name, son of testator's own brother, admitted evidence to show the testator's intention on the ground that these circumstances gave rise to a latent ambiguity as to which of the two persons was intended by the testator. This evidence was of course only admissible on the assumption that both claimants fell within the description "nephew." *Grant v. Grant* (*ubi sup.*), has, however, been disapproved by Sir G. Jessel in *Wells v. Wells*, L. R. 18 Eq. 504, on the authority of *Re Blower's Trusts*, L. R. 6 Ch. 351, in which case Mellish, L.J., observed: "It is clear that the words nephews and nieces *primâ facie* mean the children of brothers or sisters;" and of *Sherratt v. Mount-*

ford, L. R. 8 Ch. 928, in which latter case the same learned Judge observed: "There is no doubt a man's own nephews and nieces are primarily his nephews and nieces, but I am of opinion that his wife's nephews and nieces are his nephews and nieces according to the ordinary meaning of the words in a secondary sense." *Grant v. Grant* is also disapproved of in *Merrill v. Morton*, 17 C. D. 382, and in *Re Taylor*, 34 C. D. 255. The result would seem to be that the words "nephews" and "nieces" will be construed in the primary sense if there is any person or class answering the description, and the Court will go no further, unless it is shown that there is another person or class of persons answering the description: in which case extrinsic evidence of intention will be admissible to remove the latent ambiguity and show which of the persons or classes is intended: where however the words are not strictly applicable to any person, then evidence of intention will not be admissible, but only evidence of the surrounding circumstances and the testator's knowledge. It will be observed that in *Sherratt v. Mountford*, in which the claim of the nephews and nieces of the testator's wife was sustained, there were no nephews and nieces in the primary sense.

will include the nephews and nieces of his wife (q). So will a bequest to nephews and nieces where the testator has none of his own (r).

5. "Cousins."

5. "Cousins:" It might seem, that the word "cousins," if used *simpliciter*, would include cousins of every description. But the Court is frequently obliged to put a restricted sense on the general expression. Thus in *Caldecott v. Harrison* (s), a testator, in his Will, gave several legacies, and mentioned several persons as his cousins, and every person there called a cousin was, in fact, a first cousin: By a codicil he gave his residuary estate to all such of his cousins both on his father's and mother's side, as should be living at his decease, and to all the children of such of his said cousins as might have theretofore died or might die in his lifetime: The testator left several first cousins and children of first and second cousins, and one first cousin once removed: And Sir L. Shadwell, V.-C., held that none of them were included in the residuary bequest, except the first cousins living at the testator's death, and the children of first cousins who died in his lifetime; his Honor being of opinion that, from the context, it appeared that by the word "cousins" the testator meant his first cousins, simply and strictly, without any qualification. And it has been held by Lord Cranworth, C., that when the testator says nothing more than "cousins," he means *first* cousins (t).

Though, formerly, some doubt on the subject prevailed, it may now be taken that the same principles apply in determining who are entitled under a bequest to first or second cousins as apply in the case of a bequest to children or grandchildren. That is to say, as Sir G. Jessel, M.R., puts it in the case of *Re Parker* (u): "You are not without a context to

(q) *Frogley v. Phillips*, 30 Beav. 168.

(r) *Hogg v. Cook*, 32 Beav. 641. *Sherratt v. Mountford*, L. R. 8 Ch. 928.

(s) 9 Sim. 457.

(t) *Stoddart v. Nelson*, 20 Jur. 27, in which case it was also decided that "first cousins" and "consins-german" meant the same thing.

(u) 15 C. D. 528, 538.

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alter the meaning of well-known terms that have a definite meaning." In this case it is pointed out that the doubt on the construction of these gifts to cousins has arisen through a misunderstanding of the decision in the case of *Mayott v. Mayott* (x), in which case Lord Kenyon, M. R., held that, there being a gift to the first and second cousins of the testator who, at the date of the Will, had no second cousins, the phrase "second cousins" must be interpreted to mean all persons related as nearly as second cousins. Sir G. Jessel goes on to point out that the cases of *Silcox v. Bell* (y) and *Charge v. Goodyer* (z) were decided on a misinterpretation of the decision of *Mayott v. Mayott*, viz., that this case decided that a bequest to second cousins included all persons of the same degree of relationship, whereas, all that case really decided was that, in the particular circumstances, and there being no second cousins, the testator must have intended to benefit all relations as near as second cousins.

In all cases, however, later than *Charge v. Goodyer* decisions have followed the ordinary rule of construction. Thus it was held by Lord Cottenham in *Sanderson v. Bayley* (a) (reversing a decision of Sir L. Shadwell, V.-C.), that a bequest to the testator's "first cousins or cousins-german" does not include first cousins once removed. And in *The Corporation of Bridgnorth v. Collins* (b), it was held that a first cousin once removed is not entitled under a bequest to "second cousins." Again, in *Re Parker* (c), the Court of Appeal (affirming Jessel, M. R.) held, in a case where a testator left first cousins, second cousins and children and grandchildren of first cousins, that a bequest to "second cousins" did not include the children and grandchildren of the first cousins.

Where, however, there is no individual of the class named, the word "cousins" will be construed in the more extended sense (d): as also will the word "cousin" as applied to a

(x) 2 Bro. C. C. 125.

(y) 1 Sim. & Stu. 301.

(z) 3 Russ. 140.

(a) 4 M. & Cr. 56.

(b) 15 Sim. 541.

(c) 15 C. D. 528; 17 C. D. 262.

(d) *Slade v. Fooks*, 9 Sim. 386.*Re Bonner*, 19 C. D. 201. *Wilks**v. Bannister*, 30 C. D. 512.

named legatee if there is no person of the name to whom the word cousin, in its primary sense, is applicable (e).

So, too, it has been held that "cousin" in such a case may be understood in a popular sense as the wife of a cousin (f).

(B.) *Who are entitled under the description of* 1. "Heirs:" 2. "Issue:" 3. "Descendants:" 4. "Relations:" 5. "Next of Kin:" 6. "Family:" 7. "Executors and Administrators," or "Legal Representatives," or "Personal Representatives."

Terms which applied to realty give an estate tail, give the absolute interest if applied to personalty.

It may be observed, in the first place, that it is an established rule of construction, with respect to Wills of personalty, that where personal estate is given, in terms which, if applied to real estate, would create an estate tail, the property so bequeathed vests absolutely in the first taker, and, consequently, devolves at his death on his executors and administrators, whether he has issue or not (g). Hence,

(e) *Re Taylor*, 34 C. D. 255.

(f) *Re Taylor, ubi sup.*

(g) *Elton v. Eason*, 19 Ves. 78. *Lyon v. Mitchell*, 1 Madd. 475. *Ward v. Bevil*, 1 Younge & Jerv. 525. *Byng v. Lord Strafford*, 5 Beav. 558. *Williams v. Lewis*, 6 H. L. C. 1020. *Bennett v. Bennett*, 2 Drewr. & Sm. 160. *Russell v. Campbell*, 2 Russ. & M. 390. S. C. in Dom. Proc., *sub nom.*, *Candy v. Campbell*, 8 Bligh, 469. The cases in which the words of a Will will be so construed as to create an estate tail have been materially reduced by the provisions of s. 29 of the Wills Act (1 Vict. c. 26): the effect of which provisions as to Wills made on or after 1st Jan. 1838 is that in any devise or bequest of real or personal estate words which are open to three constructions—viz., the death of the legatee in the lifetime of the tenant for life without having issue

living at the legatee's death: the death of the legatee in like manner without having issue living at the death of the tenant for life: or the death of the legatee in the lifetime of the tenant for life followed by an indefinite failure of issue, are not to be construed as meaning indefinite failure of issue. The result of which is that cases of implication of an estate tail from words importing a failure of issue will not often arise, and cases of a bequest of personal property in words which, if applied to real estate would by express terms create an estate tail, are not likely to arise except in cases where realty and personalty are included in one gift. It is to be observed, however, that the statute only applies in cases where the words may support either a want or failure of issue of any person in the testator's lifetime, or at his death, or an indefinite

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generally speaking, where realty and personalty are included in one gift, if the legatee takes an estate tail in the former, he takes the latter absolutely (*h*).

Hence a legacy "to A. and to the heirs of his body," or "to A., to be secured to him and the heirs of his body," is an absolute bequest to A. (*i*), though a legacy "to A. and his heirs (say children)," is only a legacy to A. for life,

1. "Heirs:"

legacy to A.
and the heirs
of his body:

failure of issue, and therefore have no application where the words must import an indefinite failure of issue. In other words, the statute only applies where there is ambiguity. *Dawson v. Small*, L. R. 9 Ch. 651. It must be remembered, moreover, that the generality of this rule may possibly be qualified by a doubt whether the rule in *Shelley's case*, 1 Rep. 93, B., has any application to personalty. See *Smith v. Butcher*, 10 C. D. 113, where *Jessel, M. R.*, refused to apply that rule to a Will dealing with personalty. But *Bacon, V.-C.*, in the case of *Comfort v. Brown*, 10 C. D. 146, says in reference to an argument that the rule did not apply to personal estate, "*De Beauvoir v. De Beauvoir*, 3 H. L. C. 524, and *Gittings v. McDermott*, 2 M. & K. 69, are instances, and there are hundreds of other instances in which the rule has been applied to personal estate." So it has been said that the rule in *Wild's case*, 6 Rep. 17, that where lands are devised to a person and his children, and he has no child at the time of the devise, the parent takes an estate tail, has no application to personalty, *Audsley v. Horn*, 1 De Gex, F. & J. 226. Besides all these particular limitations of the generality of the

rule that words which would create an estate tail in realty will vest personalty absolutely in the first taker it must be remembered that this rule, which, so far as regards personalty, seems to be a mere rule of construction, is never allowed to override the intention to be gathered from the whole of the words of the Will. *Symers v. Jobson*, 16 Sim. 267. *Re Jeaffreson's Trusts*, L. R. 2 Eq. 276. *Knight v. Ellis*, 2 Bro. C. C. 570. *Ex parte Wynch*, 5 De Gex, M. & G. 188.

(*h*) *Donn v. Penny*, 19 Ves. 544. *Dunk v. Fenner*, 2 Russ. & M. 557. *Simmons v. Simmons*, 8 Sim. 22. But the blending of realty and personalty in one gift is not conclusive if it appear from the whole Will that it was not the intention to give the personalty to an indefinite succession of persons. See *Herrick v. Franklin*, L. R. 6 Eq. 593. *Smith v. Butcher*, 10 C. D. 113. The rule that the same words need not receive the same construction, though appearing in one clause, when applied to realty and personalty respectively, is established by *Forth v. Chapman*, 1 P. Wms. 667. See *ante*, p. 933.

(*i*) *Crawford v. Trotter*, 4 Madd. 361. *Ante*, p. 598. *Harris v. Davis*, 1 Coll. 416.

remainder to his children (*k*). Again, there has already (*l*) been occasion to show, that if a term of years be devised to one for life, and afterwards to the heirs of his body, the whole term will, generally speaking, vest absolutely in him (*m*). Again, a devise of freeholds and leaseholds to A. for life, and after his decease to the heirs of his body, *their heirs, executors, administrators, and assigns*, gives A. an estate tail in the former, and an absolute interest in the latter (*n*).

It must be observed, that several cases occur in the books, where words creating an estate tail, according to the established rules of law, have been held to be narrowed by inconsistent limitations in other parts of the Will: Thus children have been held entitled, as purchasers, under the description of "heirs of the body," where the directions of the Will are inconsistent with construing the word in its usual acceptation as a word of limitation; as a legacy to A. for life, and then "to the heirs male of his body, *as tenants in common*" (*o*). But these cases, it is submitted, must be considered as much shaken, if not entirely overruled, by the decision of the House of Lords in *Jesson v. Wright* (*p*).

With respect to a legacy to "the heirs of A.:" When the word "heirs" is used to denote succession or substitution (*q*),

legacy to "the heirs of A.:"
or "to my heirs:"

(*k*) *Crawford v. Trotter*, 4 Madd. 361. *Ante*, pp. 946, 947.

(*l*) *Ante*, p. 598.

(*m*) *Theebridge v. Kilburne*, 2 Ves. Sen. 233. *Garth v. Baldwyn*, 2 Ves. Sen. 646. *Verulam v. Bathurst*, 13 Sim. 374. But the context may demonstrate that by the words "heirs of the body," is meant "Children:" *Symers v. Jobson*, 16 Sim. 267.

(*n*) *Kinch v. Ward*, 2 Sim. & Stu. 409. See also *Dunk v. Fenner*, 2 Russ. & M. 557.

(*o*) *Jacobs v. Amyatt*, 4 Pro. C. C. 542.

(*p*) 2 Bligh, 1, where Lord Redesdale says: "That the general intent should override the particular is not the most accurate expression of the principle of decision. The rule is that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise." See also *Dunk v. Fenner*, 2 Russ. and M. 557.

(*q*) Generally a bequest of personal estate to one or his heirs is a sufficient indication that the word "heirs" is used to denote succe-

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it may be understood, as it is in the case of a legacy to A. and heirs, to mean such person or persons as would legally succeed to the property according to its nature and quality: Thus, in *Vaux v. Henderson* (r), a legacy of personal property to A., "and failing him by decease before me, to his heirs," was decreed to belong to the next of kin of A. living at the time of the testator's death, A. having died before that event (s). More correctly stated, the rule is that the word "heir" in a gift of personal property means (t) such persons as would have been entitled under the Statute of Distributions to succeed to the personal property of the deceased, in case he had died intestate, including, therefore, a widow; and excluding the husband, in case of a bequest to a woman, and in the event of her death to "her heirs" (u).

sion or substitution. *Gittings v. McDermott*, 2 M. & K. 69. *Doody v. Higgins*, 2 K. & J. 729. So, again, a direction for distribution amongst heirs is an indication that the testator by "heirs" meant next of kin. *Low v. Smith*, 2 Jur. 344. *Re Steevens' Trusts*, L. R. 15 Eq. 110.

(r) 1 Jac. & Walk. 388, note (c).

(s) See also *Holloway v. Holloway*, 5 Ves. 403. *Gittings v. McDermott*, 2 M. & K. 69. *Jacobs v. Jacobs*, 16 Beav. 557. *Low v. Smith*, 2 Jur. 344, *coram* Kindersley, V.-C. *Re Gamboa's Trusts*, 4 K. & J. 756. *Re Newton's Trusts*, L. R. 4 Eq. 171. *Re Philips' Will*, L. R. 7 Eq. 151. *Finlason v. Tutlock*, L. R. 9 Eq. 258. *Re Steevens' Trusts*, L. R. 15 Eq. 110.

(t) It would seem that the rule above stated is too wide. The word "heirs" in a gift of personal property is easily taken to mean "next of kin" according to the Statute of Distributions, as appears from the cases cited in this and the

preceding note, as also from the cases of *Wingfield v. Wingfield*, 3 C. D. 658, and *Keay v. Boulton*, 25 C. D. 212, in which it was held that where there is a gift of realty and personalty together to children "or their heirs," the word "heirs" must be read in a twofold meaning—viz., *heir-at-law* as regards the realty and *next of kin* as regards the personalty. But yet in each case the question must be whether there is anything to control the ordinary meaning of the word "heir" so as to prevent the heir taking the personalty as a *persona designata*, and to raise the inference that the next-of-kin are to take in substitution or in succession. This seems the ground upon which *Smith v. Butcher*, 10 C. D. 113, was decided, which at first sight is difficult to reconcile with *Wingfield v. Wingfield*.

(u) *Doody v. Higgins*, 2 K. & J. 738. *Re Porter's Trusts*, 4 K. & J. 188. *Parsons v. Parsons*, L. R. 8 Eq. 260. The heirs take as tenants in

But where the word is used, not to denote succession or substitution, but to describe a legatee, and there is no context to explain it otherwise, it should seem that there is no reason to depart from the natural and ordinary sense of the word heir (*x*); Thus, in *Mounsey v. Blamire* (*y*) the testatrix devised, *inter alia*, a real estate to a person not her heir-at-law; and by a codicil she gave a pecuniary legacy "to my heir:" At her death three persons were co-heirs-at-law: And Sir J. Leach, M. R., held that they, and not her next of kin, were entitled to the legacy. *A fortiori*, the heir, properly and technically speaking, may take personal property bequeathed to him by that description where the intention of the testator in his favour appears upon the construction of the whole Will (*z*), as where it is blended in the gift with real estate.

legacy to "my heirs or next of kin."

In a case where the testator bequeathed, by an unattested Will, the residue of his estate of every kind to "my next of kin or heir-at-law, whom I appoint my executor," it was holden that the bequest was void, and that the property, which was entirely personal, must be distributed according to the Statute of Distributions (*a*). So, in a case where a testator, who had long resided in India, gave a legacy to "A. B., who

common in the proportion fixed by the statute. *Jacobs v. Jacobs*, 16 Beav. 557. *Re Porter's Trusts*, *ubi sup.*

(*x*) So the words "next lawful heir," in an ultimate gift of real and personal estate are to be construed in their strict sense as to personality: *De Beauvoir v. De Beauvoir*, 3 H. L. C. 524, 557. *Haslewood v. Green*, 28 Beav. 1. *Smith v. Butcher*, 10 C. D. 113. *In the Goods of Dixon*, 4 P. D. 81.

(*y*) 4 Russ. Chanc. Cas. 384. The reported disapproval of this case by Jessel, M. R., in *Smith v. Butcher*, 10 C. D. 113, 114, if correct, clearly does not go to the

authority of the decision as a whole.

(*z*) *Gwynne v. Muddock*, 14 Ves. 488. *De Beauvoir v. De Beauvoir*, 3 H. L. C. 524.

(*a*) *Lowndes v. Stone*, 4 Ves. 649. But where a testatrix bequeathed personality "to the heirs or next of kin of A. deceased," it was held to be a gift to one class—viz., the next of kin of A. according to the statute. *Re Thompson's Trusts*, 9 C. D. 607. It seems that Jessel, M. R., distinguished this case from *Lowndes v. Stone*, *ubi sup.* on the ground that in that case the word used was "heir-at-law," but in this case the testatrix spoke of "heirs" as a class.

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resided at P. when I left England, or to his heirs, executors, administrators or assigns, for ever;" and A. B. died in the testator's lifetime, Sir J. Leach, V.-C., held, that the bequest was void for uncertainty (b).

A bequest to "A. and his issue," (c) as it will clearly pass an estate tail in real property, so it will give to A. the absolute interest in a personal legacy (d). So a legacy to all the children of A. and their issue, share and share alike, and to be paid twelve months after the testator's decease, is an absolute gift to such children of A. as are living at the testator's death (e). So a bequest to several persons share and share alike, as tenants in common, and to the issue of their respective bodies, but in case of the death of any or

2. "Issue:"

legacy to "A. and his issue:"

to several persons, and the issue of their respective bodies:

(b) *Waite v. Templer*, 2 Sim. 524, recognized by Lord Brougham, in *Gittings v. McDermott*, 2 M. & K. 78, but disapproved of by Lord St. Leonards in *De Beauvoir v. De Beauvoir*, 3 H. L. C. 557, and, *semble*, overruled by the Lords Justices, *Re Walton*, 20 Jur. 363, 8 De Gex, M. & G. 173, *post*, p. 978, note (g).

(c) In devises of real estate "issue" is *prima facie* a word of limitation and not of purchase. *Roddy v. Fitzgerald*, 6 H. L. C. 823, 879. But even when used in respect of real property "issue," although primarily a word of limitation, is often construed as "children," and a word of purchase. *Morgan v. Thomas*, 8 Q. B. D. 575: affirmed on appeal, 9 Q. B. D. 643. See *post* p. 973. It may be doubted whether in respect of personal property "issue" is even *prima facie* a word of limitation, because, in the case of a bequest of personalty, the construction is governed rather by intention than by principles derived from the Law of Tenure. *Ex parte Wynch*, 5 D.

M. & G. 188.

(d) *Donn v. Penny*, 19 Ves. 547. *Crawford v. Trotter*, 4 Madd. 361. *Martin v. Swannell*, 2 Beav. 249. *Parkin v. Knight*, 15 Sim. 83 (cited *infra*, p. 978, note (d)). *Beaver v. Nowell*, 25 Beav. 551. The tendency of modern authorities, however, is to construe such words as giving an interest to the issue as legatees where the context offers any reason for so doing. See *ante*, p. 966, note (g). The words may, if so construed, be held to give the ancestor and issue interests as joint tenants or tenants in common, as the case may be, but in cases where the bequest is of personalty there is a strong disinclination to hold that the parents and children take concurrently, and very little is sufficient to make the Courts hold that the Will discloses an intention that the parents shall take a life estate and the issue take in remainder.

(e) *Butter v. Ommaney*, 4 Russ. Chanc. Cas. 70. See also *Re Stanhope's Trusts*, 27 Beav. 201.

to them and
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to A. and his
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either of them without issue, then the share of him or them so dying should go to the survivors or survivor equally, share and share alike, and to the issue of their respective bodies, gives the legatees an absolute interest with benefit of survivorship in case any of them died without issue at their death (*f*). Where a testator bequeathed all his personal property, not before disposed of by his Will, unto his trustees, in trust for his five sons, "and their respective issue (if any), such issue to take *per stirpes* and not *per capita*, to be divided amongst them in equal shares and proportions, the shares of such of them as shall have attained the age of twenty-one to be paid them respectively forthwith after my decease, and the shares of such of them as shall be under the age of twenty-one years to be paid to them when and as they shall respectively attain such age," it was held by the House of Lords that this bequest was an absolute gift to each of the testator's sons living at the time of his decease, of the fifth part of the property thus bequeathed; and the Lord Chancellor (Brougham) said, it was clear that the issue of any one of the sons would, at the death of the testator, take *by substitution*, if the son himself should at that time be dead (*g*). And it has been held (as in the instance of a legacy to A. and the heirs of his body (*h*)), that the construction of a legacy to "A. and his issue," as an absolute gift to A., is not to be varied by superadded words, *primâ facie* denoting distribution: as for example, where the gift is to A. and his issue, male and female, to be divided equally between them (*i*). As to the effect of a legacy to A. for life, and after his death to his issue, there has been much controversy. In *Knight v. Ellis* (*k*), Lord Thurlow held that such a

(*f*) *Lyon v. Mitchell*, 1 Madd. 467.

(*g*) *Pearson v. Stephen*, 2 Dow. & Cl. 328. *Gilbs v. Tait*, 8 Sim. 132. *Turner v. Capel*, 9 Sim. 158. *Dick v. Lacy*, 8 Beav. 214. *Hedges v. Harpur*, 9 Beav. 479. S. C. 3

De G. & J. 129, *post*, pp. 977, 978.

(*h*) *Ante*, pp. 967, 968.

(*i*) *Tate v. Clarke*, 1 Beav. 100. See *Ex parte Wynne*, 5 De Gex, M. & G. 188, 210, where Lord Cranworth comments on this case.

(*k*) 2 B. & C. 570

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bequest gave the legatee an estate for life only, and that the issue would take as purchasers. It was at one time supposed that this case had been overruled (*l*). But it has been fully sustained by the decision of the Court of Appeal in *Ex parte Wynch* (*m*).

When the description "issue" is employed in a Will as a word of purchase, it will, in its ordinary import, comprise all those who can claim as descendants from or through the person to whose issue the bequest is made, *i. e.* grandchildren and great-grandchildren, as well as children: and in order to restrain this usual sense of the word, a clear intention must appear upon the Will (*n*).

when all descendants are entitled under the description of "issue," employed as a word of purchase:

(*l*) See *Att.-Gen. v. Bright*, 2 Keen, 57. *Jordan v. Lowe*, 6 Beav. 350. *Bird v. Webster*, 1 Drewr. 340.

(*m*) 5 De Gex, M. & G. 188. *Goldney v. Crabb*, 19 Beav. 338. See also *Waldron v. Boulter*, 22 Beav. 284. *Re Andrew's Will*, 27 Beav. 608. *Jackson v. Calvert*, 1 J. & Hem. 235. *Herrick v. Franklin*, L. R. 6 Eq. 593. See further on the subject of treating the word "issue" as a word of purchase, and not of limitation, *Clay v. Pennington*, 7 Sim. 370. *Cursham v. Newland*, 2 Bing. N. C. 58. S. C. 4 M. & W. 101. *Ryan v. Cowley*, Ll. & G. *temp.* Sudg. 7. *Slater v. Dangerfield*, 15 M. & W. 263. So also in *Montgomery v. Montgomery*, 3 J. & L. 47, Lord St. Leonards lays it down as clearly settled law, that a devise to A. for life, with remainder to his issue, with superadded words of limitation inconsistent with a descent from A., will give to the word "issue" the operation of a word of purchase. This case seems to be followed by Lord Hatherley in *Kavanagh v. Morland*, Kay, 16,

and both cases were approved in *Morgan v. Thomas*, 8 Q. B. D. 575, 9 Q. B. D. 643. Compare, however, the observations of Lord Cranworth in *Parker v. Clarke*, 6 D. M. & G. 104, 109. At all events the issue will take as purchasers where there are words of distribution in addition. *Lees v. Moseley*, 1 Y. & C. 589. It does not seem, however, apposite to this Treatise to discuss all the different cases in which the word "issue" has been construed in a restricted sense as a word of purchase and not of limitation in cases of devise of real estate, but rather to call attention to those cases in which words held to create an estate tail in realty have received a different construction in respect of personal estate.

(*n*) Thus in *Hobgen v. Neale*, L. R. 11 Eq. 48, a bequest to testator's wife for life and afterwards equally between all his brothers and sisters *nominatim*, but in case any of them should die leaving issue, then the part or share of him, her, or them so dying should go to his or their respective issue, it was held that "issue" must be

when children
only.

But, to use the words of Lord Eldon in *Sibley v. Perry* (o), if, upon fair reasoning, deduced from the words of the Will, all the contents, and design, and tenor of it, as manifested

read in its largest sense, there being nothing about issue taking the parent's share or the like to restrict the sense. See also *Davenport v. Hanbury*, 3 Ves. 257. *Freeman v. Parsley*, *ib.* 421. *Leigh v. Norbury*, 13 Ves. 340. *Bernard v. Montague*, 1 Mer. 434. *Dalzell v. Welch*, 2 Sim. 319. *Head v. Randall*, 2 Y. & C. 231. *Evans v. Jones*, 2 Coll. 516. *Robinson v. Sykes*, 23 Beav. 40. *Re Jones's Trusts*, *ib.* 242. *Maddock v. Legg*, 25 Beav. 531. *Waldron v. Boulter*, 22 Beav. 284. *Re Corrie's Will*, 32 Beav. 426. *Re Corlass*, 1 C. D. 460. *Re Warren's Trusts*, 26 C. D. 208. "Offspring" is synonymous with "issue" in a gift to any "child or offspring." *Thompson v. Beasley*, 3 Drew. 7; but has been confined to "children" in an executory trust to settle. *Lister v. Tidd*, 29 Beav. 618.

(o) 7 Ves. 531. The principle contained in these words is not assailed in any subsequent cases; but *Sibley v. Perry* has often been treated as laying down a general rule that, wherever you find "issue" and "parent" in collocation, "issue" will be cut down to mean "children" of the person described as "parent." Lord Justice James, however, in *Ralph v. Carriek*, 11 C. D. 873, 882, says, "It is, I think, much to be regretted that *Sibley v. Perry* was ever made a leading case, because according to the report of what Lord Eldon himself said in that case, it is to my mind perfectly

clear that he never intended to lay down any general rule or canon of construction, but was dealing only with the peculiar language of the Will in that particular case. He found one clause in which he considered that the testator had used the word 'issue' to signify children only, and then he said I give the same meaning to the word 'issue' in other parts of the Will. It is, however, I think, settled, but rather by the case of *Pruen v. Osborne*, 11 Sim. 132, than by *Sibley v. Perry*, that, as a general rule, when you find a gift to the issue of that person, such issue to take only the parent's share, the word issue is cut down to mean children. I am not sure that some of the consequences of such a rule have always received the attention they ought to have received. Suppose a man to leave his property to his wife for life, and at her death to all his children then living and the issue of such of them as should be then dead, equally to be divided among them, the issue of any of them who might be then dead to take only their parent's share. Suppose then his children all to die before the period of division, having had children who predeceased them, leaving families. The grandchildren might go to the workhouse and the family property go to a stranger under the residuary gift. That seems a possible result of that rule."

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by its contents, show the word "issue" to be meant in a more restrained sense, that sense may be given to it; and his Lordship proceeded to decide that, in the Will before the Court, from its being coupled with the word "parent," the correlative term "issue" must be taken in the sense of "children" (p).

(p) This restricted construction was adopted in *Pruett v. Osborne*, 11 Sim. 132, where the direction was that the issue should take their parents' share; and again in *Carter v. Bentall*, 2 Beav. 551, where trustees were directed to transfer proceeds of sale to the issue of testator's daughter in equal shares, and if *only one* child then to such child; and again in *Bryden v. Willett*, L. R. 7 Eq. 472, where the words were "such respective issue, if more than one child." *Re Hopkins' Trusts*, 9 C. D. 131, is a similar case. *Pride v. Fooks*, 3 De G. & J. 252, and *Re Wyndham's Trusts*, L. R. 1 Eq. 290, were cases where the meaning of the word issue was confined to the issue who could take under a preceding gift; and it is to be observed that the restricted construction may be excluded by the terms of a following gift over, that is, that where there is a gift over on the failure of certain persons the previous gift must, if the words reasonably admit of it, be construed as a gift to the same persons. *Ross v. Ross*, 20 Beav. 646, the principle of which was affirmed by the Court of Appeal in *Ralph v. Carrick*, 11 C. D. 673, in which case (p. 888) Lord Justice Cotton expresses the same rule in a convenient form when he says, "I think it a sound principle that

where there are ambiguous words in the original gift, you should not construe the gift over in a restrictive sense which it does not otherwise bear, but should construe the ambiguous words contained in the previous gift so as to agree with the unambiguous words in the gift over." See also *Horsepool v. Watson*, 3 Ves. 383. *Hampson v. Brandwood*, 1 Madd. 388. *Orford v. Churchill*, 3 V. & B. 67. *Swift v. Swift*, 8 Sim. 168. *Peel v. Catlow*, 9 Sim. 372. *Ryan v. Cowley*, L. & G. temp. Sugd. 7. *Ridgeway v. Mun-Kittrick*, 1 Dr. & W. 84. *Goldie v. Greaves*, 14 Sim. 348. *Buckle v. Fawcett*, 4 Hare, 536. *Farrant v. Nichols*, 9 Beav. 327. *Williams v. Teale*, 6 Hare, 250. *Edwards v. Edwards*, 12 Beav. 97. *Pope v. Pope*, 14 Beav. 501. *Bradshaw v. Melling*, 19 Beav. 417. *Re Heath's Settlement*, 23 Beav. 193. *Maynard v. Wright*, 26 Beav. 285. *McGregor v. McGregor*, 1 De Gex, F. & J. 63. *Smith v. Horsfall*, 25 Beav. 628. *Stevenson v. Abingdon*, 31 Beav. 305. *Tatham v. Vernon*, 20 Beav. 604. *Baker v. Bayldon*, 31 Beav. 209. *Fairfield v. Bashell*, 32 Beav. 158. *Re Corrie's Will*, 32 Beav. 426. *Manshall v. Baker*, 31 Beav. 608. *Lamphier v. Buck*, 2 Drew. & Sm. 184. *Martin v. Holgate*, L. R. 1 H. L. 175. *Hearn v. Pearse*, L. R. 7 Ch. 275.

3. "Descendants :"

3. "Descendants." Under this description is comprised every individual proceeding from the stock or family referred to by the testator (*q*). Thus, when the testator gave 4,000*l.* to "the *descendants* of Francis Ince," it was held by Sir Thomas Clark, M. R., that great-grandchildren were entitled with grandchildren to shares of the fund, since they answered the description of descendants of Francis Ince ; and that the distribution must be *per capita* (*r*). So where the testatrix directed her personal property to be divided equally between the *descendants* of Thomas Fairbank ; and at her death there were three sons and eleven grandchildren of Thomas Fairbank, it was held by Lord Thurlow, that as well the grandchildren as children were entitled to the fund, and *per capita* (*s*).

"Eldest male lineal descendants."

It was held by Lord Eldon in *Oddie v. Woodford* (*t*) (and his decision was confirmed by the House of Lords), that the designation of "eldest male lineal descendant" was inapplicable to a male person claiming in part through a female. Again, in *Bernal v. Bernal* (*u*), it was decided by Lord Cottenham, in the construction of a Dutch Will, that "male children" meant "male descendants," and that male descendants meant, according to the English Law (and, as it should seem, according to the Dutch Law also), descendants claiming through males only (*x*).

"Male descendants."

"Relations by lineal descent :"

Where a testator gave all the residue of his real and personal estate unto and equally between and amongst all

(*q*) See the observations of Lord Eldon, in *Wright v. Atkyns*, 1 Turn. & Russ. 162. The word "descendants" is less flexible than "issue," and requires a stronger context to confine it to children. *Ralph v. Carrick*, 11 C. D. 873.

(*r*) *Crossly v. Clare*, Amb. 397. S. C. 3 Swanst. 320, note to Brandon v. Brandon.

(*s*) *Butler v. Stratton*, 3 Bro. C. C. 367. *Ralph v. Carrick*, 11 C. D. 873.

(*t*) 3 Mylne & Cr. 584.

(*u*) 3 Mylne & Cr. 559.

(*x*) *Lywood v. Kimber*, 29 Beav. 38. *Accord.* But see also *Sayer v. Bradley*, 5 H. L. C. 873. *Post*, p. 986. In the great case of *Thellusson v. Rendlesham*, 7 H. L. C. 429, the contest was, whether under the words "eldest male lineal descendant," the eldest in line or the eldest in years was entitled, and the House of Lords decided in favour of the eldest in line.

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his relations who might claim and prove their relationship to him *by lineal descent*; and he had no wife or issue at the time of making his Will nor afterwards; and he died leaving several first cousins, his next of kin; it was held that they were entitled to the residuary estate both real and personal; for that the word "lineal descent" did not necessarily mean lineal descent *from the testator (y)*.

Very often when there is in a Will a bequest to a parent coupled with a bequest to children, issue, or offspring, as purchasers a question arises whether the parent and children take as joint tenants or as tenants in common, or whether the parent takes a life estate with an estate in remainder to the children. Sometimes the parent *and* the children are spoken of, sometimes the parent *or* the children. When the words are "the parent *and* the children" the rule would seem to be that a joint tenancy is created if nothing can be found to indicate a different intention (z), but slight special circumstances have often been held to justify the construction settling the property upon the parent for life, especially in cases where the testator stands in a position of duty to provide for the maintenance of the parent and children, *e.g.*, a husband (a).

When a bequest is made to "A. *or* his children," or to "A. *or* his issue," or "A. *or* his heirs," or "A. *or* his descendants," a question may arise, whether the children, or issue, or descendants, are to take concurrently with A., or merely in substitution for him, in case of his death before the testator (b). In *Newman v. Nightingale (c)*, the testator

Whether a gift to "A. *or* his issue," or to "A. *or* his children," or to "A. *or* his heirs," (and the like) is concurrent or substitutional.

(y) *Craig v. Lamb*, 1 Coll. 489.
 (z) *Newell v. Newill*, L. R. 7 Ch. 253 (reversing *Malins, V.-C.*, L. R. 12 Eq. 432), following *De Witte v. De Witte*, 11 Sim. 256. *Bustard v. Saunders*, 7 Beav. 92. *Bibby v. Thompson*, 32 Beav. 647. *Butler v. Bradford*, 2 Atk. 220. *Beales v. Crisford*, 13 Sim. 592. *Mason v. Clarke*, 17 Beav. 126.

(a) *Dawson v. Bourne*, 16 Beav.

29. *Jeffery v. De Vitre*, 24 Beav. 296. *Audsley v. Horn*, 26 Beav. 195. *Ward v. Grey*, 26 Beav. 485. *Crockett v. Crockett*, 2 Phil. 553. *Armstrong v. Armstrong*, L. R. 7 Eq. 518. *Re Owen's Trusts*, L. R. 12 Eq. 316.

(b) See *post*, p. 1075 *et seq.*: as to preventing the lapse of legacies by words of substitution.

(c) 1 Cox, 341.

gave 500*l.* "to the sole use of N. or of her children for ever:" And Lord Thurlow held, that N. took only an interest for life in the 500*l.*, and that the children were to take it among them after her death (*d*). But in *Crooke v. De Vandes* (*e*), Lord Eldon held that a bequest to two persons, or their children, gave the children an interest by way of substitution only, and not a concurrent interest. So in *Montagu v. Nucella* (*f*), a testator bequeathed a sum of stock to each of five nephews and nieces, or to their respective child or children; should any die, without child, such share to revert to the residuary legatee: and Lord Gifford, M. R., held, that the true construction was, to vest the legacies absolutely in the nephews and nieces who survived the testator, and that the child or children of nephews or nieces took only as substitutes for their parent or parents dying in the testator's lifetime. And many similar decisions have subsequently occurred, where, in case of direct gifts to legatees, or their children, or to legatees or their issue, or to them or their heirs, the children, &c., have been held to take only by way of substitution (*g*). But these cases must be carefully distinguished from those where the Will shows a general intention in favour of a class, and a particular intention in favour of individuals of the class to be selected by another person, and the particular intention fails from the selection not being made. In such cases, as the Court

(*d*) See also *Richardson v. Spragg*, 1 P. Wms. 433. *Eccard v. Brooke*, 2 Cox, 213. *Parkin v. Knight*, 15 Sim. 83. *Horridge v. Ferguson*, Jac. 583. *Maude v. Maude*, 22 Beav. 290.

(*e*) 9 Ves. 197.

(*f*) 1 Russ. Chanc. Cas. 165.

(*g*) See *Gibbs v. Tait*, 8 Sim. 132. *Turner v. Capel*, 9 Sim. 158. *Price v. Lockley*, 6 Beav. 180. *Dick v. Jacy*, 8 Beav. 214. *Salisbury v. Fetty*, 3 Hare, 86. *Whitcher v. Penley*, 9 Beav. 477.

Speakman v. Speakman, 8 Hare, 180. *Chipchase v. Simpson*, 16 Sim. 485. *Gibson v. Hale*, 17 Sim. 129. *Penley v. Penley*, 12 Beav. 547. *Blundell v. Chapman*, 33 Beav. 648, and *post*, p. 1076. But a gift to a legatee, or his heirs, or assignee, is an absolute gift to him: *Re Walton*, 20 Jur. 363, *coram* the Lords Justices. S. C. 8 De Gex, M. & G. 173. See also *Greenway v. Greenway*, 2 De Gex, F. & J. 128.

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cannot supply the execution of the power of selection, it gives the fund to the whole class equally, in order to carry into effect the general intention. This distinction is illustrated by the case of *Penny v. Turner* (h), where there was a gift to the testator's three sisters, or their children, as his mother should, by deed or Will, appoint: And Lord Cottenham held, that, in default of appointment, this was a gift to the whole class of the sisters and their children equally; not on the ground that "or" was to be construed "and," but that it was referable only to the power given to the mother of selection from among the class; and as that power had not been exercised, the whole class must take equally (i).

A gift to "survivors of a class and the issue of such survivor, such issue to take the parents' share only," is a gift to the parents for life, with remainder to their children, and not a substitutionary gift (k).

4. "Relations." When a legacy is given by a testator "to my relations" generally, without enumerating any of them, the Court will direct the money to be paid to such of his relations as would have been entitled under the Statute of Distributions, if he had died intestate (l). So where the

4. "Relations :"

(h) 2 Phill. Ch. C. 493.

(i) See *Accord*. Longmore v. Broom, 7 Ves. 124. Burrough v. Phileox, 5 M. & Cr. 73, 92. *Re White's Trusts*, Johns. 656. Izod v. Izod, 32 Beav. 242. But see *contra*, Jones v. Torin, 6 Sim. 255. As to when the class is to be ascertained, see *Re White's Trusts*, Johns. 656, 659. *Re Phené's Trusts*, L. R. 5 Eq. 346. The word "or," however, is not infrequently read "and," even apart from the case of a devise of real estate to "A. or his heirs," or to "A. or the heirs of his body," where by a technical rule "or" is read "and," and the devisee takes an estate in fee or

an estate in tail, as the case may be. In such cases "or" is generally read as "and," on the assumption that the testator used the word "or" by mistake for the word "and," and it is necessary that this should appear clearly from the general context of the Will. See the cases on p. 978, note (d), and King v. Cleveland, 26 Beav. 26. *Re Philps' Will*, L. R. 7 Eq. 151. Burt v. Hellyar, L. R. 14 Eq. 160. Wingfield v. Wingfield, 9 C. D. 658.

(k) *Parsons v. Coke*, 4 Drewr. 296.

(l) *Roach v. Hammond*, Prec. Chanc. 401. *Thomas v. Hole*,



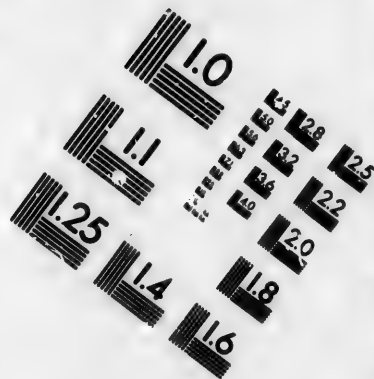
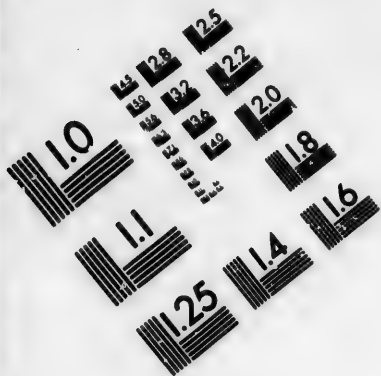
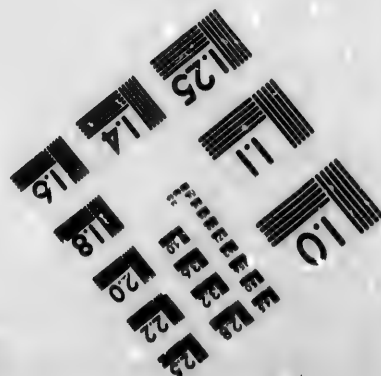
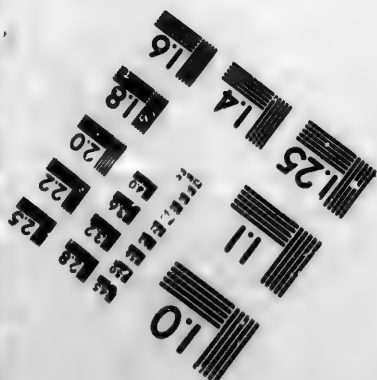
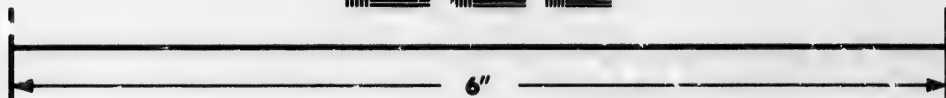
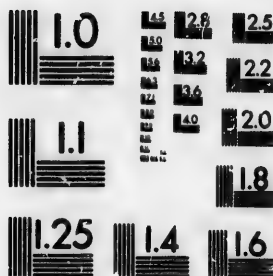


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testator bequeathed 50*l.* to each of his "relations by blood or marriage," Lord Rosslyn held, that the word "relations" must be confined to relatives entitled under the Statute of Distributions, and to persons who had married relatives entitled under that Act (*m*).

"near relations:" "poor relations:"

The same rule applies where the bequest is to "near relations" (*n*). So where the bequest is to "poor relations" (*o*), or "my most necessitous" or "poorest" relations (*p*), no persons are entitled except such as are within the statute; unless the legacy be given to establish a *charity* for poor relations (*q*).

So where a power is given to a person to dispose of a fund "among my relations, in such manner as he shall think proper," the appointment cannot be in favour of any relative

Cas. temp. Talb. 251. Withorn v. Harris, 2 Ves. Sen. 527. Green v. Howard, 1 Bro. C. C. 31. Rayner v. Mowbray, 3 Bro. C. C. 234. Brandon v. Brandon, 3 Swanst. 319. Wright v. Atkyns, 1 Turn. & Russ. 161. Ham's Trust, 2 Sim. N. S. 106. Lees v. Massey, 3 De Gex, F. & J. 113. But the distribution must, it seems, be *per capita* and not *per stirpes*, that is, the objects, but not the proportions, will be determined according to the Statute: 2 Sugd. Powers, 246, 7th edit. 2 Jarm. on Wills, 122. (4th edit.) Tiffin v. Longman, 15 Beav. 275. A gift, however, of residue to be distributed "to my relatives, share and share alike, as the law directs," has been held to mean a distribution under the Statute of Distributions, *per stirpes* and not *per capita*. Fielden v. Ashworth, L. R. 20 Eq. 410.

(*m*) Devisme v. Mellish, 5 Ves. 529. Where a testator, after giving legacies to various persons describ-

ing their relationship, including a person described as his niece, but in reality illegitimate, and persons connected by affinity, directed that, if the whole of his property made more than the whole amounts mentioned in his Will, it should be divided "amongst my relations in proportion to their separate amounts," it was held by Bacon, V. C., that only such of the legatees as were blood relations were entitled under the residuary gift. Hibbert v. Hibbert, L. R. 15 Eq. 372.

(*n*) Whithorn v. Harris, 2 Ves. Sen. 527.

(*o*) Brunson v. Woolridge, 1 Dick. 380.

(*p*) Widmore v. Woodrooffe, Amb. 636.

(*q*) White v. White, 7 Ves. 423. Att.-Gen. v. Price, 17 Ves. 371. A relation who was poor at the death of the testator, and has become rich before the period of distribution, is not entitled: Mahon v. Savage, 1 Sch. & Lefr. 111.

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who is not within the statute (r). But though a party to whom a power is thus delegated to fix the amount of the share that *each* relation shall take, without entrusting him with the choice of the objects, is confined within the limits of the statute, it is otherwise when a power is committed to an individual to distribute the fund among *such* of the "relations" of the testator as he shall, in his discretion, select: for in such a case, the individual is not restrained in the exercise of such discretion to relations within the Statute of Distributions (s). Where, indeed, the Court is called on to distribute, in failure of the person so empowered, it will confine itself according to the degrees mentioned in the statute, as well in the latter case as in the former (t): but a difference was supposed to exist, that where the donee of the power had authority to select the objects, the fund shall be distributed among the testator's next of kin, *in existence at the death of the donee of the power* (u): but where the donee of the power was entrusted with a discretion merely in apportioning the shares, the property shall be divided among the next of kin *living at the testator's death* (x).

But this doctrine is founded on an inaccurate report of the case of *Pope v. Whitcombe*, and it was held by Romilly, M. R., to be a mistake, and that in both instances the next of kin living at the death of the donee of the power were entitled (y).

(r) *Pope v. Whitcombe*, 3 Meriv. 689.

(s) *Mahon v. Savage*, 1 Scho. & Lefr. 111. *Spring v. Biles*, 1 T. R. 435, *in notis*. *Forbes v. Ball*, 3 Meriv. 437. *Grant v. Lynam*, 4 Russ. Chanc. Cas. 292.

(t) *Grant v. Lynam*, 4 Russ. Chanc. Cas. 292. See *Ray v. Adams*, 3 M. & K. 237. *Salisbury v. Denton*, 3 Kay & J. 529. See also *Re Caplin*, 29 Jur. 383, where

the power was to appoint "unto such of my relations and friends," as the donee of the power should direct.

(u) *Harding v. Glyn*, 1 Atk. 469. S. C. cited 5 Ves. 501. *Cruwys v. Colman*, 9 Ves. 325; but see *Cole v. Wade*, 16 Ves. 27.

(x) *Pope v. Whitcombe*, 3 Meriv. 689.

(y) *Finch v. Hollingworth*, 21 Beav. 112.

relations by
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"Relation"
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number."

"Relations"
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No person can regularly answer the description of "relations," but those who are akin to the testator by *blood*: and, consequently, relations by marriage are not included in a bequest to "relations" generally: A wife, therefore, cannot regularly claim under a bequest to her husband's relations, nor a husband as a relation to his wife (z).

Where the description employed is "nearest relations," the Statute of Distributions shall not ascertain the persons entitled: but whosoever is the *nearest* will be entitled, to the exclusion of more remote relations who could have claimed under the statute in case of intestacy: As where a testator directed his residuary property to be "equally distributed amongst his *nearest* surviving relations," and died leaving a brother, and sisters, and nephews and nieces, the children of a deceased brother: Sir William Grant held, that the brothers and sisters, as *nearest* of kin to the testator, were exclusively entitled (a). If the bequest be in the singular number, "my nearest relation," and there be several persons nearest of kin, in the same degree, the fund must be divided between them; and the word "relation," like "heir," must be taken in such case as *nomen collectivum* (b).

When the bequest is to relations of a particular name, as "my nearest relations of the name of Pyot," the word "name" has been considered equivalent to the expression "stock;" so that where a female relation was one of the nearest of kin, and entitled to the described name by birth, her claim was sustained to a share of the legacy, although she had lost the name of Pyot by her marriage (c).

Where the bequest was "to the first and nearest of my

- (z) Davies v. Baily, 1 Ves. Sen. 84. Worsley v. Johnson, 3 Atk. 758. Harvey v. Harvey, 5 Beav. 134. See Craik v. Lamb, 1 Coll. 489, 494. See *post*, p. 983.
(a) Smith v. Campbell, 19 Ves. 400.
(b) Marsh v. Marsh, 1 Bro. C. C. 294. Pyot v. Pyot, 1 Ves. Sen. 337. See *ante*, p. 970.
(c) Pyot v. Pyot, 1 Ves. Sen. 336. Carpenter v. Bott, 15 Sim. 606.

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kindred, being *male, and of my name and blood*," it was held, that a person who was first and nearest of blood to the testator, and a male, but not originally of the testator's name, though he assumed it by the king's license, could not succeed to his claim (d).

5. "Next of kin." A man's "kindred," in the proper signification of the word, means, such persons as are related to him *by blood*: and, accordingly, relations by *marriage* are generally incapable of bringing themselves within the description of "next of kin" in a Will: and (as in the case just mentioned, of "relations") neither husband nor wife can be entitled under a bequest to the "next of kin" of either of them (e). But it was observed by Lord Eldon, in

5. "Next of kin:"

who are "kin:"

(d) *Leigh v. Leigh*, 15 Ves. 92. See also *Barlow v. Bateman*, 2 Bro. C. C. 272, Toml. edit. But where the bequest was to the immediate or direct descendants of my brother or nephew who shall "bear the name" of R. G. only, it was held that under the circumstances of that case "bear the name" meant "use the name:" and that therefore the bequest was not confined to the persons entitled to that name by birth. *Re Roberts*, 19 C. D. 520.

(e) *Nichols v. Savage*, cited in *Bailey v. Wright*, 18 Ves. 52. *Garwick v. Lord Camden*, 14 Ves. 372. Nor can a widow, as such, take under a limitation to the next of kin of her husband, according to the *Statute of Distributions*: *Cholmondeley v. Lord Ashburton*, 6 Beav. 86: *Secus*, under a bequest to such persons as would have been entitled under the Statute in case of intestacy: *Jenkins v. Gower*, 2 Coll. 537; and see *Ash v. Ash*, 33 Beav. 187. *Starr v. Newberry*, 23 Beav. 436. But a

husband would not take under a bequest "to such persons as would be entitled, as next of kin or otherwise, under the Statute of Distributions" to the personal estate of his wife; for he is not entitled under any of the statutes, but paramount thereto: *Milne v. Gilbert*, 2 De Gex, M. & G. 715. 5 De Gex, M. & G. 510. Where the bequest is to the persons who would have been entitled to the personal estate of a wife, in case she had died intestate and without being married, the husband only is excluded and not the children of the marriage: *Norman's Trust*, 3 De Gex, M. & G. 965. *Pratt v. Mathew*, 22 Beav. 328. 8 De Gex, M. & G. 522. Where the testator refers to the Statute of Distributions in such a manner as shows that the persons who are to take, are to take according to the title given by the statute, they will take as tenants in common: *Downes v. Bullock*, 25 Beav. 54. *Bullock v. Downes*, 9 H. L. C. 1. But where there is no such reference

Garrick v. Lord Camden (f), that it was competent to, and required from, the Court, to look through the whole Will, and to see whether, from the whole, an intention was manifested to include the wife among those who were to be taken more strictly as next of kin; a description *primâ jacie* excluding her (g).

half-blood :

Persons related to the testator by the half-blood are equally of "kin" to him with those of the whole-blood, and equally entitled, with respect to the description of "nearest of kin" in a Will, to every preference over the more remote kindred of the testator (h).

to what kin
the description
"next of kin"
extends.

It remains to consider to what kindred the description "next of kin" extends. Mr. Justice Buller in *Phillips v. Garth* (i) decided, that under a bequest of a residue to the testator's executors "to be equally divided amongst his next of kin, share and share alike," all his next of kin were entitled who could have claimed under the statute in case of an intestacy. But this decision has been overruled (k), and it is now established that if the words are "next of kin," and there is nothing to show that the testator had reference to the Statute of Distributions, or to a division as in case of intestacy, the nearest of kin only are entitled (l). Hence a

they will take as joint tenants :
Lucas v. Brandreth, 28 Beav. 274.
Re Greenwood's Will, 3 Giff. 390.

(f) 14 Ves. 382.

(g) See also *McLeroth v. Bacon*,
5 Ves. 159, for an instance where
a relation *by marriage* may be in-
cluded in the word "family."

(h) *Collingwood v. Pace*, 1 Vent.
424. *Brown v. Wood*, Alleyn, 36.
Ante, p. 359.

(i) 3 Bro. C. C. 64.

(k) *Elmsley v. Young*, 2 M. &
K. 780 (in which the Lords Com-
missioners Shadwell and Bosan-
quet overruled the decree of Sir
John Leach, M. R., *ibid.* 82, and
his decision in *Hinckley v. Mac-*

larena, 1 M. & K. 27). Withy v.
Mangles, 10 Cl. & F. 215. *Rook*
v. Att.-Gen., 31 Beav. 313. *Avison*
v. Simpson, Johns. 43.

(l) *Smith v. Campbell*, 19 Ves.
404. And the law is the same
where a bequest is to the "next of
kin in blood;" *Halton v. Foster*,
L. R. 3 Ch. 505. *Re Gryll's Trust*,
L. R. 6 Eq. 589. See also the
cases cited in note (b). And see
further *Nicholls v. Haviland*, 1
Kay & J. 504. Under a devise of
land "to my nearest of kin by
way of heirship," it was held that
the heir was entitled, though not
next of kin: *Williams v. Ashton*,
1 Johns. & H. 115.

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surviving brother of the intestate will be entitled, in exclusion of the children of a deceased brother or sister (*m*). *A fortiori*, the nearest of kin will be alone entitled under a bequest to "next of kin in equal degree" (*n*).

Accordingly, where by the marriage settlement of Emily M., the ultimate limitation of a sum of 10,000*l.* which her father thereby covenanted to pay, was to "*such person or persons as at the time of her death should be her next of kin*;" and she died leaving her husband and a child of the marriage and her own father and mother surviving, it was held by the House of Lords in *Withy v. Mangles* (*o*), that her father, mother, and child were entitled, under the limitation, to the 10,000*l.* in joint tenancy: for that the words "next of kin" used *simpliciter*, must be construed in their natural meaning of nearest in proximity of blood, and, by the law of England, the child and the parent are equal in degree of proximity, *i.e.* both are in the first degree though the child (and the lineal descendants of the child) is preferred in the succession to property (*p*), and consequent grant of administration (*q*).

Again, in *Cooper v. Denison* (*r*), a testator bequeathed the residue of his effects to his wife for life, remainder to his daughter absolutely; but if his wife survived his daughter, then at his wife's death, one-third of the capital was to go according to her Will, and the other two-thirds were to be paid "*to my other the next of kin of my paternal line*:" He died, possessed of personal estate only, leaving his wife and daughter, and three brothers surviving: The daughter died, leaving children, before her mother: On the death of the mother, the question ultimately was, who were to take the two-thirds, as being at the death of the widow the testator's

(*m*) See *Brandon v. Brandon*, 3 Swanst. 312. *Elmaley v. Young*, 2 M. & K. 780. the decree of Lord Langdale, 4 Beav. 358.

(*p*) See *post*, p. 1337.

(*n*) *Wimbles v. Pitcher*, 12 Ves. 433.

(*q*) *Ante*, p. 360.

(*r*) 13 Sim. 290.

(*o*) 10 Cl. & F. 215, affirming

"next of kin of his paternal line." It was contended for the grandchildren, that as being the sole next of kin, *ex parte paternâ*, according to the Statute of Distributions, they were exclusively entitled to the fund: On the part of the brothers, it was argued that the computation of degrees of kindred in this case ought to be made in conformity with the Canon Law, according to which the brothers of the testator were nearer of blood than his grandchildren, and were therefore exclusively entitled as his next of kin: But Shadwell, V.C., decided against the exclusive claim on either side, being of opinion, that, as the question related to personal estate, the mode of computation ought to be in conformity to the civil law, according to which the grandchildren and brothers were in equal degree of kindred: And his Honor further held, that the brothers, as well as the grandchildren, were entitled; for that the Court must not look at the Statute of Distributions, but must inquire who were the next of kin, irrespective of that statute.

Nearest of kin
in the male
line.

Where a testator directed that the interest and dividends of the remainder of his stock should be invested, so as to accumulate until the end of twenty-one years from his death, when the whole was to be disposed of towards his "then nearest of kin in the male line in preference to the female line, it was held by Wood, V.C., and by the Lords Justices and also by the House of Lords, that the son of the testator's paternal uncle was not entitled in preference to the testator's sister (s).

"Next of kin"
means next of
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The natural and ordinary meaning of the phrase "next of kin" is next of kin at the death of the persons whose next of kin is spoken of: And this construction ought to prevail, whether the Will speaks of the testator's own next of kin, or of the next of kin of some other person, unless the context demonstrates that such a construction would counteract the apparent intention of the testator (t). And the rule is not

(s) *Boys v. Bradley*, 10 Hare, v. Bradley.
359. 4 De Gex, M. & G. 58. (t) *Gundry v. Pinniger*, 1 De
S. C. 5 H. L. C. 875, *nomine* Sayer Gex, M. & G. 505, 506. *Downes v.*

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varied by the circumstance that the bequest to the next of kin is preceded by a bequest of the fund to a tenant for life (u), or that the bequest is contingent on an event which may or may not happen (x).

Where, indeed, the tenant for life is himself one of the next of kin, it was at one time thought that the rule was inapplicable, and that the next of kin intended to take must be the next of kin living at the death of the tenant for life. But the law is now settled by a long series of cases, that if there is nothing in the context of the Will, or the circumstances of the case, to control the natural meaning of the

bequest to "next of kin, after a previous bequest for life to one of the next of kin or to the sole next of kin.

Bullock, 25 Beav. 54. Bullock v. Downes, 9 H. L. C. 1. Holloway v. Radcliffe, 23 Beav. 163. Eagles v. Le Breton, L. R. 15 Eq. 148. Mortimore v. Mortimore, 4 App. Cas. 448. See *Re Rees*, 44 C. D. 484.

(u) The rule was applied by Romilly, M. R., in *Cable v. Cable*, 16 Beav. 507, where the bequest was to the testator's wife for life, with remainder to his children living at his death; and if there should be none (which happened), then, and in such case, the fund should belong to the persons who should then be entitled to take out administration to his effects; His Honor being of opinion that the word "then" must be construed as an adverb referring to the event and not to the time. A similar construction of the word "then," prevailed in *Ware v. Rowland*, 2 Phill. Ch. C. 635, 637. *Gundry v. Pinniger*, 14 Beav. 94. 1 De Gex, M. & G. 502. *Wheeler v. Adams*, 17 Beav. 417. *Bullock v. Downes* (*ubi sup.*), and the rule also prevails where the word "then," the adverb of time, is used not in connection with the description of the class (as in *Re Sturge and Great*

Western Railway Co., 19 C. D. 444): but in connection with the time at which the estate is to come into being: *Mortimer v. Slater*, 7 C. D. 322. But in other cases the word "then," by the context, has been held to refer, as an adverb of time, to the period at which the prior life interest would determine: *Long v. Blackall*, 3 Ves. 486. *Re Edgington's Trust*, 3 Drew. 202. *Olney v. Bates*, *ibid.* 319. *Pinder v. Pinder*, 28 Beav. 44. *Wharton v. Barker*, 4 Kay & J. 483. Thus in *Re Sturge and Great Western Railway Co.*, 19 C. D. 444, where a testator gave property in trust for the benefit of the persons who at a time subsequent to his own death should by virtue of the Statutes of Distribution be his next of kin, the class was held to be an artificial class to be ascertained on the hypothesis that the testator lived up to and died at the subsequent period of time. See also *Holgate v. Jennings*, 34 Beav. 79. *Gill v. Barratt*, 29 Beav. 372. See *Moss v. Dunlop*, Johns. 490, as to the effect of the words "for the time being."

(x) *Bird v. Luckie*, 8 Hare, 301.

testator's words, his next of kin *living at his death* will be entitled; and, that if the tenant for life happens to be one of such next of kin, *or to be solely such next of kin*, he is not on that account to be excluded (y). But where the context demonstrates that the person or persons to take under the description of next of kin, is a person or persons, to be ascertained at a future period, or that it is the testator's intention to exclude the tenant for life from the description of next of kin, the expression must be necessarily understood as meaning the testator's next of kin, *living at the death of the tenant for life* (z).

Direction that a fund shall be disposed of "in a due course of administration."

In *Scott v. Moore* (a), a fund was bequeathed to Elizabeth B. for life, and after her death for her children; and if she died without leaving a child, the testator directed that the fund should be considered as part of his personal estate, and should be disposed of in a due course of administration; and

(y) *Holloway v. Holloway*, 5 Ves. 399. *Doe v. Lawson*, 3 East, 278. *Pearce v. Vincent*, 1 Cr. & M. 598. 2 Bing. N. C. 328. 2 Keen, 230. *Stert v. Platel*, 5 Bing. N. C. 434. *Elmsley v. Young*, 2 M. & K. 780. *Jennings v. Newman*, 10 Sim. 219. *Smith v. Smith*, 12 Sim. 317. *Urquhart v. Urquhart*, 13 Sim. 613. *Withy v. Mangles*, 4 Beav. 358. 10 Cl. & F. 215. *Nicholson v. Wilson*, 14 Sim. 549. *Jenkins v. Gower*, 2 Coll. 537. *Wilkinson v. Garrett*, *ibid.* 643. *Allen v. Thorp*, 7 Beav. 72, 75. *Lasbury v. Newport*, 9 Beav. 376. *Seifferth v. Badham*, 9 Beav. 370. *Say v. Creed*, 5 Hare, 580, 587. *Baldwin v. Rogers*, 3 De Gex, M. & G. 649, 656, 657. *Re Barber*, 1 Sm. & G. 118. *Gorbell v. Davison*, 18 Beav. 556. *Lee v. Lee*, 1 Dr. & Sm. 85. See *Clarke v. Hayne*, 42 C. D. 529.

(z) *Briden v. Hewlett*, 2 M. &

K. 90. *Butler v. Bushnell*, 3 M. & K. 232. *Booth v. Vicars*, 1 Coll. 6. *Bird v. Wood*, 2 Sim. & Stu. 400 (as explained in *Elmsley v. Young*, 2 M. & K. 82, 89. *Urquhart v. Urquhart*, 13 Sim. 627). *Clapton v. Bulmer*, 10 Sim. 426. 5 M. & Cr. 108. *Minter v. Wraith*, 13 Sim. 52. *Cooper v. Denison*, 13 Sim. 290. *Say v. Creed*, 5 Hare, 580. *Pinder v. Pinder*, 28 Beav. 44. *Chalmers v. North*, 28 Beav. 175. *Re Greenwood's Will*, 3 Giff. 390. *Lees v. Massey*, 3 De Gex, F. & J. 113. See also *Tiffin v. Longman*, 15 Beav. 275. It has been doubted whether *Jones v. Colbeck*, 8 Ves. 38, which was decided on this principle, was properly within it. And the current of later authorities (*supra*, note (y)) seems to justify the extension of this doubt to some of the cases above cited.

(a) 14 Sim. 35.

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he gave her the residue of his effects, she paying thereout his debts and funeral and testamentary expenses; and he made her executrix: On her death without children, it was contended, on behalf of the testator's widow and next of kin, that the words "a due course of administration" meant that the fund should be distributed under the statute: But Sir L. Shadwell, V.-C., held otherwise, being of opinion that the fund belonged to the personal representative of Elizabeth B., as the residuary legatee.

6. "Family." The description "family" in a bequest of personalty, although it may comprise the same persons as "kindred" or relations, or even receive a still wider interpretation (*b*), yet primarily and independently of context showing the contrary, will be read as meaning "children" (*c*), to the exclusion even of the wife (*d*). But this acceptance of the term "family," may be narrowed or enlarged by the context of the Will (*e*), so as in some instances to mean heir (*f*), or it may even include relations by marriage (*g*). So where a testator directed his business to be carried on by his wife and son for the mutual benefit of the family, it was held, that the

(*b*) *Cruwys v. Colman*, 9 Ves. 323. *Grant v. Lynam*, 4 Russ. 292. A power to an unmarried woman to appoint a fund amongst "her own family or next of kin" was held not to be confined to her statutory next of kin but to be capable of extension to any relative. *Snow v. Teed*, L. R. 9 Eq. 622.

(*c*) *Pigg v. Clarke*, 3 C. D. 672. *Re Terry's Will*, 19 Beav. 580. See also *Barnes v. Patch*, 8 Ves. 604. *Wood v. Wood*, 3 Hare, 65. *Beales v. Crisford*, 13 Sim. 592. *Gregory v. Smith*, 9 Hare, 708. *Re Parkinson's Trusts*, 1 Sim. N. S. 242. *Burt v. Hellyar*, L. R. 14 Eq. 160. *Re Hutchinson and*

Tenant, 8 C. D. 540. See also Lord Alvanley's observation in *M'Leroth v. Bacon*, 5 Ves. 159, 166.

(*d*) *Re Hutchinson and Tenant*, 8 C. D. 540.

(*e*) See the observations of James, L. J., in *Lambe v. Eames*, L. R. 6 Ch. 597, 600.

(*f*) *Griffiths v. Evan*, 5 Beav. 241. *White v. Briggs*, 15 Sim. 17. 2 Phill. Ch. C. 583.

(*g*) *M'Leroth v. Bacon*, 5 Ves. 159. See *White v. Briggs*, 2 Phill. Ch. C. 583, as to the construction of the word "family" when applied to real and personal estate. See also *Williams v. Williams*, 1 Sim. N. S. 358.

testator, in the words "my family," intended to comprise his wife (*h*). So where (*i*) a testator devised certain estates by name, together with his farming stock and furniture, to his beloved wife, to sell, to discharge all his creditors; and he constituted his wife and another person his executors, whom he appointed to sell and dispose of his estates and chattels, in such manner as they should jointly agree upon; or not to sell them, if it seemed most advisable to keep them, or in any way they should think proper, so that every creditor had his money, and if sold, "all overflush to my wife, towards her support and her family;" Lord Cottenham held, that the word "family" could not be confined to the heir, but that the other children of the testator must be considered as also objects of his bounty; And that if the contemplated event of a sale took place, a trust, as between the widow and children, would be created: And that they had such an interest in the devised estates, as enabled them to sustain a bill against the widow and her co-executor, impeaching a sale on the ground of fraud, and praying an account of the rents and profits. And in a subsequent case (*k*) the same Judge held that where a testator directed that "all my property shall be at the disposal of my wife for her and her children," she was either a trustee of the fund with a large discretion as to the application of it, or she had a power in favour of her children, subject to a life interest in herself (*l*).

In *Robinson v. Waddelow* (*m*), where a testator gave all

(*h*) *Blackwell v. Bull*, 1 Keen, 176.

(*i*) *Woods v. Woods*, 1 Mylne & Cr. 401. See also *Re Parkinson's Trusts*, 1 Sim. N. S. 242.

(*k*) *Crockett v. Crockett*, 2 Phill. Ch. C. 553, overruling *S. C.* 5 Hare, 326.

(*l*) See *Accord. Hart v. Tribe*, 18 Beav. 215. And see further *Shovelton v. Shovelton*, 32 Beav. 143. *Bibby v. Thompson*, 32 Beav. 646. *Mackett v.*

Mackett, L. R. 14 Eq. 49. *Curnick v. Tucker*, L. R. 17 Eq. 35. *Le Marchant v. Le Marchant*, L. R. 18 Eq. 414. But see *Re Hutchinson and Tenant*, 8 C. D. 540, and the cases cited *ante*, p. 97, note (*m*), in which a gift of property with an expression of confidence as to its disposal by the donee has been held to confer an absolute interest unfettered by any trust.

(*m*) 8 Sim. 134.

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the residue of his effects to be divided equally between his daughters, and their husbands and families; Sir L. Shadwell, V.-C., rejected the words "husbands and families," for uncertainty, and held that the two daughters took the residue equally and absolutely (*n*).

In *Doe v. Flemming* (*o*), there was a devise of lands to the testator's daughter for life, remainder to her sons and daughters successively in tail, remainder to the testator's son for life, and his sons and daughters in tail; and for default of such issue, to the "younger branches of the family" of Brown Willis, and their heirs, to be equally divided amongst them, as tenants in common; and in default of such issue, to the "elder branches of the family of Brown Willis" (in the same terms): At the time of the making of the Will, and of the testator's death, there were living two daughters of Brown Willis, four daughters of one of those daughters, an only son of Brown Willis's eldest son, and an only son of his third son: At the expiration of the estate tail, limited to the testator's grandchildren, there were living many descendants of one of Brown Willis's daughters, and of his third son: And it was held by the Court of Exchequer that the devise to the branches of Brown Willis's family was void for uncertainty.

"Younger branches of a family."

7. "Executors and administrators," or "legal representatives," or "personal representatives." If there be a bequest of personalty to A., "his executors and administrators," the law and the testator's intention concur in transferring to A. the absolute interest in the legacy (*p*); and if A. dies before the testator, the legacy will lapse, and cannot be claimed by

7. "Executors and administrators," or "legal representatives," or "personal representatives" or "representatives:"

(*n*) See also *Cooper v. Thornton*, 3 Bro. C. C. 186. *Robinson v. Tickell*, 8 Ves. 142. In *Re Parkinson's Trusts*, 1 Sim. N. S. 245, 246, Lord Cranworth said that the case of *Robinson v. Waddelow*, 8 Sim. 134, was not quite satisfactory

to his mind. See also *Harland v. Trigg*, 1 B. C. C. 142. *Hayter v. Joinville*, 3 East, 172.

(*o*) 2 Cr. M. & R. 638.

(*p*) *Anderson v. Dawson*, 15 Ves. 537.

cases where they are to be considered as mere words of limitation :

his executors or administrators (*g*). And so it is if the bequest be to A. and his "legal personal representative" (*r*), or to A. and his "legal representatives," which, in its ordinary sense, is synonymous with executors or administrators : Accordingly, in *Price v. Strange* (*s*), where there was a trust to sell land on the determination of a life estate, and to pay and divide the proceeds amongst such of the children as should then be living and the legal representative or representatives of him, her or them, as shall then be dead, it was held that the children took a vested interest on attaining the age of twenty-three.

So the words "personal representatives" are to be understood in the ordinary sense of executors or administrators, unless controlled by the context of the Will (*t*). Accordingly, in *Saberton v. Skeels* (*u*), where the limitation was to the daughter for life, and then as she should appoint, and in default of appointment, to her personal representatives, it was held that the executor was entitled. Sir J. Leach there says that the ordinary sense of the words "personal representatives" is executors and administrators.

(*g*) See *infra*, p. 1074.

(*r*) *Taylor v. Beverley*, 1 Coll. 108, 116. *Appleton v. Rowley*, L. R. 8 Eq. 139.

(*s*) 6 Madd. 159.

(*t*) In *Stockdale v. Nicholson*, L. R. 4 Eq. 359, Malins, V.-C., elaborately discusses the whole of the cases, first dealing with those in which the words *personal representatives*, *legal representatives*, or *legal personal representatives* applied to personal estate are read as equivalent to *executors and administrators*, and consequently as words of limitation when they follow a limitation for life to the person to whose representative the property is given, and as a gift to executors and administrators in that capacity when there is no such limitation.

He then deals with those in which the ordinary sense of the words is controlled by a different intention appearing on the whole instrument so as to mean "next of kin." The cases where the words were held to have their ordinary meaning are set out in this note. The cases in which the words were held to mean "next of kin" will be found in notes (*g*), p. 995, *post*. *Smith v. Barneby*, 2 Coll. 728. *Re Henderson*, 28 Beav. 656. *Chapman v. Chapman*, 33 Beav. 553. *Re Turner*, 2 Dr. & Sm. 501. *Hinchliffe v. Westwood*, 2 De Gex & Sm. 216. *Re Wyndham's Trusts*, L. R. 1 Eq. 29. *Alger v. Parrott*, L. R. 3 Eq. 328.

(*u*) 1 Rusc. & M. 587.

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So the ordinary legal sense of the term "representatives," without the addition of "legal" or "personal," is executors or administrators (x). Accordingly, where a testator gave a life interest in a certain fund, with remainder "to be equally divided between all my cousins-german now existing, or their representatives," it was held, that there being nothing in the rest of the Will to control the primary legal meaning of the word *representatives*, the fund went to the executors or administrators of the testator's cousins-german as part of their personal estate (y).

Again, where there is a bequest to A. for life, remainder to such persons as he shall appoint by Will, and in default of appointment to his executors or administrators, he may assign the fund absolutely (z). So where there were bequests to females, some of whom were married, and some single, for their separate use for their respective lives, and after their

"representatives:"

bequest to A. as tenant for life, or as one of several tenants for life, remainder as he shall appoint, and in default of appointment, to his executors, &c.:

(x) *Re Crawford's Trusts*, 2 Drewr. 230. *Corbyn v. French*, 4 Ves. 418. *Re Turner*, 2 Dr. & Sm. 501, 508. *Re Best's Settlements*, L. R. 18 Eq. 686. But the context of the will and the surrounding circumstances may show that "representatives" is not used to mean legal personal representatives, but "next of kin" or descendants. See *Re Horner*, 37 C. D. 695.

(y) *Re Crawford's Trusts*, 2 Drewr. 230, in which case *Kindersley, V.-C.*, elaborately and lucidly reviewed all the authorities. See also *Chapman v. Chapman*, 33 Beav. 566. *Re Turner*, 2 Dr. & Sm. 501, 508. *Alger v. Parrott*, L. R. 3 Eq. 328. *Re Best's Settlements*, L. R. 18 Eq. 686.

(z) *Kirkpatrick v. Capel*, MS. Sugd. Pow. vol. i. p. 79, 6th edit. See *Acc. Cherry v. Boulton*, 2

Keen, 319. So a bequest to a wife for life, with remainder to her children, with remainder as she shall appoint, and in default thereof to her executors, administrators and assigns, gives her an absolute interest, subject to the prior limitations and the power: *Graffey v. Humpage*, 1 Beav. 52, *per Lord Langdale*. But where the trust was, to pay the income of a fund to a wife for her separate use for life, and that, after her death, the principal should remain on such trusts as she should appoint by will, and in default of appointment, in trust for her next of kin according to the Statute of Distribution, it was held, that she was entitled merely to the income for life, and not to the principal absolutely: *Hansen v. Miller*, 14 Sim. 22.

decease to such persons as they should respectively appoint, and in default of appointment to their respective executors, administrators and assigns, it was held, that each of the legatees, whether a married or unmarried woman, was entitled, on petition, without executing any formal appointment, to an immediate transfer or payment to herself of the *corpus* of her share of the fund (*a*). So where the ultimate limitation of a fund is to the executors or administrators of one of several preceding tenants for life, it is held that the gift to the executors or administrators constitutes part of the estate of the tenant for life (*b*). Therefore, where the ultimate trust in a marriage settlement of a fund belonging to the wife is to her executors or administrators, her surviving husband will be entitled, to the exclusion of her next of kin (*c*). So where a gift, under a Will, subject to a life estate to the testator's widow, and to a life estate to his daughter and her husband and the survivor, with power of appointment to the daughter which was not executed, was in trust to pay the fund, "to and for the benefit of her executors or administrators;" and the daughter died first, and then the husband, and then the testator's widow; it was held, that the daughter's husband, on her death, became entitled to the reversionary interest in the fund as part of her estate (*d*).—Again, if there be a limitation of a fund to the executors of A., after the death of B. and C., it does not fail by the death of B. and C. in the lifetime of A. (*e*): And the executors of A., at his death, are entitled to the fund as part of his residuary personal estate (*f*).

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But the ordinary sense of the words "legal representative" may be controlled by a different intention appearing upon

(*a*) *Holloway v. Clarkson*, 2 Hare, 521.

(*b*) *Daniel v. Dudley*, 1 Phill. 1. *Att.-Gen. v. Malkin*, 2 Phill. Ch. C. 64, *post*, p. 998. See also *Howell v. Gayler*, 5 Beav. 157.

(*c*) *Allen v. Thorp*, 7 Beav. 72.

(*d*) *Att.-Gen. v. Malkin*, 2 Phill.

Ch. C. 64. See also *Howell v. Gayler*, 5 Beav. 157.

(*e*) *Horseman v. Abbey*, 1 Jac. & W. 381.

(*f*) *Morris v. Howes*, 4 Hare, 599. *Post*, p. 998. See also *Howell v. Gayler*, 5 Beav. 157.

the whole where a t in trust f should ap convey the the heir-at the person as would and Mary estate; Si not the ex the person "to or an personal re plicable to *Smith* (*i*), husband, h daughter, f to such per of appoint the daught Sir L. Sha entitled to it was plain fund, mere lifetime, an

(*g*) *Robinson* 47. *Baines* 485: *Walter Styth v. Mon* *Cleveland*, 4 See *Briggs v.* 376, where, i words "to p sentatives in ministration," *Hatherley*, L decision of

the whole instrument (g). Thus in *Baines v. Ottey* (h), where a testatrix gave real and personal estate to trustees, in trust for Mary Knightly for life, with remainder as she should appoint; and in default of appointment, in trust to convey the real estate to such person or persons as would be the heir-at-law of Mary Knightly, and to transfer and assign the personal estate to or amongst such person or persons as would be the personal representatives of Mary Knightly; and Mary Knightly appointed only a part of the personal estate; Sir J. Leach, M. R., held, that the next of kin, and not the executors, were entitled to the unappointed part of the personal estate: And his Honor observed, that the words "to or amongst such person or persons as would be the personal representatives of Mary Knightly," were not applicable to executors or administrators. So in *Robinson v. Smith* (i), where a testator bequeathed 700*l.* to his daughter's husband, his executors, &c., in trust to pay the interest to his daughter, for her separate use, for life, and after her death, to such persons as she should appoint by Will, and in default of appointment, to her "personal representatives;" and the daughter died without having made any appointment; Sir L. Shadwell, V.-C., held, that her next of kin were entitled to the 700*l.* to the exclusion of her husband, because it was plain that the husband was made legatee of the fund, merely as trustee, to pay it over, if his wife died in his lifetime, and not to retain it (k). So in *Walter v. Makin* (l),

presentative," or "executors and administrators" controlled by context, so as to mean "next of kin."

(g) *Robinson v. Smith*, 6 Sim. 47. *Baines v. Ottey*, 1 M. & K. 465; *Walter v. Makin*, 6 Sim. 148. *Styth v. Monro*, *ibid.* 49; *King v. Cleaveland*, 4 De Gex & J. 477. See *Briggs v. Upton*, L. R. 7 Ch. 376, where, in a settlement, the words "to pay to legal representatives in a due course of administration," were held by Lord Hatherley, L. C., affirming the decision of Wickens, V.-C., to

amount to a direction to pay to next of kin, and not to executors and administrators. *Re Gryll's Trusts*, L. R. 6 Eq. 589.

(h) 1 M. & K. 465.

(i) 6 Sim. 47.

(k) And where there are no words of division, the nearest of kin take as joint-tenants: *Stockdale v. Nicholson*, L. R. 4 Eq. 359.

(l) 6 Sim. 148.

a testator gave 450*l.* to trustees, their executors, &c., in trust for his son for life, and after his son's decease, to pay thereout two legacies of 100*l.* each to two of his daughters, and to pay the residue to the "legal representatives" of his son; and he gave the residue of his personal estate to his son, his executors, &c.: and Sir L. Shadwell held, that the words "legal representatives" meant next of kin; for it was clear on the face of the Will, that the testator meant to use those words in a different sense from "executors and administrators," which latter words occurred several times in the Will, and especially, in the gift of the residue to his son; and moreover the effect of putting that construction on the words would be to make the son partial residuary legatee, so far as 450*l.* was concerned, and also general residuary legatee of the personal estate (*m*). And in *Styth v. Monro* (*n*), where a bequest was made to the "representatives" of a person already deceased, it was held by Sir L. Shadwell, V.-C., that this expression ought to be construed "descendants," the context of the Will requiring it (*o*).

The ordinary sense even of the express words "executors and administrators" has been held to be controllable by the plain intent collected from the whole instrument: Thus in *Bulmer v. Jay* (*p*), there was a trust in a marriage settlement to raise a sum of money out of the settled estate of the husband, at the end of twelve months from the decease of the survivor of the husband and wife, and to pay the same to the "executors or administrators" of the wife: The wife died in the husband's lifetime: And it was held by Sir L. Shadwell, V.-C., and afterwards by Lord Brougham on appeal, that the next of kin of the wife were entitled to the

(*m*) See also *Cotton v. Cotton*, 2 Beav. 67. *Post*, p. 1001. *Nicholson v. Wilson*, 14 Sim. 549. *Smith v. Palmer*, 7 Hare, 225. *Walker v. Lord Camden*, 16 Sim. 329. So a gift to "legal personal representatives, share and share alike," was

held to mean next of kin: *King v. Cleaveland*, 26 Beav. 26, 166. 4 De G. & J. 477.

(*n*) 6 Sim. 49.

(*o*) See also *Accord. Atherton v. Crowther*, 19 Beav. 448.

(*p*) 4 Sim. 48. 3 M. & K. 197.

money. ment, the executors and the executors Shadwell, *mutatis* justified in they mean to the hu simply. settlement vested in life, and his life, a trusts for sons, sho attain two persons a by deed o trust to administr strong op in the sa the execu not belong husband, of her ge sentatives executors cases in termini, tives, hav in this ca

(*q*) 9 Sim.

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money. Again, in *Smith v. Dudley* (q), in a marriage settlement, the ultimate trust of the wife's chattels was for the executors or administrators of the wife *of her own family*, and the ultimate trust of the husband's chattels was for his executors or administrators *of his own family*: and Sir L. Shadwell, V.-C., held that, though the same words were used, *mutatis mutandis*, in both limitations, yet the Court was justified in holding that, with respect to the wife's chattels, they meant her next of kin at her death, and, with respect to the husband's chattels, his executors or administrators simply. But in *Daniel v. Dudley* (r), where by a marriage settlement a sum of money, the property of his wife, was vested in trustees for the separate use of the wife during her life, and after her decease in trust for the husband during his life, and after the death of the survivor, upon certain trusts for the children, and in default of children, who, being sons, should attain twenty-one, or being daughters, should attain twenty-one or marry, in trust for such person or persons as the wife should, notwithstanding her coverture by deed or Will appoint, and in default of appointment, in trust to pay and transfer the same to the executors or administrators of the wife: Lord Cottenham expressed a strong opinion (contrary to the decision of Sir L. Shadwell in the same case (s)) that under the ultimate limitation to the executors or administrators of the wife the fund did not belong to the next of kin of the wife, in exclusion of the husband, but passed to the administrator of the wife as part of her general personal estate. "Legal or personal representatives," said his Lordship, "may mean next of kin, but executors or administrators cannot. Therefore, none of the cases in which next of kin have been held to take *ex vi termini*, by the description of legal or personal representatives, have any application to the present. The limitation in this case being to the executors or administrators, it seems

(q) 9 Sim. 125.

(s) 11 Sim. 163.

(r) 1 Phill. 1.

to me that it cannot signify whether these words are construed as words of limitation or words of purchase; because, on either supposition, the persons answering that description take in their representative character, and then the fund is to be applied and administered in the same manner as any other assets that come to them in that character. That is the doctrine of all the cases that have been cited, except that of *Bulmer v. Jay* which stands alone." This opinion of Lord Cottenham was recognised by Lord Langdale as a governing authority in *Allen v. Thorp* (c). In the subsequent case of *The Attorney-General v. Malkin* (u) Lord Cottenham said, that cases might exist, where the next of kin would be entitled under a gift to executors and administrators upon evidence of an intention derived from peculiar terms and provisions of the instrument controlling the ordinary and legal sense of the word used; but that such evidence ought to be very strong to justify such a construction (x).

Bequest by A. to the executors or "representatives" of B., or by a testator to his own "executors," &c., or "representatives:"

A question, somewhat different from that involved in the cases just mentioned, arises on occasions where a bequest is made by A. to the executors, or to the "representatives" of B., or where the testator bequeaths a fund to his own executors or administrators, or to his own "representatives."

—In cases of such limitations to executors or administrators, the fund will pass to them, not for their own benefit, but for the purposes, whatever they may be, for which they hold the general personal estate of the testator (y). And the

(t) 7 Beav. 72. *Ante*, p. 994 (c). See also *Morris v. Howes*, 4 Hare, 606, *per* Wigram, V.-C., and *Att.-Gen. v. Malkin*, 2 Phill. 64. *Ante*, p. 994. See also *Page v. Soper*, 11 Hare, 321, in which case Wood, V.-C., thought himself justified in disregarding *Bulmer v. Jay*. See also *Seymour's Trust*, Johns. 472.

(u) 2 Phill. Ch. C. 64, 68. *Ante*, p. 994.

(x) In *Graffey v. Humpage*, 1 Beav. 52, Lord Langdale said, that though cases had occurred in which, to support the plain intent, the words "personal representatives," or "executors and administrators," had been construed to mean next of kin, yet the words "executors, administrators, and assigns," did not appear to him to admit of this interpretation.

(y) *Mackenzie v. Mackenzie*, 3

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same construction seems *primâ facie* to be applicable, if the limitation be to the testator's "representative or representatives," or "legal representatives" (z). But the context of a Will containing these words may be such as to render it necessary or proper to read them as importing consanguinity, or as referring to a distribution, though there is no intestacy, such as would have taken place had there been an intestacy (a).

In *Jennings v. Gallimore* (b), the sum of 1,000*l.* was settled in trust to be paid according to the appointment of Ambrose Gallimore, and in default thereof to his legal representatives, according to the course of administration: By his Will, reciting the settlement, and his power of appointment, he appointed the money to be paid to his "legal representatives according to the course of administration:" And he gave the residue of his property, real and personal, to his nephew, whom he appointed his residuary legatee and one of his two executors: The question as to this 1,000*l.* was between the assignees of the nephew, a bankrupt, and the other next of kin, a sister and nieces: And Lord Alvanley held, that the next of kin were entitled to share with the assignees of the nephew: His Lordship observed, that if it had rested on the settlement itself, he should have had great doubt of being able to get over the words "legal representatives;" but that he could not read the Will without implying an intention to consider it otherwise: That the testator never would have made such a Will, if he had thought that all the words he used came to nothing more than executing the power by giving the fund to his nephew: If he meant to give to him, to whom he had given all the rest, why did he not say so? Again in *Long v. Blackall* (c), the testator bequeathed lease-

Mac. & G. 590. *Long v. Watkinson*, 17 Beav. 471. *Trethewy v. Helyar*, 4 C. D. 53.

(z) *Smith v. Barneby*, 2 Coll. 728, 736: affirmed by Lord Chancellor, July, 1847. *Re Crawford's*

Trusts, 2 Drewr. 230, *ante*, p. 993.

(a) See *Minter v. Wraith*, 13 Sim. 52.

(b) 3 Ves. 146.

(c) 3 Ves. 486.

hold property held for a term of years to his widow, during her widowhood, remainder to his two living sons, and a child *in ventre*, if it proved a son, in succession, for life, remainder to their successive issue male; and if all his sons died without leaving issue male, remainder to such persons as should then be the "legal representatives" of him the testator; and he appointed his wife executrix: The sons all died without issue: And Lord Loughborough held, that the next of kin at the time of distribution were entitled to the property. The words in this case, as Lord Alvanley observed on another occasion (*d*), put it out of the power of the Court to put any other interpretation on the Will: for the word "then" plainly proved that the personal representatives at the time of the death were not intended; and even if that word had not occurred, there was a great deal to show that such could not be the intention; for the wife was made executrix, and it would have been a strange circuitous way of giving it to her.

Whether the expression "legal representatives," when it does not mean executors, means "nearest of kin," or next of kin according to the Statute of Distributions.

It was observed by Sir John Leach, M. R., in *Price v. Strange* (*e*), that he did not collect that Lord Alvanley, in *Bridge v. Abbott* (*f*), adverted to the case of a widow, and would have included her in his sense of legal representatives: Nor did the circumstances of the case of *Palin v. Hills* (*g*) require any decision with respect to this point. In *Horsepool v. Watson* (*h*), a testatrix devised lands to James Horsepool and Mary his wife for their lives, and the life of the survivor; and after the decease of the survivor, to trustees, to sell and apply the proceeds "unto and amongst all and every the issue child or children male or female of the body of the said James Horsepool by the said Mary his wife, and their representatives equally, share and share alike." One of the children of James and Mary Horsepool survived the testatrix and Mary Horsepool, but died in the

(*d*) *Holloway v. Holloway*, 5 Ves. 401, 402.

(*e*) 6 Madd. 162. *Ante*, p. 992.

(*f*) 3 Bro. C. C. 224.

(*g*) 1 M. & K. 470, *post*, p. 1005.

(*h*) 3 Ves. 383.

lifetime children. The question share, and could claim decided in opinion, that "representatives" by the gift being issued to A. or B. of the testator particularly the fund whether by representatives among themselves or among Distributions of kin according to opinion that persons statute; representatives the force are held of the Will person to share, leg Vicars (*l*) sonal estate life, should his executor divided be

(*i*) See *ante*, p. 996.

lifetime of James Horsepool, having married and left children, and her husband, who became her administrator: The question was, whether the children were entitled to her share, as her "representatives," or whether their father could claim, as her administrator: And Lord Loughborough decided in favour of the children; his Lordship being of opinion, that the use of the word "issue" qualified the word "representatives," and explained what the testatrix meant by the general word children and their representatives being issue (i). In *Cotton v. Cotton* (k) there was a bequest to A. or his legal representatives: A. was dead at the date of the testator's will, having bequeathed his property on particular trusts: Several points were argued: first, whether the fund was subject to the trusts of A.'s Will; secondly, whether his executors took beneficially as his "legal representatives:" and thirdly, whether the fund was divisible among the nearest of kin of A. (thus excluding the widow), or amongst his next of kin according to the Statute of Distributions: Lord Langdale, M. R., held that A.'s next of kin according to the statute, were entitled; being of opinion that the words "legal representatives" meant those persons who would be entitled beneficially under the statute; for that when it is said that the expression "legal representatives" means next of kin, it is not that such is the force of the words themselves, but because the words are held to indicate the persons, who, upon the construction of the Will, are beneficially entitled in the place of the person to whom the gift was first made, and who, in that sense, legally represent such person. So in *Booth v. Vicars* (l), a testator directed that the residue of his personal estate, after the death of his widow, the tenant for life, should be paid by his trustees or the survivor of them, his executors or administrators, to A. and B., equally to be divided between them, share and share alike, if then living;

(i) See also *Styth v. Monroe*, (k) 2 Beav. 67.
ante, p. 996. (l) 1 Coll. 6.

but if dead, to go and be divided to and amongst the next legal representatives of A. and B., share and share alike : A. and B. died in the lifetime of the testator's widow ; And it was held by Knight Bruce, V.-C., that the next of kin to A. and B. according to the *Statute of Distributions*, living at the death of the testator's widow, were entitled to the fund ; and further, that they were to take *per stirpes*, and not *per capita* (m).

Bequests to "executors or administrators," or "representatives," as substitutes for a legatee dying before the testator :

Cases of some difficulty connected with this subject occur as to the construction of Wills, in which the words "executors or administrators" or "representatives" clearly mean *substitutes* in the event of a legatee dying in the lifetime of the testator ; and the question is, who are the substitutes intended ? The first inquiry which suggests itself on this head is, whether, if the legatee dies before the testator, and the bequest consequently passes, under the Will, to the executors and administrators of the legatee, they shall hold the property bequeathed for their own personal benefit, or as trustees. On the latter supposition a second inquiry becomes necessary : viz., for whose benefit they shall be considered to hold it.

whether in such case, or in any case, an executor or administrator can take, as such, beneficially :

In the case of *Ripley v. Waterworth* (n), Lord Eldon observed, that he doubted whether an executor or administrator ever takes anything as such, which he will not be bound to apply as personal estate of the testator or intestate : And in *Milner v. Harewood* (o), his Lordship, recurring to his decision in *Ripley v. Waterworth*, said, "I have determined, and I see no reason to dissent from it, that where the executor is the special occupant of an estate *pur autre vie*, taken as executor, he must hold that as all other property taken by an executor, and therefore distributable in this Court."

The case of *Evans v. Charles* (p), which was an express decision, that where executors or administrators are

(m) See also *Martin v. Glover*, 1 Coll. 269. *Dilner v. Lecch*, 10 Beav. 362. *Fielden v. Ashworth*, L. R. 20 Eq. 410. *Re Gryll's* Trusts, L. R. 6 Eq. 589. (n) 7 Ves. 438. (o) 18 Ves. 273. (p) 1 Anstr. 128.

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entitled under a bequest to "the personal representatives" of a third person, they take the property as *personæ designatæ*, beneficially, and not as part of the estate of the deceased, must be regarded as no longer law.

Lord Abinger, C. B., said that this case was clearly not law (*q*). And it appears to have been regarded as overruled by Sir John Leach and Lord Brougham, in the case of *Palin v. Hills* (*r*), and by Romilly, M. R., in *Long v. Watkinson* (*s*).

It must, however, be observed, that unquestionably it is competent to a testator, if he thinks fit, to limit any interest to such persons as shall, at a particular time named by him, sustain a particular character (*t*): And therefore that the expressions of the Will may be such, as clearly to entitle the executors or administrators to a beneficial interest, even although the limitation to them should be preceded by a life estate in their testator or intestate; Thus, in *Sanders v. Franks* (*u*), it was determined by Sir Thomas Plumer, that a limitation of personal estate to a widow, by her husband's Will, for life, with a power of appointment, and in default of such disposition, "to her executors or administrators for their own use and benefit," did not vest the absolute interest in the property in the widow; but that she had an estate for life only, with a power to dispose of the fund: upon the principle, that the executors and administrators took as purchasers in

(*q*) *Marshall v. Collett*, 1 Younge & Coll. 239. *Post*, p. 1004.

(*r*) *Post*, p. 1005. See also *Daniel v. Dudley*, *ante*, p. 997. *Att.-Gen. v. Malkin*, 2 Phill. Ch. C. 64, *ante*, p. 994. *Morris v. Howes*, 4 Hare, 599, *ante*, p. 994. *Post*, pp. 1005, 1006.

(*s*) 17 Beav. 473. See also *Re Henderson*, 28 Beav. 656. *Webb v. Sadler*, L. R. 8 Ch. 419, where James, L. J., says: "For some time there was an opinion entertained by the Courts that the words 'executors and administrators' following a gift for life

were to be considered next of kin, or that the executors were to take beneficially as '*personæ designatæ*.' This was acted on in *Palin v. Hills*, 1 M. & K. 470, before Lord Brougham when he reversed a decision of the Master of the Rolls; but for many years there has been no question that 'executors and administrators' mean executors and administrators and nothing else."

(*t*) *Holloway v. Holloway*, 5 Ves. 401.

(*u*) 2 Madd. 147.

their own rights, and not by representation. So in *Wallis v. Taylor* (x), a testatrix gave stock in the three per cents. to her executors, in trust, as to one moiety thereof, for her daughter Hannah, and as to the other moiety, in trust to permit her daughter Sophia, then the wife of W. M. (but afterwards the wife of the plaintiff), to receive the dividends for her life for her separate use, and from and after her decease, on trust to assign and transfer the last-mentioned moiety "unto the executors or administrators of my said daughter Sophia, to and for his, her, or their use and benefit absolutely for ever:" And Sir L. Shadwell, V.-C., held, that the plaintiff, as the administrator of Sophia, took under this limitation beneficially.

On the other hand, in *Marshall v. Collett* (y), by a marriage settlement, stock was assigned to trustees, upon trust to pay the interest and dividends to the husband for life, and in case he should survive the wife, upon trust to transfer the said stock to the husband, "his executors, administrators, or assigns, to and for his or their own use and benefit:" but in case the wife should survive the husband, upon trust during her life to pay the interest and dividends as she should appoint, and, after her decease, upon trust to transfer the stock "unto the executors or administrators of the said George Marshall (the husband) to and for their own use and benefit:" The wife survived the husband, and took out administration of his effects, and claimed an absolute interest in the whole corpus of the stock: but Lord Abinger, C. B., held, that she was not entitled: And his Lordship appeared to be of opinion that a limitation in a settlement "to the executors and administrators of A. for their own use and benefit," unconnected with any other limitations showing more specifically who are to take, is void for uncertainty. Again, in *Stocks v. Dodsley* (z), a testator gave a legacy of 500*l.* to his wife, and after her decease to George Wragg; and if he should die in her lifetime,

(x) 8 Sim. 241.

(y) 1 Younge & Coll. 232.

(z) 1 Keen, 325.

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to such person or persons as he should by Will appoint; and in default of appointment, after the death of the wife, "to the executors and administrators of the said George Wragg, *absolutely*": George Wragg died, having made a will, by which he appointed an executor, but made no appointment of the legacy: And Lord Langdale, M. R., held that the executor did not take a beneficial interest in the legacy. And in *Hames v. Hames* (a), it was held by the same learned Judge, upon the construction of a marriage settlement, that under a limitation to the executors, administrators, or assigns of the settlor, to and for his and their own use and benefit, his executors were not entitled beneficially (b).

Assuming that executors or administrators, who take a bequest as purchasers, are to be regarded merely as trustees, the question remains to be considered, for whose benefit such trust shall enure. The general rule appears to be, that the fund is to be applied and administered in the same manner as any other assets that come to them in their official character (c). However, in *Palin v. Hills* (d), John Milward by his Will, after giving several legacies, among which was a legacy of 2,000*l.* to Sarah Brown, directed, that in case of the death of any or either of the legatees in his lifetime, the legacy given to the legatee so dying in his lifetime "should go and be paid to his or her executors or administrators:" Sarah Brown died in the lifetime of the testator, having made a Will, by which she appointed Rebecca Sarah Palin her residuary legatee, and made two other persons her executors: The question was, first, whether the executors of Sarah Brown were entitled beneficially to the legacy of 2,000*l.*; and secondly, whether, supposing them to hold it in their capacity of executors, they held it in trust for the residuary legatee of Sarah Brown, or for her next of kin; Sir John Leach, M. R., being of opinion that the executors were clearly excluded from

for whose benefit the trust shall enure when an executor or administrator takes a bequest made to him as a purchaser, and not beneficially.

(a) 2 Keen, 646.

Collett, 8 Beav. 386.

(b) See also *Wood v. Cox*, 2 M.(c) *Ante*, p. 998.& Cr. 684. *Stubbs v. Sargon*, 3

(d) 1 M. & K. 470.

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any beneficial interest in the legacy, decided that they held it in trust for the residuary legatee; his Honor considering it most consistent with the intention of the original testator to give a benefit to Sarah Brown, that the legacy should go to the ascertained object of Sarah Brown's bounty, namely, her residuary legatee: But this decision was reversed on appeal by Lord Brougham, C.: and his Lordship held, on the authority of the case of *Bridge v. Abbott* (e), that Sarah Brown's next of kin were entitled to the beneficial interest in the legacy: The principle of his Lordship's decision appears to be, that the property in the fund never vested, nor could by possibility vest, in Sarah Brown herself (f). A question somewhat similar arose subsequently in *Morris v. Howes* (g). There a trust term had been created by a marriage settlement to raise 1,000*l.* on the decease of the survivor of the husband and wife, in case there should be no issue of the marriage living at her death, and to pay it as the wife should appoint, and in default of such appointment, to the executors, administrators, and assigns of the wife's mother: There was no issue of the marriage, and the wife, having survived her husband, died without having exercised her power of appointment: Her mother afterwards bequeathed her residuary estate and died: And Wigram, V.-C., held that the executors of the mother were entitled to take the 1,000*l.* and interest as part of her residuary personal estate: and his Honor said, that it was clear they could not claim it beneficially but must take it in their character of executors, and if so, it was subject to her debts, and she might have dealt with it as with her other property: His Honor, therefore, had no doubt that, as part of her estate, it would pass by the residuary clause in her Will: But it had been suggested that this would conflict with *Palin v. Hills*: That case, however, decided, not that property which belongs to a party though not in possession does not pass, but

(e) 3 Bro. C. C. 224.

son, 1 Jac. & Walk. 388.

(f) See also *Vaux v. Hender-*

(g) 4 Hare, 599.

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that property, the title to which commences after the death of the testator, does not pass by his Will: His Honor added, that although his decision did not conflict with *Palin v. Hills*, he might observe that that case had not been universally approved of. (This decision was affirmed by the Lord Chancellor, M. T. 1846.) And in a subsequent case of *Long v. Watkinson* (h), where a testator bequeathed his residuary estate to his sister, and in case of her death, to the executors she might appoint, and she died before him, Romilly, M. R., held that her executor took the bequest in trust to be administered like any other part of her assets: And his Honor said he could not reconcile *Palin v. Hills* with the later authorities.

(C.) *Who are entitled under the description of*—1. "Servants"—2. "Inhabitants"—3. "Government."

1. "Servants." Where the testator, after giving legacies to two of his servants, if in his service at his death, bequeathed to his "other servants" who should be living with him at that time 50*l.* a-piece, and 10*l.* each for mourning; and by a codicil revoked the two latter legacies, and gave to all his other servants, in lieu thereof, 500*l.* each, and 20*l.* each for mourning; Sir W. Grant held, that a coachman, who was provided for the testator by a job-master, together with a carriage and horses, in the usual course of business, was not a servant within the intent and meaning of the Will (i). In another case (k) the testator bequeathed a year's wages to "such of his servants as should be living with him at his death;" And the Court declared that stewards of Courts, and such other servants as were not obliged to pass their whole time in their master's service, were not servants within the meaning of the bequest (l). So in *Booth v.*

1. "Servants:"
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(h) 17 Beav. 471.

(i) *Chilcot v. Bromley*, 12 Ves. 114.

(k) *Townshend v. Windham*, 2 Vern. 546.

(l) The Court remarked at the same time, that it would not narrow the bequest to such servants only who lived at the testator's house, or had diet from him.

Dean (m), a testator bequeathed to each of his servants one year's wages, over and above what might be due to them at the time of his decease: Upon this bequest a question was raised, whether a person who had worked in the testator's garden, under his gardener, for several years, at weekly wages, and a boy who had served the testator for some time as a cowboy, at weekly wages, and neither of whom resided with or formed part of the testator's family, were to be considered as entitled under the Will to the year's wages: And Sir J. Leach, M. R., was of opinion that these persons were not servants in the sense in which the testator had used the expression: That in speaking of a year's wages, the testator plainly used that expression with reference to family servants usually hired by the year (*n*). In *Howard v. Wilson (o)*, (which was a suit of subtraction of legacy, before Sir John Nicholl,) a coachman, a married man, originally hired by and who had lived five years with the testatrix, residing over her stables in town, occasionally accompanying her into the country, where he lived in the house, though, like all her servants, on board wages; waiting sometimes at table, and remaining with her, though she changed her job-man, was held (although the several job-masters paid him his wages and board wages, except three shillings per week extra in the country, and found him his liveries) entitled under a bequest "to each of my servants living with me at the time of my death, 10*l*."

(*m*) 1 M. & K. 560.

(*n*) Accordingly, it was held by Turner, V.-C., that a gardener employed at weekly wages was not included in a bequest of a year's wages to each of the servants of the testator living with him at his decease; for that a legacy of a year's wages cannot properly be construed to mean the aggregate of the weekly wages of a servant for fifty-two weeks: *Blackwell v. Pennant*, 9 Hare, 511. But outdoor servants continuously em-

ployed at weekly wages, are entitled under a bequest to "servants in my service at the time of my decease:" *Thrupp v. Collett*, 26 Beav. 147. And one who acted as the land agent and house steward of the testator, but resided out of the house, was held entitled under a bequest to "all my servants and day labourers who shall be in my service at the time of my death, one year's full wages:" *Armstrong v. Clavering*, 27 Beav. 226.

(*o*) 4 Hagg. 107.

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But in *Ogle v. Morgan* (p), Lord Truro held that a head gardener, who lived in one of the testator's cottages and was not dieted by him, was not entitled under a bequest of a year's wages to "each person as a servant in my domestic establishment at the time of my decease."

Generally speaking, a servant must continue in the service of the testator till the time of his death, to come within the description of "servants." But in *Herbert v. Reid* (q), where a servant quitted the testator's house a few days before the death of the testator, she was allowed to show, by proof of his declarations, that she was still considered by him to be in his service. And where a testator, by a codicil, bequeathed pecuniary legacies to certain persons by name, who were described as having lived many years in his family, and then added "to the other servants 500*l.* each," it was held, that a person who was in the testator's service at the date of the codicil, but who quitted it before his decease, was entitled to a legacy of 500*l.* (r).

whether a continuance in the service is necessary to entitle.

2. "Inhabitants." Where a testator gave a legacy "to the poor inhabitants of St. Leonard's, Shoreditch, for ever," Sir Thomas Clarke, M. R., gave his opinion in favour of the charity, and said the Court had done so in many cases where the expressions were much more general and uncertain: But as it could not be intended that the poor inhabitants which were relieved by the parish should have benefit by this legacy (which in effect would be giving to the rich and not to the poor), his Honor declared that the distribution of the legacy was to be confined to the poor inhabitants of the parish, not receiving alms of the said parish; and ordered a scheme to be laid before the Master for such distribution (s).

2. "Inhabitants:"

(p) 1 De Gex, M. & G. 359.

(q) 16 Ves. 481.

(r) *Parker v. Marchant*, 1 Y. & Coll. Ch. C. 290. But where an annuity was given to a servant, provided she should be in the testator's service at the time of his

decease, and two days before his death, she was wrongfully dismissed, it was held that she was not entitled: *Darlow v. Edwards*, 1 H. & C. 547.

(s) *Att.-Gen. v. Clarke, Ambler*, 422.

In another case (*t*), a testatrix bequeathed all which might remain of her money, after her debts and legacies were paid, "to the Inhabitants of Tawleaven Row, in the parish of Lethney:" The Master found that Tawleaven Row consisted of seven houses, which were entirely occupied by poor fishermen and labourers and their families, and that the inhabitants at the time of the death of the testatrix, were the persons in his report enumerated, being thirty in number, of whom three were since dead, leaving no personal representatives: and Lord Langdale, M. R., held that the persons so found by the Master to be inhabitants were entitled to the residue of the testatrix's general personal estate, after payment of her debts and legacies.

3. "Government:"

3. "Government." A legacy to government for the benefit of the public, is to be disposed of under the king's appointment by sign manual: The Crown is to direct its application to a proper use: Accordingly, in *Newland v. Attorney-General* (*u*), Abraham Newland bequeathed stock "to his Majesty's Government in exoneration of the national debt;" and Lord Eldon directed the fund to be transferred to such person as the king should appoint under sign manual.

(D.) Of Mistakes in the Names or Descriptions of Legatees.

The general rule upon this subject is, that where the name or description of a legatee is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake shall not disappoint the bequest. The error may be rectified, and the true intention of the testator ascertained in two ways: 1. By the context of the Will; 2. To a certain extent, by parol evidence.

Mistake rectified by the context:

1. The mistake may be rectified by the context. Thus, an error in the name, and even of the name and sex (*x*) of the legatee may be obviated by the accuracy of his descrip-

(*t*) *Rogers v. Thomas*, 3 Keen, 8. 536. *Re Ricket*, 11 Hare, 299.

(*u*) 3 Meriv. 684.

S. C. *sub nom. Re Ricket's Trust*,

(*x*) *Ryall v. Hannam*, 10 Beav. 22 L. J. Ch. 1044.

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tion(y): as where a legacy is given to "my namesake Thomas, the second son of my brother," and the testator's brother has no son named Thomas, but his second son is named William, there is sufficient certainty in the description to entitle the second son (z). So an error in the *description* may be obviated by the certainty of the *name*; as where a legacy was given to "Charles Millar Standen and Caroline Eliz. Standen, legitimate son and daughter of Charles Standen, now residing with a company of players," and it appeared that they were *illegitimate* children, their claim was, nevertheless, supported (a). So where there was a bequest to John Newbolt, second son of William Strangways Newbolt, vicar of Somerton; and the vicar of Somerton was William Robert Newbolt, and his second son was Henry Robert, and his third son was John Pryce; it was held, that John Pryce Newbolt was entitled to the legacy; for that the maxim applied, "*Veritas nominis tollit errorem descriptionis*" (b). So where the testator, being resident in India, bequeathed his residuary property to his "nearest relations in my native country Ireland," sisters living elsewhere were held entitled (c).

Cases where the description prevailed.

Cases where the name prevailed.

(y) *Camoyse v. Blundell*, 1 H. L. C. 578. *Blundell v. Gladstone*, 1 Phil. C. C. 279, 288. *Feltham's Trust*, 1 Kay & J. 528. *Adams v. Jones*, 9 Hare, 486. *Hodgson v. Clarke*, 1 De G. F. & J. 394. *Re Nunn's Trusts*, L. R. 19 Eq. 331. *Charter v. Charter*, L. R. 7 H. L. 364. For cases of a misnomer of corporations, see *Att.-Gen. v. Sibthorpe*, 2 R. & M. 107. *Queen's College v. Sutton*, 12 Sim. 521.

(z) *Stockdale v. Bushby*, 19 Ves. 381. See also *Bristow v. Bristow*, 5 Beav. 289. *Douglas v. Fellows*, Kay, 114.

(a) *Standen v. Standen*, 2 Ves. 589. *Re Blackman*, 16 Beav. 377. *Mostyn v. Mostyn*, 17 Beav. 323; 3

De G. M. & G. 140; 5 H. L. C. 155. *Bernasconi v. Atkinson*, 10 Hare, 345. *Garner v. Garner*, 29 Beav. 114. *Gillett v. Gane*, L. R. 10 Eq. 29. *Farrer v. St. Catherine's Coll.*, L. R. 16 Eq. 19. *Garland v. Beverley*, 9 C. D. 213.

(b) *Newbolt v. Price*, 14 Sim. 364. The rule "*Falsa demonstratio non nocet*" means that if there be an adequate and convenient description with convenient certainty of what was meant to pass, or who was meant to be legatee, a subsequent erroneous addition will not vitiate it: *Webber v. Stanley*, 16 C. B., N. S. 755.

(c) *Smith v. Campbell*, 19 Ves. 400.

Again, a mistaken omission of the name of the legatee may be supplied by the context: as when the testator gives his residuary estate to be divided among his *seven* children, and in enumerating them, mentions *six* names only: or where he makes a bequest to his six grandchildren by their Christian names, and mentions one twice over, omitting another altogether (*d*).

Mistake
rectified by
parol evidence.

2. The mistake may, to a certain extent, be rectified by parol evidence. It is obvious that the nature of this Treatise will not allow of a full consideration of this wide and difficult subject: It may be sufficient in this place to mention the general principles established with respect to it.

It may, perhaps, be safely stated as a general proposition, that a Court may inquire into every material fact relating to the person who claims to be interested under the Will, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the Court to identify the person intended by the testator (*e*).

In all cases in which a difficulty arises in applying the words of a Will to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain who was the person really intended to take under the Will; according to the maxim, "*Ambiguitas verborum latens, verificatione suppletur*."

There is, however, but one class of cases in which evidence of the testator's *declarations* can properly be admitted; and

(*d*) Garth *v.* Meyrick, 1 Bro. C. C. 30. Eddels *v.* Johnson, 1 Giff. 22. See *post*, p. 1017.

(*e*) This subject is discussed with much learning and ability by Vice-Chancellor Wigram, in his Treatise on "The application of Extrinsic Evidence to Interpretation of Wills." See also Feltham's Trust,

1 Kay & J. 528. Bernasconi *v.* Atkinson, 10 Hare, 345. Drake *v.* Drake, 8 H. L. C. 172. Webber *v.* Stanley, 16 C. B., N. S. 698. Charter *v.* Charter, L. R. 7 H. L. 364. *Re* Wolverton Estates, 7 C. D. 197. In the goods of Brake, 6 P. D. 217. *Re* Taylor, 34 C. D. 255.

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that is, of cases of *equivocation*, viz., where an ambiguity arises, from the admission of extrinsic evidence, as to which of two or more things, or which of two or more persons, each answering the description in the Will, the testator meant to designate (*f*).

Accordingly, where a complete blank is left for the devisee's name in a Will, no parol evidence, however strong, will be allowed to fill it up as intended by the testator (*g*). Where, however, a blank was left for the Christian name only, parol evidence was admitted to prove the individual intended (*h*). So in a case of a devise "to Mrs. C.," Lord Loughborough referred it to the Master to receive evidence, to show the person intended (*i*). The two last cases, per-

(*f*) *Miller v. Travers*, 8 Bing. 244. *Doe v. Hiscocks*, 5 M. & W. 363. *Doe v. Westlake*, 4 B. & Ald. 57. *Stringer v. Gardiner*, 27 Beav. 35. *Fleming v. Fleming*, 1 H. & C. 242. *Re Ingle's Trusts*, L. R. 11 Eq. 378. *Farrer v. St. Catherine's Coll.*, Cambridge, L. R. 16 Eq. 19. Evidence of the declarations of a testator as to whom he intended to benefit, or supposed that he had benefited, can only be received where the description of the legatee or of the thing bequeathed is equally applicable in all its parts to two persons or to two things. But evidence of the circumstances, the habits, and the state of his family at the time he made the will is admissible, so as to put the Court in the position of the testator, in order to ascertain the bearing and the application of the language which he uses, and whether there exists any person or thing to which the whole description given in the will can be with sufficient certainty applied. *Charter v.*

Charter, L. R. 7 H. L. 364. Where a legatee is once correctly described in a will and the same name is mentioned again without any description, evidence is not admissible to show that a different person was intended. *Webber v. Corbett*, L. R. 16 Eq. 515.

(*g*) *Baylis v. Att.-Gen.*, 2 Atk. 239. *Hunt v. Hort*, 3 Bro. C. C. 311. *Miller v. Travers*, 8 Bing. 254. *Clayton v. Lord Nugent*, 13 M. & W. 200. But where such complete blank appears in the probate copy of a Will the Court is entitled to look at the original Will for the purpose of construing it, *per* Lord Esher, M. R., and Baggallay, L.J., in *Re Harrison*, 30 C. D. 390.

(*h*) *Price v. Page*, 4 Ves. 680. See also *Phillips v. Barker*, 1 Sm. & G. 583.

(*i*) *Abbot v. Massie*, 3 Ves. 148. And where the testator appointed "Percival —, of Brighton, the father," his executor, evidence was admitted of the circumstances under which the deceased

haps, are only reconcileable with the principles of law applicable to this subject, on the supposition that the evidence

made his Will and of the persons about him in order to satisfy the Court who was meant by the imperfect description of the executor. In the goods of De Rosaz, 2 P. D. 66. Evidence in this case was tendered of the draft of the Will in the testator's own handwriting in which the blank was filled in, and the name of Percival Boxall written in full. Sir J. Hannen decided the case irrespective of the testator's expressed intention, and did not consider it necessary to express a positive opinion on the admissibility of the evidence. In the course of his judgment, however, he said: "I have dealt with the case thus far on the supposition that evidence of the testator's declarations of intention are not admissible. In the case of *Charter v. Charter* (*ubi sup.*), Lord Cairns says: "The only case in which evidence of this kind can be received is where the description of the legatee or of the thing bequeathed is equally applicable in all its parts to two persons or two things." Sir J. Wigram states the proposition thus (prop. 7, par. 194): "The only cases in which evidence to prove intention is admissible are those in which the description in the Will is unambiguous in its application to each of several subjects." If these expositions of the law are to be taken without any qualification, evidence of the testator's expressed intention could not be given in this case, for there is here only one known subject to which the testator's language can apply. It

is possibly open to question whether such a case as this was in the contemplation of Lord Cairns and Sir J. Wigram. As I have said, it is not shown here that there is any other person who could properly be designated as "Percival —, of Brighton, Esquire, the father." If there were any such, parol evidence of the testator's intention would be admissible: is such evidence the less admissible because the claimant has no competitor? Probably the answer is, that if the description in the Will is in itself sufficient to define the only known subject to which it is sought to apply it no evidence of intention is needed, if it is insufficient such evidence is inadmissible. "In point of principle," says Sir J. Wigram (prop. 7, par. 192), "it is submitted that a description which is so imperfect as to be useless as it stands—i.e., useless unless it be aided by evidence of intention—is not distinguishable from one which is wholly incorrect."

Sir J. Hannen's own reasoning seems to show that the rule in *Charter v. Charter* requires no qualification, but of course the nearer the imperfect description approaches a sufficient definition of the testator's intention, the stronger the inclination to break the rule and to admit evidence of the testator's declaration to complete the imperfect description. It will be found that in most of the cases in which evidence of declarations of the testator was admitted, the description in the

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went to establish in the one case, that the claimant of the legacy was a person whom the testator was in the habit of calling "Mrs. C.;"—and in the other, that the claimant was a person whom the testator was in the habit of calling by the surname only (*k*). Where a testator has habitually called certain persons or things by peculiar names, and those names occur in his Will, evidence of such habit seems receivable to explain the meaning of the Will, in like manner as if his Will had been written in cypher, or in a foreign language (*l*).

In conclusion, it may be expedient to advert to cases of legacies given to persons in particular characters.

Legacy to one in a particular character.

In some cases, such legacies will fall within the rule above stated, that where there is no doubt as to the person intended, the mis-description of character shall not frustrate the bequest. Thus a woman may take a legacy by the name of the wife of such a one, although she be not a lawful wife, if she be reputed or known by that name (*m*). But it is otherwise where a bequest is made to a person in a certain character, which may reasonably be presumed to be the motive of the testator's bounty, and that character is subse-

Will was really applicable to each of several subjects when the words not applicable to any person at all are omitted from consideration. See *Careless v. Careless*, 1 Mer. 384. Still *v. Hoste*, 6 Madd. 192. The case of *Price v. Page* (*ubi sup.*), would seem to be explicable as a case of "equivocation" without reference to the ground mentioned in the text. The case of *Abbot v. Massie* (*ubi sup.*), would seem explicable (if at all) only on the ground that the evidence intended to be taken had no reference to the declarations of intention by the testator.

(*k*) See the observations of

Rolfe, B., in *Clayton v. Lord Nugent*, 13 M. & W. 207. See also *Lee v. Pain*, 4 Hare, 251.

(*l*) *Doe v. Hiscocks*, 5 M. & W. 363, 368. As to special names used by a testator to describe things, and evidence of his practice in his lifetime, see *post*, p. 1169.

(*m*) *Giles v. Giles*, 1 Keen, 685. *Doe v. Rouse*, 5 C. B. 422. *Re Petts*, 27 Beav. 576. But not, it should seem, if there is no evidence that she was known to the testator in such a way as to lead to the inference that she was intended by the description of wife: *Davenport's Trust*, 1 Sm. & G. 126.

quently ascertained to have been falsely assumed by the legatee, by a fraud practised on the testator (n). Thus, if a woman bequeathes a legacy to her supposed husband, who is in fact the husband of another woman, he shall take nothing by the bequest (o).

In *Rishton v. Cobb* (p) a testator gave a fund to trustees, on trust to empower Lady C., "widow of Sir N. C.," to receive the dividends so long as she should continue single and unmarried: At the date of the Will, and at the testator's death, Lady C. was married to one R.; but he had deserted her; and she always called herself Lady C., and represented herself to be a single woman and the widow of Sir N. C.; and the testator and others always considered her so to be: Sir I. Shadwell, V.-C., held that she, and her husband in her right, were entitled to claim the benefit of the bequest; for that no case of fraudulent misrepresentation had been

(n) The distinction between a fraudulent and an innocent legatee is well illustrated by the case of *Wilkinson v. Joughin*, L. R. 2 Eq. 319, where the income of property was given by a testator to a woman in the character of, and whom he described as, his wife, but who at the time of the marriage ceremony with him and at his death had a husband living, and who bequeathed the residue of his property to his "step daughter," the daughter of his supposed wife: and it was held that the bequest to the mother was void by reason of the fraud committed by her, but that the bequest to her daughter was valid. As to the gift to the daughter, compare *Davenport's Trust*, 1 Sm. & G. 126. But in *Re Petts*, 27 Beav. 576, the Court, in the case of a married woman who had gone through the form of marriage a second time in the belief that her husband was dead,

supported the bequest to her on the ground that the evidence showed no fraud on her part.

(o) *Kennell v. Abbott*, 4 Ves. 802. *Wilkinson v. Joughin*, L. R. 2 Eq. 319. See also *Ex parte Wallop*, 4 Bro. C. C. 90, mentioned by Lord Alvanley in *Kennell v. Abbott*. That learned Judge, in the latter case, observed, that he would not have it understood, that if a testator, in consequence of the supposed affectionate conduct of his wife, gives her, being deceived by her, a legacy as his *chaste* wife, evidence of violation of her marriage vow could be given for the purpose of defeating the bequest; since that would open too wide a field: 4 Ves. 809.

(p) 9 Sim. 615. The authority of this case was doubted by Lord Selborne in *Re Boddington*, 25 C. D. 685, 686, 689.

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established against her. And this decision was affirmed by Lord Cottenham on appeal (*q*).

In *Schloss v. Stiebel* (*r*) a testator, domiciled in Jamaica, became, during a temporary residence at Frankfort, engaged and betrothed to marry A. S.; and by a codicil to his Will, after mentioning her by name, and alluding to his intended marriage with her, he gave 8,000*l.* "to my wife." During the engagement, but before the marriage, the testator died: And Sir L. Shadwell, V.-C., held that A. S. was entitled to the legacy: his Honor being of opinion that it was not given on condition of the testator marrying her, but that he had described her with reference to his intention of doing so.

Where there is a bequest to a class, and the intention of the testator is apparent to include all who constitute the class, though by mistake he has specified a wrong number, the Court will not allow such an error to have an excluding operation, but will strike out the specified number. Thus, in *Tomkins v. Tomkins* (*s*), where there was a bequest of 50*l.* a-piece to the *three* children of A., and A. had *four*; Lord Hardwicke was of opinion, that each of the four children was entitled to the 50*l.* So in *Garvey v. Hibbert* (*t*), the testator gave "to the *three* children of A. the sum of 600*l.* a-piece;" and Sir W. Grant held, that four children, all born before the date of the Will, were entitled to 600*l.* each (*u*). Again, in *Harrison v. Harrison* (*x*), the testator bequeathed to the *two sons and the daughter* of Thomas Lovell 50*l.* each. At the date of the Will and of the death of the testator, Thomas Lovell had *five* children living, namely, *one son and four daughters*, and not two sons and one daughter: And

Mistakes in the description of the number of a class of legatees.

(*q*) 5 M. & Cr. 145.

(*r*) 6 Sim. 1.

(*s*) Cited 3 Atk. 257; 2 Ves. Sen. 564.

(*t*) 19 Ves. 124.

(*u*) See also *Accord. Lee v. Pain*, 4 Hare, 249. *Morrison v. Martin*, 5 Hare, 507. *Daniell v.*

Daniell, 3 De G. & Sm. 337.

Yeats v. Yeats, 16 Beav. 170.

Spencer v. Ward, L. R. 9 Eq. 507.

Re Bassett's Estate, L. R. 14 Eq.

54. *M'Kechnie v. Vaughan*, L. R. 15 Eq. 289.

(*x*) 1 Russ. & M. 72.

Sir J. Leach, M. R., held that each of the five children was entitled to a legacy of 50*l.* But in *Lord Selsey v. Lord Lake* (y), the testator gave a rent-charge to trustees, during the life of his niece and her *five daughters* in trust, to pay it to his niece for life, and after her death, upon the like trust for her *said daughters* and the survivors and survivor, and while more than one should be living, to be divided between them in equal shares: It appeared, that at the date of the Will, and at the death of the testator, his niece had *five sons and only one daughter*: And Lord Langdale, M. R., held, that the daughter alone was entitled to the annuity for life on the death of her mother. Where, however, a testator, bequeathed 100*l.* a-piece to the four sons of A. H. by a former husband, and she had four such children, but one of them was a daughter, Knight Bruce, V.-C., held, that the daughter took a legacy of 100*l.* (z).

It should be observed, that the principle on which an erroneous statement of the number of a class is rejected, does not apply where the Will affords the means of determining which of the class are pointed at (a).

(y) 1 Beav. 146.

(z) *Lane v. Green*, 4 De G. & Sm. 239. See *ante*, p. 1012, as to the mistaken omission of the name of the legatee.

(a) *Re Hull's Estate*, 21 Beav. 310. *Wrightson v. Calvert*, 1 Johns. & H. 250. *Glanville v. Glanville*, 33 Beav. 302. The rule may be thus stated, viz., that in the case of a testamentary gift to a class, describing them as consisting of a specified number which is less than the number in existence at the date of the Will, the Court rejects the specified number on the presumption of mistake, and all the members of the class in existence at the date of the Will are held entitled unless it can be inferred who are the particular

members intended, in which case the Court holds those children entitled to the exclusion of the others. This rule, gathered from the judgment of Sir G. Jessel in *Newman v. Piercey*, 4 C. D. 41, was based by him largely on the rule as stated in *Hawkins on Wills*, p. 62. Vice-Chancellor Wood in *Wrightson v. Calvert*, 1 J. & H. 250, states the principle thus: "The principle of the earlier cases on this subject was to avoid an intestacy by reason of uncertainty. If there is a gift to the two children of A. when A. in fact has three children, you must either act upon the general intent to benefit the class and treat the statement of the number as a mistake, or else the gift must be void

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SECTION III.

Of Specific Legacies.

Of legacies there are two kinds: a general legacy and a specific legacy. A legacy is "general" when it is so given as not to amount to a bequest of a particular thing or money of the testator, distinguished from all others of the same kind: A legacy is "specific" when it is a bequest of a *specified* part of the testator's personal estate which is so distinguished (b).

General legacies.

Specific legacies.

for uncertainty, it being impossible to say which two out of the three are to take." Sir G. Jessel points out in *Newman v. Piercey* (*ubi sup.*) that this rule is rather too wide without the qualification, "unless there is some evidence to enable the Court to find out who are meant."

The existence of a child "*en ventre sa mère*" does not make the number of children uncertain within the meaning of this rule where the number of living children at the date of the Will is correctly stated, so as to give a child "*en ventre sa mère*" a right to be included in the class. *Re Emery's Estate*, 3 C. D. 300.

(b) The fact, however, that a specific legacy is given or a specific part of the personalty excepted out of a general residue does not make a gift of that general residue specific. *Re Ovey*, 20 C. D. 676. In *Bothamley v. Sherson*, L. R. 20 Eq. 304, 308, 309, Jessel, M. R., defines a specific legacy as follows:—"In the first place it is a part of the testator's property; in the next place it must be a part emphatically as distinguished from the whole: it must be what has been sometimes called a severed

or distinguished part: it must not be the whole in the meaning of being the totality of the testator's property, or the totality of the general residue of his property after having given legacies out of it. If it satisfy both conditions that it is a part of the testator's property itself, and is a part as distinguished from the whole, or from the whole of the residue, then it appears to me to satisfy everything that is required to treat it as a specific legacy." This definition was referred to and repeated by the same learned Judge in a later case. *Re Ovey*, 20 C. D. 676, 681, in which case, upon appeal to the House of Lords (*sub nom. Robertson v. Broadbent*, 8 App. Cas. 812), Lord Selborne, L. C. (with the expressed approval of Lord Blackburn) defined a specific legacy as "something which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed in the state and condition indicated by that description, separates in favour of a particular legatee from the general mass of his personal estate." See also *Giles v. Melsom*, L. R. 6 H. L. 24.

Thus, for example, "I give a diamond ring," is a general legacy, which may be fulfilled by the delivery of any ring of that kind; while "I give the diamond ring presented to me by A.," is a specific legacy, which can only be satisfied by the delivery of the identical subject. Again, if the testator, having many brooches or horses, bequeath "a brooch" or "a horse" to B.; in these cases the legacy is general. But a bequest of "such part of my stock of horses which A. shall select, to be fairly appraised, to the value of 800*l*." (c), or of "all the horses which I may have in my stable at the time of my death" (d), is specific.

Distinction
between gene-
ral and specific
legacies.

The distinction between these two sorts of legacies is of the greatest importance: for, as it will hereafter more fully appear, if there be a deficiency of assets, a specific legacy will not be liable to abate with the general legacies; while, on the other hand, if the specific legacy fail by the ademption or inadequacy of its subject, the legatee will not be entitled to any recompense or satisfaction out of the general personal estate. So that, though specific legacies have in some respects the advantage of those that are general, yet in other respects they are distinguished from them to their disadvantage (e).

Again, if there be a specific bequest of a thing described as already in existence, and no such thing ever did exist among the testator's effects, the legacy fails: Thus, although a gift of "my grey horse" will pass a black horse, which is not strictly grey, if it be found to have been the testator's intention that it should pass by that description; yet if the testator had no horse, the executor is not to buy a grey one (f): On the other hand, if the bequest is of "a horse," and no horse be found in the testator's possession at the time of his death,

(c) *Richards v. Richards*, 9 Price, 226.

(d) *Fontaine v. Tyler*, 9 Price, 98, by *Richards*, C. B. See also *Stephenson v. Dowson*, 3 Beav.

349, per Lord Langdale.

(e) *Ashton v. Ashton*, 5 P. Wms.

315, by Lord Talbot, C.

(f) *Evans v. Tripp*, 6 Madd. 92.

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the executor is bound, provided the state of the assets will allow him, to procure a horse for the legatee (*g*).

It seems to have been once considered as the criterion of a specific legacy, that it is liable to ademption (*h*). But this has since been repeatedly denied (*i*). And it has even been held that a legacy may be specific, notwithstanding the testator expressly provides that it "shall not be deemed specific, so as to be capable of ademption" (*j*).

A legacy of quantity is ordinarily a general legacy: but there are legacies of quantity *in the nature of* specific legacies, as of so much money, with reference to a particular fund for payment. This kind of legacy is called by the civilians a *demonstrative legacy* (*k*); and it is so far general, and differs so much in effect from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets (*l*); yet the legacy is so far specific, that it will not be liable to abate with *general* legacies upon a deficiency of assets (*m*).

Bequests in the nature of specific legacies, or demonstrative legacies.

(*g*) See *Bronsdon v. Winter*, Amb. 57.

(*h*) *Parrott v. Worsfold*, 1 Jac. & Walk. 601, *post*, p. 1028. See also the observations on this case by Jessel, M. R., in *Bothamley v. Sherson*, L. R. 20 Eq. 304, 309, 310.

(*i*) See *post*, p. 1028.

(*j*) *Jacques v. Chambers*, 2 Coll. 435.

(*k*) "If the testator doe devise tenne quarter of corne coming of the corne which shall growe in such a soyle, or two tunnes of wine of his grapes in such a vineyard, or tenne lambs of such a flocke, though so much corne, or wine, or so many lambs doe not arise of the things abovesaid, yet the heire or executor is compellable by law to make them good

integraliter; because he may seeme to have mentioned the soyle, the vineyard, and the flocke, rather by way of *demonstration* than by way of condition." Fulbecke's Parallele, p. 37, Edition, 1618.

(*l*) *Mann v. Copeland*, 2 Madd. 223. *Fowler v. Willoughby*, 2 Sim. & Stu. 358. *Wilcox v. Rhodes*, 2 Russ. Chanc. Cas. 445. *Creed v. Creed*, 11 Cl. & F. 491, 509, by Lord Cottenham. *Tempest v. Tempest*, 7 De Gex, M. & G. 470, 473, *per* Lord Cranworth.

(*m*) *Livesay v. Redfern*, 2 Y. & C. 90. *Robinson v. Geldard*, 3 Mac. & G. 744, 745. *Tempest v. Tempest*, 7 De Gex, M. & G. 473, by Lord Cranworth. *Mullins v. Smith*, 1 Dr. & Sm. 204. See also, for further instances of demonstrative legacies, Williams

The Courts in general are averse from construing legacies to be specific: and the intention of the testator, with reference to the thing bequeathed, must be clear (*n*). Having thus premised, it may be advisable to consider some instances in which legacies have been held to be specific, with reference to—1. Money, securities for money, debts, &c.: 2. Bequests connected with the realty: 3. Bequests contained in a residuary clause.

1. Legacies of money, securities for money, debts, &c.: money:

1st. Legacies of money, securities for money, debts, &c. Under some circumstances, even pecuniary legacies are held to be specific; as of a certain sum of money in a certain bag or chest (*o*), or in the hands of A. (*p*); or of 200*l.*, the balance due to the testator from his partner on the last settlement between them, *if the testator did not draw such money out of the trade before he died* (*q*). But a legacy of "400*l.* to be paid to A. in cash," is a general legacy (*r*). So a legacy of money, to procure a specified object for the legatee: as of a sum to buy a ring (*s*), or to purchase lands (*t*) or government securities (*u*) for the legatee, is a general legacy. So a bequest of an annuity out of, or charged on, the personal estate is a general legacy (*v*).

A money legacy will not be rendered specific, by its payment being postponed until a particular investment of a fund

v. Hughes, 24 Beav. 474. *Paget v. Huish*, 1 Hemm. & M. 663. *Jones v. Southall*, 32 Beav. 31. *Bevan v. Att.-Gen.*, 4 Giff. 361. *Disney v. Crosbie*, L. R. 2 Eq. 592. *Hodges v. Grant*, L. R. 4 Eq. 140.

(*n*) *Ellis v. Walker*, Ambl. 310. *Kirby v. Potter*, 4 Ves. 748. *Innes v. Johnson*, 4 Ves. 568. *Webster v. Hale*, 8 Ves. 413. *Sayer v. Sayer*, 7 Hare, 377.

(*o*) *Lawson v. Stitch*, 1 Atk. 508.

(*p*) *Crocket v. Crocket*, 2 P. Wms. 164.

(*q*) *Ellis v. Walker*, Ambl. 310.

(*r*) *Richards v. Richards*, 9

Price, 226.

(*s*) *Apreece v. Apreece*, 1 Ves. & Beam. 304.

(*t*) *Hint v. Blake*, 1 P. Wms. 539.

(*u*) *Lawson v. Stitch*, 1 Atk. 507. So a direction to invest so much money as will produce a certain amount of stock is a pecuniary legacy: *Edwards v. Hall*, 11 Hare, 23.

(*v*) *Alton v. Medicott*, cited in *Lewin v. Lewin*, 2 Ves. Sen. 417. *Creed v. Creed*, 11 Cl. & F. 491 508, by Lord Cottenham. See further, *post*, p. 1220.

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(*x*) *Sadler v. Raymond* v.

(*y*) *Kirkp* cited in Rol 158.

(*z*) See *G Kay & J. 34* the Wills Act, "a particular thing is bequeathed as horse," the which the 2d refers, appears Will, and the date of its execution bequest is of—not that which or diminish

takes place; as where the bequest is to A. and B. of 1,000*l.* each, "which legacies I direct to be *paid* so soon as my property in India shall be realized in England" (x); in which case the legatees are entitled to satisfaction, although all the property in India belonging to the testator should have been transmitted to England in his lifetime. So where sums of money are bequeathed by a testator, who has property in England and India, to persons resident in each place, with a direction that they shall be paid out of the assets in the respective countries, such a direction will not constitute the legacies specific (y).

Stock, or government securities, or shares in public companies, may be specifically bequeathed, where, to use the expression often applied, there is a clear reference to the "*corpus*" of the fund. Thus, the word "*my*" preceding the word "*stock*" or "*annuities*" has been held sufficient to render the legacy specific, so as only to pass (before the Wills Act) the property of that description which belonged to the testator at the date of his Will (z): as where the bequest is of "*my capital stock of 1,000*l.* in the India Company's stock*" (a): or a legacy is given "*of my stock,*"

stocks, shares,
&c.

(x) *Sadler v. Turner*, 8 Ves. 617. *Raymond v. Broadbent*, 5 Ves. 199.

(y) *Kirkpatrick v. Kirkpatrick*, cited in *Roberts v. Pocock*, 4 Ves. 158.

(z) See *Goodlad v. Burnett*, 1 Kay & J. 341. In cases to which the Wills Act applies, if a particular thing is referred to and bequeathed as "*my ring*" or "*my horse*," the contrary intention to which the 24th Section of the Act refers, appears (as it seems) by the Will, and the Will speaks from the date of its execution, but when the bequest is of that which is generic—or that which may be increased or diminished—the Act requires

something more on the face of the Will for the purpose of indicating such contrary intention than the mere circumstance that the subject of the bequest is designated by the pronoun "*my*." *Ibid.* p. 348, by Wood, V.-C. *Post*, p. 1301. See *Drake v. Martin*, 23 Beav. 89, *note*, as to such a bequest since the Wills Act. Legacies, which before the passing of the Wills Act would have been specific, remain specific. *Bothamley v. Sherson*, L. R. 20 Eq. 304.

(a) *Ashburner v. M'Guire*, 2 Bro. C. C. 108. *Barton v. Cooke*, 5 Ves. 461. *Norris v. Harrison*, 2 Madd. 279, 280.

or in "my stock," or "part of my stock" (b), or "my shares in the Grand Junction Canal Navigation Company" (c), or of "all my stock in the Midland Railway Company" (d), or where a life interest is given in "the whole of the remainder of my dividends" (e). So where the testator, being possessed of 5,000*l.* stock, bequeathed "all the stock which I have in three per cents., being about 5,000*l.*," Lord Thurlow held the legacy specific (ee).

But in *Parrott v. Worsfold* (f), where a testator, reciting that he had 1,500*l.* five per cents., gave it to A., and then gave to B. all other *his* stocks that he might be possessed of at the time of his death: Sir Thomas Plumer, M. R., held that the latter bequest was not specific; for that the gift comprehended all the stock that he might subsequently acquire, and if he had sold out and bought more, that would have been included (g); and his Honor observed, that although the word "my" is evidence of the legacy being specific, where the particular stock is also referred to, yet it is not enough alone. So in *Dummer v. Pitcher* (h), a testator, before making his Will, transferred two sums of four per cents. and five per cents., which were then the whole of his funded property, into the joint names of himself and his

(b) *Kirby v. Potter*, 4 Ves. 750, 751, by Lord Alvanley. *Davies v. Fowler*, L. R. 16 Eq. 308.

(c) *Miller v. Little*, 2 Beav. 259. *Measure v. Carleton*, 30 Beav. 538. The word "my" is not required to make a gift specific: *Hosking v. Nicholls*, 1 Y. & C. C. 478. *Vaughan v. Buck*, 1 Phil. 75. It seems doubtful whether the word "now" is sufficient: *Cole v. Scott*, 1 Mac. & G. 518. *Page v. Young*, L. R. 19 Eq. 501. An instruction to *sell* for the benefit of the legatee has been held sufficient: *Ashton v. Ashton*, 3 P. Wms. 384; but a direction to transfer the sum of

1,000*l.* consols was held not sufficient: *Sibley v. Perry*, 7 Ves. 522.

(d) *Bothamley v. Sherson*, L. R. 20 Eq. 304.

(e) *Vincent v. Newcombe*, 1 Younge, 599.

(ee) *Humphreys v. Humphreys*, 2 Cox, 184. See also *Cockran v. Cockran*, 14 Sim. 343. *Kampf v. Jones*, 2 Keen, 756. *Shuttleworth v. Greaves*, 4 M. & C. 35. *Gordon v. Duff*, 28 Beav. 519.

(f) 1 Jac. & Walk. 594.

(g) But see *post*, p. 1028.

(h) 5 Sim. 36; 2 Mylne & K. 262.

wife: By funded property trust for (amongst cent. stock description v. of his estate sums of five and died is mentioned to pay his V.-C., and her husband's ship, to the transferred before bequest of specific, or party, to pay So in *Authentic* standing in as the contents words as directed the sum its

It must be the testator's or larger amount specific, whether or of stock

(i) See also 15 Beav. 131.

(j) 13 Sim.

(k) The gift of stock specific smaller: *Ash v. Wms.* 384. P. 19 Eq. 501, & generally will *Sutton*, 15 Ves.

wife: By his Will he gave his leasehold houses and all his funded property or estate of what kind soever, to trustees, in trust for his wife for life, and after her decease, in trust (amongst other things) to pay certain legacies of four per cent. stock, amounting within 50^{l.}, to the stock of that description which he had so transferred; and he gave the residue of his estate to A. and B.: He afterwards purchased further sums of five per cents. in the names of himself and his wife, and died in her lifetime, having no stock except that before-mentioned, exclusive of which his property was not sufficient to pay his legacies: And it was held by Sir L. Shadwell, V.-C., and afterwards by Lord Brougham, that the wife, on her husband's death, became absolutely entitled, by survivorship, to the stock standing in the joint names, whether transferred before or after the date of the Will; and that the bequest of the testator's funded property was not sufficiently specific, or pointing to the stock which thus became her property, to put her to her election to take under the Will (i). So in *Auther v. Auther* (j), a legacy of 10,000^{l.} consols "now standing in my name," was held not to be specific; inasmuch as the context showed that the testator meant to use the words as designating the value of 10,000^{l.} consols, and not the sum itself.

It must further be observed that the mere possession by the testator, at the date of his Will, of stock, &c., of equal or larger amount than the legacy, will not make the bequest specific, when it is given *generally* of stocks or annuities (k), or of stocks or annuities *in particular funds* (l), without

(i) See also *Laurie v. Clutton*, 15 Beav. 131, 144.

(j) 13 Sim. 422.

(k) The gift of a larger sum of stock specifically will pass a smaller: *Ashton v. Ashton*, 3 P. Wms. 384. *Page v. Young*, L. R. 19 Eq. 501, 507; but the excess generally will not pass: *Hotham v. Sutton*, 15 Ves. 319; that is, unless

the Court think that the smaller figure was a mistake for the larger.

(l) *Simmons v. Vallance*, 4 Bro. C. C. 345. *Webster v. Hale*, 8 Ves. 410. *Sibley v. Perry*, 7 Ves. 523, 529, 530. *Wilson v. Brownsmith*, 9 Ves. 180. *Re Gray*, 36 C. D. 205. But see *Avelyn v. Ward*, 1 Ves. Sen. 424. As to the

further explanation: for the testator might mean only to direct his executor to purchase with his general estate so much stock, &c., in the fund described; and therefore that clear intention, which (as it has before been observed) (*m*) is requisite for making a legacy specific, does not here exist (*n*). If, indeed, it clearly appears from the context, that the testator meant to bequeath the *identical* stock, &c., he was possessed of at the date of the Will, such manifest intention will render the legacy specific, although the testator has not *expressly* declared such intention, nor expressly referred to the stock: Thus, if a person having 1,000*l.* three per cent. consols, bequeath 1,000*l.* three per cent. consols to trustees, in trust to *sell* for the benefit of the legatee, the bequest will be specific; the intention being manifest, not conjectural, from the direction to *sell* three per cent. consols, that the testator referred to the stock he *then* had (*o*).

In *Hayes v. Hayes* (*p*), a testator gave to his wife, Fanny Hayes, the interest of all his property in the public funds during her life, the principal being placed in the names of the undermentioned trustees for that purpose; and he also gave to his wife all his other property which he might be possessed of at his decease, after paying his funeral expenses and debts, part of his funded property being applied for that purpose, if necessary: On the death of his wife he gave to his daughter, Jane Hayes, 200*l.* stock three per cent. reduced annuities, and to two other persons, 50*l.* three per cent. reduced annuities respectively, and to his son the residue of his

possession of stock to the particular amount mentioned in the bequest and no more, see *Jeffreys v. Jeffreys*, 3 Atk. 120.

(*m*) *Ante*, p. 1022.

(*n*) See further illustrations of the same principle applied to India Bonds, in *Sleech v. Thorington*, 2 Ves. Sen. 562, 563. *Gillaume v. Adderley*, 15 Ves. 385, 389; and to canal shares, in *Robinson v.*

Addison, 2 Beav. 515.

(*o*) *Ashton v. Ashton*, Cas. temp. Talb. 152. *Simmons v. Vallance*, 4 Bro. C. C. 348. For a further instance, see *Sleech v. Thorington*, 2 Ves. Sen. 561, 564. See also *Mullins v. Smith*, 1 Dr. & Sm. 204. *Hill v. Hill*, 11 Jur. N. S. 806. *Page v. Young*, L. R. 19 Eq. 501.

(*p*) 1 Keen, 97.

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property, after paying those legacies: And he appointed two persons his executors and trustees: At the date of his Will the testator had 700*l.* three per cent. reduced annuities, but he afterwards sold out that stock and invested part of the produce on mortgage: It was held by Lord Langdale, M. R., that the gift to Fanny Hayes of the interest of the testator's property in the funds was specific, and was consequently adeemed by the sale of the stock, but that the other legacies were general, and that Fanny Hayes took only a life interest in the testator's residuary estate.

Again, when a legacy is given out of a particular stock, of which the testator was possessed at the date of the Will, without anything expressive of the testator's intention, as where the bequest is of "1,000*l.* out of my reduced bank annuities three per cents.," the legacy will not be specific (*q*), but a demonstrative legacy as above described (*r*). Where, indeed, a clear intention appears, upon other parts of the Will, that the testator intended to bequeath so much of the identical stock or annuities which he had, the legacy will be considered specific (*s*).

(*q*) Kirby v. Potter, 4 Ves. 748. Deane v. Test, 9 Ves. 146, 152. "If," said Lord Alvanley, M. R., in Kirby v. Potter (*ubi sup.*), "the legacy given had been 'of my stock' or 'in my stock' or 'part of my stock,' I should have held it clearly a specific gift of an aliquot part of the stock." And where there was a bequest of 500*l.* consols out of my 3 per cent. consols the legacy was held to be specific. (Mullins v. Smith, 1 Dr. & S. 204.) So also in Fosking v. Nicholls, 1 Y. & C. C. C. 478, where the testator by his Will gave to trustees 4,000*l.* capital stock in the 3 per cent. consolidated bank annuities or "in whatever of the government funds the same should be found invested" upon trust to assign and

transfer the capital stock of 4,000*l.* unto and among the persons mentioned, the legacy was held to be specific, and the Vice-Chancellor said, "If the testator had meant to give a general legacy he would probably have said no more than that he gave 4,000*l.* consols, but he does more than that; he bequeaths 4,000*l.* in the 3 per cent. consols or in whatever government funds the same shall be found invested." See also Davies v. Fowler, L. R. 16 Eq. 308.

(*r*) *Ante*, p. 1021. Rogers v. Clarke, 1 Coop. 376. So, where the testator gives an annuity "from my funded property:" Attwater v. Attwater, 18 Beav. 330.

(*s*) Drinkwater v. Falconer, 2 Ves. Sen. 623. Morley v. Bird, 3

So where a certain sum is given, and the stock, &c., in which it is invested, at the time of making the bequest, is described in the Will, that circumstance alone will not make the legacy specific: As, where the bequest is "to B., the sum of 12,000*l.* of my *funded* property, to be transferred in his name, or as it shall appear most beneficial for his interest, by my executor (t)."

But there is, it seems, a distinction between a bequest of *money* out of stock, and a bequest of *stock* out of stock. Thus where a testatrix bequeathed the sum of 4,000*l.* capital stock in the 3*l.* per cent. consols, or in whatever of the government funds the same shall be found invested, it was held by K. Bruce, V.-C., that this was a specific legacy (u).

In *Parrott v. Worsfold* (x), Sir Thomas Plumer appeared to be of opinion, that a Will made now cannot contain a specific bequest of what may be bought hereafter; and he observed, that the ordinary criterion of a specific bequest is, that it is liable to ademption (y). But in a later case it was determined, that there may be a specific bequest of stock, of which a testator is not possessed, at the making of his Will, but of which he *may* be possessed *at his death* (z). So where a testator bequeathed the dividends, &c., of all stocks he should be entitled to, at the time of his decease, in the public funds: and he had 10,000*l.* consols at his

Ves. 628, 631. See *Townsend v. Martin*, 7 Hare, 471.

(t) *Lambert v. Lambert*, 11 Ves. 607. See also for another instance, *Gillaume v. Adderley*, 15 Ves. 885; and see further, *Le Grice v. Finch*, 3 Meriv. 50. *Oliver v. Oliver*, L. R. 11 Eq. 506. *Mytton v. Mytton*, L. R. 19 Eq. 30.

(u) *Hosking v. Nicholls*, 1 Y. & Coll. C. C. 478.

(x) 1 Jac. & Walk. 601. *Ante*, p. 1024.

(y) See also *Howe v. Lord Dart-*

mouth, 7 Ves. 147, 148, by Lord Eldon. As to the true test, see the judgment of Lord Cottenham in *Bethune v. Kennedy*, 1 M. & C. 114.

(z) *Fontaine v. Tyler*, 9 Price, 94. *Queen's College v. Sutton*, 12 Sim. 521. See also the judgment of Lord Cottenham, in *Bethune v. Kennedy*, 1 M. & C. 114, and the judgment of Sir G. Jessel, M. R., in *Bothamley v. Sherson*, L. R. 20 Eq. 304.

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death: it was held that this was a specific bequest of that sum (a).

It has been decided, after much consideration, that evidence of the state of the funded property of the testator may be resorted to, in order to determine whether a bequest of stock is specific or pecuniary. In the *Attorney-General v. Grote* (b), a legacy of "100l. Long Annuities Stock," was held by Lord Eldon (reversing the decision of Sir W. Grant) (c), to be pecuniary and not specific; his Lordship coming to that conclusion upon the context of the Will and the terms of the gift, as compared with those of the other bequests, and upon evidence of the state of the funded property. Again, in *Boys v. Williams* (d), a testatrix, by a codicil, gave "to A. and M. 50l. each of Bank Long Annuities now standing in my name:" At the date of the codicil and at her death, she possessed Long Annuities sufficient to answer this bequest specifically, but not also to satisfy certain legacies charged by the other testamentary papers upon the same stock: Evidence as to the state and value of the testatrix's property in the funds at those respective times was admitted by Lord Brougham (reversing the decision of Sir L. Shadwell, V.-C.) (e). On the effect of that evidence, and the language of the testamentary papers taken together, the bequests to A. and M. were held by his Lordship not to be specific, but mere pecuniary legacies, intended to be charged on the stock in question (f).

Admissibility of evidence as to whether bequests of stock are specific.

A debt due to the testator may be specifically bequeathed: Debts and securities.

(a) *Stephenson v. Dowson*, 3 Beav. 342.

(b) 2 Russ. & M. 699. But evidence of declarations of the testator of his intentions is not admissible: *Horwood v. Griffith*, 4 De G. M. & G. 700. See *post*, p. 1069.

(c) 3 Meriv. 316.

(d) 2 Russ. & M. 689.

(e) 3 Sim. 563.

(f) See also *Collison v. Curling*, 9 Cl. & F. 88. *Warren v. Postlethwaite*, 2 Coll. 116, 121. *Innes v. Sayer*, 3 Mac. & G. 606. *Horwood v. Griffith*, 4 De Gex, M. & G. 700.

as where there is a bequest of "the money now owing to me from A." (g), or "the money due to me on the bond of A," or "my mortgage" (h), or "the interest of 7,000*l.* secured on mortgage of an estate at W., in the county of N., belonging to R. T." (i), or "my East India Bonds" (k), or "my note owing from A." (l): Or where the testator, *reciting that he is possessed* of about 7,000*l.* Navy Bills, gives the same to his executor, to receive the interest, and lay out the same in the funds, to such uses as his daughter shall appoint (m). So where the testator bequeathed to his sister "the interest arising from her husband's bond to me for principal 3,500*l.* sterling for life, to her separate use, amounting to 175*l.* sterling per annum," and on the decease of his sister, the principal of the said bond to her four daughters, to be equally divided amongst them: Lord Thurlow decided that the bond was specifically given (n).

Again, where the bequest was "to my granddaughter the sum of 40*l.*, being part of a debt due to me for rent from A., she allowing what charges shall be expended in getting the same: Item, I bequeath to my grandsons, C. and D., the rest and residue of what is due to me from the said A., which is about 40*l.* more, in equal shares, and they allowing charges

(g) *Ellis v. Walker*, Amb. 309. *Duncan v. Duncan*, 27 Beav. 386.

(h) *Sidebotham v. Watson*, 11 Hare, 170. But where a sum of money is given, and the mortgage is merely mentioned as descriptive of the then situation of the money, the legacy is general: *Le Grice v. Finch*, 3 Meriv. 50.

(i) *Gardner v. Hatton*, 6 Sim. 93.

(k) *Sleech v. Thorington*, 2 Ves. Sen. 562, 563.

(l) *Drinkwater v. Falconer*, 2 Ves. Sen. 622. So where the

legacy is of "all such sums of money as my executors may, after my death, receive on the interest note given to me by Messrs. C., bankrupts, &c.," it is specific: *Fryer v. Morris*, 9 Ves. 360.

(m) *Pitt v. Camelford*, 3 Bro. C. C. 160.

(n) *Ashburner v. M'Guire*, 2 Bro. C. C. 108. This case has been followed by *Chaworth v. Beech*, 4 Ves. 555. *Innes v. Johnson*, 4 Ves. 568. *Stanley v. Potter*, 2 Cox, 180. But see *Coleman v. Coleman*, 2 Ves. 639.

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(o) *Forde* Abr. 302.

(p) *Nelson* See also H. 171.

(q) *Davies* 405.

(r) *Antony Graham*, bequest of my share gaged in was held

as aforesaid : " these were held specific legacies (*o*). So a legacy of " 1,000*l.* being some part of moneys received from my debtor, Mrs. A. G., deceased, but not remitted to me," was held specific (*p*). So a gift to A. B. of " the sum of 100*l.*, which said sum is owing to me by bond from her father," was held to be a specific, and not a demonstrative legacy (*q*).

But where a legacy is bequeathed out of a debt it will not, generally speaking, be a regular specific legacy, but a bequest, in the nature of a specific legacy, or a demonstrative legacy, according to the distinctions already stated, with regard to legacies out of a particular stock (*r*). Such legacies, therefore, are, in one sense only, specific, viz., that against all other general legatees they have a precedency of payment out of the debt or security : but in another sense they are general, since, if the debt be not in existence at the testator's death, or if it be insufficient to pay the legacies, the legatees will be entitled to satisfaction out of the general estate of the testator (*s*). This general rule is obviously, as in the case of a legacy out of stock, subject to be controlled by the manifest intention of the testator to bequeath so much of the identical debt (*t*).

The income arising from personalty specifically bequeathed is not apportionable under the Apportionment Act, 1870 (*tt*), as between the specific legatee and the estate of the testator (*u*).

2. Bequests connected with the realty. Every devise of

2. Bequests connected with the realty.

(*o*) *Ford v. Fleming*, 1 Eq. Cas. Abr. 302, pl. 3.

(*p*) *Nelson v. Carter*, 5 Sim. 530. See also *Basan v. Brandon*, 8 Sim. 171.

(*q*) *Davies v. Morgan*, 1 Beav. 405.

(*r*) *Ante*, p. 1027. *Campbell v. Graham*, 1 Russ. & M. 453. A bequest of 10,000*l.* sterling " being my share of the capital now engaged in the banking business," was held by Romilly, M. R., to be

a demonstrative legacy : *Sparrow v. Josselyn*, 16 Beav. 135.

(*s*) For examples, see *Roberts v. Pocock*, 4 Ves. 150. *Smith v. Fitzgerald*, 3 Ves. & Beam. 5. *Acton v. Acton*, 1 Meriv. 178. *Ante*, p. 1021, note (*k*).

(*t*) *Badrick v. Stevens*, 3 Bro. C. C. 431.

(*tt*) 33 & 34 Vict. c. 35.

(*u*) *Whitehead v. Whitehead*, L. R. 16 Eq. 528.

land is specific (*x*); and so a bequest of a lease for years of a farm (*y*), or of tithes (*z*), is a specific legacy.

So a bequest of a rent out of a term of years is specific: as where the testator bequeathed 40*l.* a year to A. for life, out of his chattel estate at Kenn, and 10*l.* a year to B. for life, out of the same estate, which he gave to C.; these several bequests were held specific (*a*). But if it be apparent that the testator's meaning is to give the legatee an annuity at all events, the legacy will be a general one, though it is directed to be paid out of an estate or the rents of it; consequently, though the fund, out of which the legacy is directed to be paid, should fail the legatee will be entitled to have his legacy made good out of the general personal estate (*b*).

So if, instead of an annuity, a gross sum be given out of a term or estate, it would seem that such bequest would operate as a charge only on the property and be considered as a demonstrative legacy. The gift of so much money, intended for the legatee at all events, with a fund (the estate) particularly referred to for its payment; so that if the estate be not the testator's property at his death, the legacy will not fail, but be payable out of his general assets (*c*). This is another instance of a bequest in the nature of a specific legacy, or a demonstrative legacy.

(*x*) *Forrester v. Leigh*, AmbL. 173. It was at one time supposed that since the Wills Act (1 Vict. c. 26), a residuary devise of real estate is not specific: *Dady v. Hartridge*, 2 Dr. & Sm. 236; but it is now established that a residuary devise ranks for the purpose of payment of debts *pari passu* with specific devises. See *post*, p. 1565, and the cases cited in note (*h*).

(*y*) *Long v. Short*, 1 P. Wms. 403.

(*z*) *Rudstone v. Anderson*, 2

Ves. Sen. 418. *Hone v. Medcraft*, 1 Bro. C. C. 263.

(*a*) *Long v. Short*, 1 P. Wms. 403; and see the extract from Reg. Lib. in Cox's note. See also *Creed v. Creed*, 11 Cl. & F. 508, by Lord Cottenham.

(*b*) *Mann v. Copeland*, 2 Madd. 223. *Vickers v. Pound*, 6 H. L. C. 885.

(*c*) *Savile v. Blacket*, 1 P. Wms. 778. *Fowler v. Willoughby*, 2 Sim. & Stu. 354. *Livesay v. Redfern*, 2 Y. & Coll. 90.

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Accordingly in the case of *Willox v. Rhodes* (*d*), a testator gave a number of legacies, adding, "I guarantee my estate at C. for the payment of the above legacies;" and in the subsequent part of his Will he gave many other legacies: It was holden, that the first class of legacies were not specific, and, failing the estate at C., were to be borne by the general personal estate (*e*).

But though general legacies do not become specific because they are charged upon, or payable out of the proceeds of real estate, yet if the testator direct his freehold or leasehold estates to be sold, and dispose of the proceeds in such a form as to evince an intention to bequeath them specifically, the legacy will be properly specific (*f*). So if a testator simply charges his real estate with a sum of money, and then bequeaths the money so charged, the real estate alone is liable to the payment (*g*). Again, if annuities are given as specific interests in the real estate, they will not be affected by a general charge of legacies: and if the land be sold for the payment of the legacies, it must be sold subject to the annuities; or if sold discharged of them, the proceeds must be subject to the same liability, inasmuch as such annuities are, as to the real estates, entitled to priority over the legacies (*h*).

(*d*) 2 Russ. Chanc. Cas. 452.

(*e*) See *Accord*. *Creed v. Creed*, 11 Cl. & F. 510, by Lord Cottenham.

(*f*) *Page v. Leapingwell*, 18 Ves. 463. *Williams v. Hughes*, 24 Beav. 474. The authority of *Page v. Leapingwell* (*ubi sup.*) applies where the testator disposes of an estate which he assumes will produce a given sum or of an ascertained fund, in which case it is indifferent whether after he has given certain portions he specifies the remainder by stating its amount, or by comprising it under

the term of "residue:" *Petre v. Petre*, 14 Beav. 197. *Elwes v. Causton*, 30 Beav. 554, 555. *Walpole v. Apthorp*, L. R. 4 Eq. 37, but does not apply where the testator does not know the amount of the fund, nor could be taken to have acted on a conception of it. *De Lisle v. Hodges*, L. R. 17 Eq. 440.

(*g*) *Dickin v. Edwards*, 4 Hare, 273, 276. See also *Williams v. Hughes*, 24 Beav. 474, 480.

(*h*) *Spong v. Spong*, 3 Bligh, N. S. 84. *Creed v. Creed*, 11 Cl. & F. 491, 507. *Conron v. Conron*, 7 H. L. C. 168.

3. Bequests contained in a residuary clause :

bequest of general personal estate :

3. Bequests contained in a residuary clause : The question, whether such bequests are specific or general, may become important, where it is contended that the bequest is specific, so as to exonerate the personal estate, which is the subject of it from debts and legacies, and charge the realty therewith (i) ; or where the personal estate so bequeathed comprises property which is wearing out rapidly (such as leaseholds or Long Annuities), and it is given to one for life, remainder to another.

The bequest of all a man's personal estate generally is not specific : the very terms of such a disposition demonstrate its generality (k). And the circumstance of the bequest of the general personal estate being in the same sentence with that of the real, the devise of which is naturally specific, will not be sufficient to make it a specific legacy (l).

But if a man having personal property at A. and elsewhere, bequeath all his personal estate at A. to a particular person, the legacy is specific ; and if there is a deficiency of assets to pay other legacies, such a legatee shall not be obliged to abate with the other legatees (m). So where the testator bequeaths the residue of all his personal estate in the *Island of Jamaica*, this is a specific legacy (n) : and so is a bequest of all the testator's goods and chattels in a particular county (o).

(i) See *post*, p. 1564 *et seq.*

(k) *Fairer v. Park*, 3 C. D. 309. *Ouseley v. Anstruther*, 10 Beav. 543. Compare *Shepherd v. Beetham*, 6 C. D. 597. In *Jones v. Bruce*, 11 Sim. 221, 228, Sir L. Shadwell said that the gift of the whole personal estate was as specific as if the testator had enumerated every chattel and then said "I give them to my wife." That dictum (which was not necessary for the decision) is disapproved by Lord Selborne in *Robertson v. Broadbent*, 8 App. Cas. 812, 816.

(l) *Howe v. Lord Dartmouth*, 7

Ves. 138.

(m) *Treat. Eq. B. 4, Pt. 1, Ch. 2, s. 5. Sayer v. Sayer*, 2 Vern. 688.

(n) *Nisbett v. Murray*, 5 Ves. 150. See also *Robinson v. Webb*, 17 Beav. 260.

(o) *Moore v. Moore*, 1 Bro. C. C. 127. So of all the goods in a particular room : *Green v. Symonds*, 1 Bro. C. C. 129, *in notis* : or of "all plate, linen, and furniture in my house at A., or which shall be therein at the time of my decease : " *Gayre v. Gayre*, 3 Vern. 538. *Shaftesbury v. Shaftesbury*, *ibid.* 747. *Land v. Davaynes*, 4 Bro. C. C. 537.

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A general residuary clause is not the less general because it contains an enumeration of some of the particulars of which it may consist (*p*). Nor does the fact that a specific legacy is given or a specific part of the personalty excepted out of a general residue, make a gift of that general residue specific (*q*). But cases of this kind obviously depend on the construction of the particular Will in which the gift is found: And sometimes where there has been an enumeration of items coupled with a gift of the general personal estate, the particular items have been held not to be included in the general personal estate, but to be disposed of specifically (*r*). In *Bethune v. Kennedy* (*s*), the Will of Charlotte Peyton was as follows, "I give and bequeath to my cousin, Henry Van Bodicoate, 100*l*. transfer stock in the Long Annuities; the like sum to my goddaughter, Cumberbatch Charlotte Forth: the residue of my property, all I do or may possess in the

residuary clause containing an enumeration of particular things:

(*p*) *Taylor v. Taylor*, 6 Sim. 246. *Pickup v. Atkinson*, 4 Hare, 628. *Sutherland v. Cooke*, 1 Coll. 502. In *Clarke v. Butler*, 1 Meriv. 304, the testator bequeathed as follows: "As to all that my leasehold house in L—, and all my household goods and furniture there and at S—, and as to all my plate, linen, china, pictures, live and dead stock, and all the residue of my goods, chattels, and personal estate, &c., I give and bequeath the same to A.:" By a codicil he revoked the bequest "of the residue" to A., and gave "the residue of his said personal estate" to B.: And Sir W. Grant, M. R., held that the gift of the general residue only, and not of the articles enumerated, was revoked by this codicil. This case was distinguished from that of *Taylor v. Taylor*, *ubi sup.*: by Sir L. Shadwell, in giving his

judgment in the latter, inasmuch as, in the one Will the gift was divided into two distinct sentences, and the judgment as to all the things not connected with the leasehold house, though given in a weak form, was supported by the gift in the second codicil: whereas, in the other Will, there was no division of the sentence, and the things specifically named could not be separated from those given in general terms.

(*q*) *Re Ovey*, 20 C. D. 676. Affirmed on appeal to the House of Lords, *sub nom.* *Robertson v. Broadbent*, 8 App. Cas. 812.

(*r*) *Fitzwilliam v. Kelly*, 10 Hare, 274, by Wood, V.-C. *Mills v. Brown*, 21 Beav. 1. But generally items included in the residue will not be treated as specific. *Re Tootal's Estate*, 2 C. D. 628.

(*s*) 1 Mylne & Cr. 114.

funds, copy or leasehold estates, to my dear sisters, Martha Peyton and Hester Kennedy, widow, during their lives; at the decease of both of them, to be equally divided, share and share alike, between my cousins, namely, Henry Van Bodi-coate, Mary Anne Bethune, and Miss Catherine Peyton, or their heirs, share and share alike: I nominate and appoint my sister, Hester Kennedy, executrix of this my last Will and Testament:" The testatrix died in the year 1824: After payment of the two specific legacies of Long Annuities, her residuary estate consisted, among other things, of 150*l.* per annum Long Annuities; Martha Peyton survived the testatrix only a few days: The bill was filed by two of the legatees in remainder against Hester Kennedy, the surviving tenant for life, and against other parties interested in the fund; and the sole question which it raised was, whether Hester Kennedy was entitled to enjoy the interest and dividends of the Long Annuities as a specific legacy, or whether she took the Long Annuities only as a general residuary bequest entitling the legatees to have them converted into a permanent fund, of which Hester Kennedy should have the annual income: And it was held by Sir C. Pepys, M. R., that the Long Annuities were to be enjoyed by the tenant for life as a specific bequest: And his Honor, in giving his judgment, observed, "The question is, whether this gift to the testatrix's sisters, although contained in what for other purposes, and in point of form, is a mere residuary clause, does not amount to a specific gift of the fund for the benefit of the tenants for life. Against such a construction it was contended, that the bequest to the sisters was substantially a part of the residuary clause, the effect of which was not to be altered, merely because the testatrix had chosen to introduce into it an enumeration of the particular articles of which the residue consisted, and to parcel out the interest of the different persons who were to enjoy it in succession. This question is plainly one of intention, to be collected from a careful examination of the whole scope and context of the instrument; and so it has always been considered. After a specific bequest of a

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part of the stock which the testatrix had, there is here a gift of all she did or might possess in the funds, copy or leasehold estates, to her dear sisters. Now as to the copyhold or leasehold estates, it is not disputed that the gift is specific. If so, why should it also not be specific with respect to the funds? The intention, it is reasonable and natural to presume, must have been the same with respect to both descriptions of property; and there can be no doubt that a bequest of all that a testator may possess in the funds, would be a specific bequest of all his funded property, the rule being that the legacy is not the less specific for being general (t). The true test by which to try whether a bequest is or is not specific, is to inquire what would be the result if there had been pecuniary legacies with a deficient fund, or a necessity for a sale for payment of debts—to inquire whether or not, in such a case, the bequest would have been protected in a competition with the claims of pecuniary legatees. A party claiming under a gift of all the property that a testator possessed of a specified kind, would not, I apprehend, be bound to contribute: and there is nothing in the particular expressions employed in the Will under consideration to make a difference in that respect. Upon the terms used in this Will, therefore, I am of opinion that this is a specific bequest of a sum invested in the Long Annuities, and to be enjoyed by the tenant for life in the state in which the testatrix left it." The learned Judge then proceeded to give another reason for his judgment, *viz.*, that even though the bequest was not, strictly speaking, specific, yet there was a sufficient indication in the Will of the intention of the testatrix that the property should continue to be enjoyed by the tenant for life *in specie* as it then existed (u).

If a person bequeaths personal property *specifically* to one in what cases,
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(t) See *Accord*, *Hill v. Hill*, 11 Jur., N. S. 806, 807, *per* Wood, V.-C.

(u) It must be observed, that this does not constitute a specific

legacy in the proper sense of that term: *Pickering v. Pickering*, 4 M. & Cr. 299. See *Fielding v. Preston*, 1 De G. & J. 438, 444. *Mills v. Brown*, 21 Beav. 14.

property is bequeathed to one for life, remainder over, the tenant for life shall enjoy the property in *specie*:

The rule in *Howe v. Lord Dartmouth*.

person for life, with remainder over afterwards, it is clear that the property must be enjoyed in *specie* by the tenant for life, notwithstanding there is a danger that one object of the testator's bounty will be defeated by the tenancy for life lasting as long as the property endures (v). But where the bequest is not *specific*, a rule has been established, which is usually called "The rule in *Howe v. Lord Dartmouth*," having been laid down and acted upon by Lord Eldon in that case (x), though it was not the first decision to that effect (y). The effect of this rule is, that where a testator limits personal property to one for life with remainder over, it is *prima facie* to be intended that the testator means that the same property which is enjoyed by the tenant for life should go to those entitled in remainder; and if any part of the property so given be of a wasting nature, as Long Annuities or leasehold estate, in order to effectuate this general purpose of the testator, such wasting property must be sold and converted into permanent property (in other words, it must be invested in such securities as are approved by a Court of Equity, for the benefit of all persons interested in it) (z). This rule has been irrevocably affirmed in many subsequent cases, and is unquestionably the law.

But it is quite as well settled as the rule itself, that when

(v) *Pickering v. Pickering*, 4 M. & Cr. 299.

(x) 7 Ves. 137.

(y) *Pickering v. Pickering*, 4 M. & Cr. 298.

(z) *Alcock v. Slopers*, 2 M. & K. 701, 702. *Macdonald v. Irvine*, 8 C. D. 101. The rule is thus described by Romilly, M. R., in *Morgan v. Morgan*, 14 Beav. 82: "Where property of a perishable nature is given to be enjoyed in succession, the object of the testator can only be effected by converting the property into permanent annuities, and giving each

person, in succession, the dividends of the fund." Statements of the rule will also be found in *Pickering v. Pickering*, 4 M. & Cr. 298, 299, by Lord Cottenham, and in *Hinves v. Hinves*, 3 Hare, 611, by Wigram, V.-C. Where upon the construction of a Will the trustees have a discretion as to what part of the testator's estate shall be converted, the Court will not interfere with such discretion, at all events if a considerable time has elapsed since it has been exercised. *Re Sewell's Estate*, L. R. 11 Eq. 80.

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any indication is to be found in the Will of an intention by the testator, that the property is to be enjoyed *in specie* in its existing state, it shall be so enjoyed (a). And a great number of cases (in some of which the Court has laid hold of expressions, apparently unimportant, as sufficient indications of such an intention) (b), have been decided on this principle, and will be found collected in the note below (c).

Nevertheless, the rule must prevail, unless *some* expression

(a) *Pickering v. Pickering*, 4 M. & C. 304, *per* Lord Cottenham, *Gray v. Siggers*, 15 C. D. 74. But though in such case investments may remain, yet debts, such as turnpike bonds, must be realised: *Holgate v. Jennings*, 24 Beav. 623.

(b) In *Hinves v. Hinves*, 3 Hare, 611, 612, Wigram, V.-C., said, that the Court in applying the rule, has leant against conversion as strongly as is consistent with the supposition that the rule itself is well founded. See also *Mackie v. Mackie*, 5 Hare, 70, 77. *Morgan v. Morgan*, 14 Beav. 72. There can be no doubt that where the conversion would defeat the intention of the testator it would be postponed until after the death of the tenant for life, and the rule in *Howe v. Lord Dartmouth* would not be applied. *Collins v. Collins*, 2 M. & K. 703. *Bethune v. Kennedy*, 1 M. & C. 114. *Rowe v. Rowe*, 29 Beav. 276. But it is quite clear that the rule must be applied, unless upon the fair construction of the Will you find a sufficient indication that it is not to be applied, the burden in every case being upon the person who says that the rule of the Court of Chancery ought not to be applied in the particular case. See the judgments

of James, L. J., and Thesiger, L. J., in *Macdonald v. Irvine*, 8 C. D. 101, 120, 124.

(c) *Collins v. Collins*, 2 M. & K. 702. *Alcock v. Sloper*, 2 M. & K. 699. *Bethune v. Kennedy*, 1 M. & Cr. 114. *Pickering v. Pickering*, 4 M. & Cr. 289. *Goodenough v. Tremamondo*, 2 Beav. 512. *Vaughan v. Buck*, 1 Phill. Ch. C. 75. *Harvey v. Harvey*, 5 Beav. 134. *Daniel v. Warren*, 2 Y. & Coll. Ch. C. 290. *Hinves v. Hinves*, 3 Hare, 609. *Cafe v. Bent*, 5 Hare, 34. *Mackie v. Mackie*, 5 Hare, 70, 77. *Hubbard v. Young*, 10 Beav. 303. *Hunt v. Scott*, 1 De G. & Sm. 219. *Burton v. Mount*, 2 De G. & Sm. 383. *Neville v. Fortescue*, 16 Sim. 333. *Bowden v. Bowden*, 17 Sim. 65. *Harris v. Poyner*, 1 Drew. 174. *Crowe v. Crisford*, 17 Beav. 507. *Marshall v. Bremner*, 2 Sm. & G. 237. *Vachell v. Roberts*, 32 Beav. 140. *Hind v. Selby*, 22 Beav. 373. *Wearing v. Wearing*, 23 Beav. 99. *Skirving v. Williams*, 24 Beav. 275. *Holgate v. Jennings*, 24 Beav. 623. *Boys v. Boys*, 28 Beav. 436. *Rowe v. Rowe*, 29 Beav. 276. *Green v. Britten*, 1 De Gex, J. & S. 649. *Prendergast v. Prendergast*, 3 H. L. C. 195, 219, *et seq.*

of intention can be gathered from the Will that the property is to be enjoyed *in specie* (d). For the mere absence of any direction to convert the property is not sufficient to preclude the application of the rule (e).

SECTION IV.

Of the Description of Legacies.

The object of this Section is to inquire, to what property legatees are entitled under particular modes of description of the thing bequeathed.

- "Goods:" "Goods," "chattels." The word "goods" is *nomen generalissimum*: and, when construed in the abstract, will comprehend all the personal estate of the testator, as stock, bonds, notes, money, plate, furniture, &c. And a bequest of all the testator's "chattels" will have the same effect as a bequest of all his "goods and chattels" (f). So the word "effects," standing alone, will pass the whole of the testator's residuary estate (g).
- "chattels:"
- "effects:"

(d) *Macdonald v. Irvine*, 8 C. D. 101. See also *Lichfield v. Baker*, 13 Beav. 447. *Benn v. Dixon*, 10 Sim. 636. *Caldecott v. Caldecott*, 1 Y. & Coll. Ch. C. 312. *Sutherland v. Cooke*, 1 Coll. 498. *Johnson v. Johnson*, 2 Coll. 441. *Chambers v. Chambers*, 15 Sim. 183. *Pickup v. Atkinson*, 4 Hare, 624. *Morgan v. Morgan*, 14 Beav. 27. *Pren-dergast v. Lushington*, 5 Hare, 171. 3 H. L. C. 195. *Thornton v. Ellis*, 15 Beav. 193. *Blann v. Bell*, 5 De G. & Sm. 658. 2 De Gex, M. & G. 775. *Murton v. Markby*, 18 Beav. 126. *Hood v. Clapham*, 19 Beav. 90. *Jebb v. Tugwell*, 20 Beav. 84. 7 De Gex, M. & G. 663.

(e) *Morgan v. Morgan*, 14 Beav.

83. See further as to the application of the rule, *post*, p. 1246 *et seq.*

(f) Co. Lit. 118, b. *Swinb. Pt. 7*, s. 10, pl. 8. *Crichton v. Symes*, 3 Atk. 62. *Kendall v. Kendall*, 4 Russ. Chanc. Cas. 370.

(g) *Campbell v. Prescott*, 10 Ves. 507. *Hearne v. Wigginton*, 6 Madd. 119. *Parker v. Marchant*, 1 Y. & Coll. Ch. C. 290. A gift of "all my furniture, plate, linen, and other effects that may be in my possession at the time of my death," was held to pass the residuary personal estate of the testatrix. *Hodgson v. Jex*, 2 C. D. 122. And see *In the goods of Jupp* [1891], P. 300. A gift of "my sheep and all the rest residue, moneys, chattels, and all

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So the general personal estate will pass under a bequest of the testator's "property" (h).

"property:"

But where the bequest is of "all my goods" (or "of all my chattels") at a particular place, the legacy is restricted to such things only as *savour of locality*, as furniture not attached to the freehold, plate, linen, Bank-notes, and ready money (i). And under such a bequest, bonds and other *choses in action* do not pass (k). Nor will they pass by a bequest of "all things" in a particular house (l). It has

other my effects" passes all the freehold as well as the personal estate. *Smyth v. Smyth*, 8 C. D. 561. But a bequest of any money that may result from a sale of my effects, followed by a specific bequest of a watch, was held not sufficient to pass the residue. In the goods of O'Loughlin, L. R. 2 P. & D. 102. See *Ponton v. Dunn*, 1 Russ. & M. 402, where, under a bequest of "all other my estate and effects of whatsoever nature or description," an interest in a partnership was held to pass. In the case of *Hall v. Hall* [1891], 3 Ch. 389, it was held that although in a will the use of the word "devise" or of the expression "whatsoever the same may be," would not of itself be enough to make the word "effects" include real estate, yet the combination of "devise" with the words, "whatsoever the same may be and wheresoever the same may be situate," followed in a subsequent clause by the word "property" used as equivalent to "effects," was enough to show the intention of the testator to dispose of real estate. This case was affirmed on appeal [1892], 1 Ch. 361.

(h) *Tyrone v. Waterford*, 1 De Gex, F. & J. 613. A testator "devised and bequeathed his lands

and property whatsoever in Australia," together with the arrears of rent to A. and B. their "heirs and assigns:" this was held to pass the testator's personalty in Australia. *Robinson v. Webb*, 17 Beav. 260. A bequest of "my property not in England and in the hands of my attorney abroad consisting of Russian bonds, &c.," was held to pass all the testator's property abroad without limitations. *Drake v. Martin*, 23 Beav. 89.

(i) Countess of Aylesbury's case, cited by Lord Hardwicke, in *Chapman v. Hart*, 1 Ves. Sen. 273. *Green v. Symonds*, 1 Bro. C. C. 129, *in notis*.

(k) *Ibid.* *Moore v. Moore*, 1 Bro. C. C. 127. *Jones v. Sefton*, 4 Ves. 166. *Hertford v. Lowther*, 7 Beav. 1. But a bequest of "all my estate and effects" in Mauritius" will pass the unpaid purchase-money of real estate in Mauritius sold by the testator to persons residing in that island. *Guthrie v. Walrond*, 22 C. D. 573.

(l) *Popham v. Lady Aylesbury*, Ambl. 68. So in *Fleming v. Brook*, 1 Scho. & Lefr. 318, where the bequest was of all testator's property in A's house, *except a particular bond*, Lord Redesdale

been suggested, indeed, that exchequer notes, promissory notes payable to the bearer, exchequer bills, and bills of exchange endorsed in blank, being, according to modern decisions in the Courts of Law, considered rather as money in possession than *choses in action*, might pass under such a bequest as well as Bank-notes (*m*). However, in *Stuart v. Bute* (*n*), Lord Eldon said, "I have seen Lady Aylesbury's case, which is also mentioned by Lord Mansfield in *Miller v. Race* (*o*), but has never been cited accurately: It was a bequest of 'my house, and all that shall be in it at my death:' Lord Hardwicke held that cash passed, and Bank-notes, which Lord Hardwicke there, I do not know why, considered as cash, but not promissory notes and securities, as they were the evidence of title to things out of the house, and not things in it: Bank-notes I think just in the same situation." In *Brooke v. Turner* (*p*), a testatrix bequeathed to her niece, her pictures and her collection of coins (except those of the two last and present kings) in and about her dwelling-house; and all the residue of her estate, both real and personal (except as otherwise disposed of), she gave to her grandchildren; and she directed that, from and after the day of her interment, all the property over which she had any disposing power, in and about her dwelling-house (except

held that, in spite of the inference to be drawn from the exception, *choses in action* generally did not pass. This decision has been doubted: See *Hotham v. Sutton*, 15 Ves. 319. *Post*, p. 1046 (*d*). But it appears to be recognised by Lord Cottenham, when Master of the Rolls, in *Arnold v. Arnold*, 2 Mylne & K. 374. The case of *Fleming v. Brook* (*ubi sup.*), which seems to have been decided on the authority of *Moore v. Moore*, 1 Bro. C. C. 127, is referred to with disapproval by Cotton, L.J., in *Re Prater*, 37 C. D. 481, 487, who says, "In *Moore v. Moore* the words were 'goods and

chattels,' and Lord Redesdale said that goods and chattels did not apply to notes, bills of exchange, or bonds, and there was not anything to give a more enlarged meaning to those words. I do not think that the case of *Moore v. Moore* has the effect which Lord Redesdale, according to the report, seems to have attributed to it."

(*m*) *Collins v. Martin*, 1 Bos. & Pull. 648. *Wookey v. Pole*, 4 B. & A. 1. See *ante*, pp. 686, 687, 739.

(*n*) 11 Ves. 662. 3. C. in Dom. Proc. 1 Dow. 73.

(*o*) 1 Bur. 457.

(*p*) 7 Sim. 671.

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what she had otherwise given) should belong to her niece, and not be subject to diminution except by her personal act and authority: After the testatrix's death, guineas, sovereigns, Bank of England, country bank, and promissory notes, and a mortgage, to a large amount in the whole, were found in her house: And Sir L. Shadwell, V.-C., held, that the niece (notwithstanding an annuity and a sum in gross were given to her by the Will) was entitled to the guineas and sovereigns, and also to the Bank of England notes, but not to the country bank or promissory notes, or the mortgage: His Honor observed, that Lord Hardwicke held that Bank of England notes passed under the bequest in *Lady Aylesbury's Case*, and that Lord Eldon, though he expressed a doubt as to the principle of that decision, did not expressly overrule it (q). Again, in *Hertford v. Lowther* (r), it was held by Lord Langdale, M. R., that a bequest of "all the goods and chattels, plate, linen, money at the bankers, or stock in the

(q) See also Lord Redesdale's judgment in *Fleming v. Brook*, 1 Scho. & Lefr. 319, and Lord Langdale's in *Hertford v. Lowther*, 7 Beav. 9. It will be observed that although there are a great many cases which lay down that *choses in action* cannot be referred to as of any particular locality, yet there are cases where a gift of property in a particular locality has been held to include debts due from persons in that locality. See *Nisbett v. Murray*, 5 Ves. 149. *Arnold v. Arnold*, 2 M. & K. 365. *Tyrone v. Waterford*, 1 De G. F. & J. 613, 625. It would seem that the latter cases go upon this, that there was in the Wills a sufficient indication of intention to include under the description of property in a particular place that which really cannot have any locality. See *per Cotton, L.J.*, in

Re Prater, 37 C. D. 481, 486. It would seem that in construing such words respecting property described locally, the older cases

not give them a stereotyped meaning, but in every Will such words must receive light and colour from the context and circumstances of the testator. See *per Bowen, L.J.*, *ibid.* 488. In this case the decision was largely based upon the ground that if the strictest and narrowest construction was put upon the words employed by the testator, "my property at Rothschild's Bank," the evidence showed that there was nothing at all in the Bank to which these words could apply, and that such a construction would render the bequest insensible.

(r) 7 Beav. 1.

Monte de Milano, linen, horses, carriages, &c., I may die possessed of at Milan," did not pass Polish certificates and Neapolitan bordereaux (being government obligations) there situate, entitling the bearer to receive the interest and capital at a future time: inasmuch as the authorities determine, that, in such cases, *choses in action*, except Bank-notes, are not to be considered as having the locality of the places where the securities are. It was further held that such securities could not be considered as money or cash: And that, not having their locality at Milan, they did not pass under the words "&c. at Milan." This decision was affirmed on appeal to the Lord Chancellor (s).

'household goods:'

By the term "household goods," everything of a permanent nature, *i.e.* articles of household use which are not consumed in their enjoyment, that were used in, or purchased, or otherwise acquired by a testator, for his house, will pass to the legatee. But goods in his house, which are also goods in the way of his trade or business, will not pass: as where the testator, under a contract with government, was possessed of seven hundred beds, which he employed in entertaining sick and wounded seamen of the royal navy (t).

Plate will pass by this term (u), and it should seem that it is not of any consequence whether the plate was in common use or not, provided it were suitable to the situation and quality of the testator (x).

But articles found in the house whose use is in their consumption, as malt, hops, or victuals, will not pass (y). Nor will guns and pistols pass, if used in riding and shooting of game, though they may in some sense be for defence of the

(s) See 7 Beav. Addenda et Corrigena.

(t) Pratt v. Jackson, 2 P. Wms. 302. S. C. in error, 1 Bro. P. C. 222, Toml. edit.

(u) Lillcott v. Compton, 2 Vern. 638. Snelson v. Corbett, 3 Atk. 370.

(x) Kelly v. Powlett, Amb. 605, approved by Lord Alvanley in Porter v. Tournay, 3 Ves. 313. But the judgments in all the older cases rely on the plate being commonly used by the family.

(y) Slanning v. Style, 3 P. Wms. 334.

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(z) Ibid. gerald, 1 Si p. 1050.

(a) Gowe (b) Jones 166.

(c) Traffo Cas. Abr. other instar nings, 13 V Squire, 3 F Lamphier Warr. 59.

house: but a clock in the house, if not fixed *hereto*, will be included in the words "household goods" (z).

Where the testator directed that all his plate, furniture, household goods, &c., &c., and other "*goods and chattels*," &c., &c., which should be *in and about his dwelling-house and outhouses* at A. at his death, should be enjoyed by such person as should be entitled to his estate under his son's marriage settlement; Lord Henley held that running horses were within the words (a).

"Goods and chattels, &c., in and about the house."

In another case, the testator bequeathed to Lady S. all the residue of his *personal estate and effects*, except such part as should be *in and about his house* at C., which part he gave to his son, and directed the household furniture to go as heirlooms: In an iron chest at C., in which the steward kept the cash, was found a bond for arrears of rent, and the sum of 37*l.* 3*s.* 9*d.* in cash; Lord Loughborough decided that the bond and cash did not pass to the son (b).

The words "goods," "chattels," and other general terms, if coupled with other words of a limited signification, will be restrained to things *ejusdem generis*. Thus, where the testator bequeathed to his niece all his *goods, chattels*, household stuff, furniture, and *other things*, which should be in his house at A., it was decreed that cash found there at the testator's house did not pass; for by the words "other things" should be intended things of like nature and species with those before specified (c).

"Goods" and other general words restricted by the context.

(z) *Ibid.* See also *Cole v. Fitzgerald*, 1 Sim. & Stu. 189. *Post*, p. 1050.

(a) *Gower v. Gower*, Amb. 61.

(b) *Jones v. Sefton*, 4 Ves. 166.

(c) *Trafford v. Berrige*, 1 Eq. Cas. Abr. 201, pl. 14. See for other instances, *Rawlings v. Jennings*, 13 Ves. 39, 46. *Collier v. Squire*, 3 Russ. Chanc. Cas. 467. *Lamphier v. Despard*, 2 Dr. & Warr. 59. See also the judgment

of Knight Bruce, V.-C., in *Parker v. Marchant*, 1 Y. & Coll. Ch. C. 301—304. *Mullins v. Smith*, 1 Dr. & Sm. 204. *Clifford v. Arundell*, 1 De Gex, F. & J. 307. In the goods of *Ludlow*, 1 Sw. & Tr. 29. *Manton v. Tabois*, 30 C. D. 92. The expression "&c." refers only to property *ejusdem generis*. *Newman v. Newman*, 26 Beav. 220. *Barnaby v. Tassell*, L. R. 11 Eq. 363. But see *Chapman v. Chapman*, 4 C. D. 800, where the

But where the bequest was of all the testatrix's plate, linen, household goods, and *other effects, money excepted*, Lord Eldon held, that although it was now settled that the words "*other effects*" mean, in general, effects *ejusdem generis*, yet in this case all the residuary estate (including leaseholds, stock, a promissory note, jewels, wearing apparel, a carriage, wines, &c.), except money, should pass: for the disposition, by reason of the express exception, must be taken to comprehend all that *she had not excluded*, which was money only (*d*).

Several other authorities may be found, which show that this rule is not of universal application (*e*).

In *Kendall v. Kendall* (*f*), it was holden by Lord Lyndhurst that a bequest of "all monies, goods, chattels, clothing, &c., my property, which may remain after paying my funeral expenses and debts," would pass the testator's interest in stock and money, inasmuch as the words "monies, goods, and chattels," would pass the whole personal estate, including stock, and the introduction of the words "clothing, &c.," was not for the purpose of qualifying the former terms, but resulted from the anxiety of the testator to enumerate every species of property which occurred to him (*g*).

residue was held to pass on the ground that "although the words which the testator used were not artistic still they lead to only one possible conclusion, viz., that he intended to make his wife his universal residuary legatee," *per Jessel, M.R.*, p. 801.

(*d*) *Hotham v. Sutton*, 15 Ves. 319. See *Accord. Ivison v. Gasiot*, 3 De Gex, M. & G. 958. See also *Brooke v. Turner*, *ante*, p. 1042.

(*e*) *Parker v. Marchant*, 1 Y. & C. Ch. C. 290, 301, 302. *Chapman v. Chapman*, 4 C. D. 800, and *post*, note (*i*). Most of the excep-

tions fall within another rule viz., that the entirety which has been expressly and definitely given shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars of the specific gift. *West v. Lawson*, 11 H. L. C. 375, 384. See also *Dean v. Gibson*, L. R. 3 Eq. 713, 717, and *compare Cambridge v. Rous*, 8 Ves. 12.

(*f*) 4 Russ. Chanc. Cas. 360. See also *Fleming v. Burrows*, 1 Russ. Chanc. Cas. 276.

(*g*) See further *Gover v. Davis*, 29 Beav. 222. *Swinfen v. Swinfen*, *ibid.* 207. *Nugee v. Chapman*,

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So in *Arnold v. Arnold* (*h*), the testator by a Will executed in India, where he and his family then resided, bequeathed, among other legacies, "to my dear wife 1,000*l.* sterling; also my wines and property in England:" The Master found, by a special report, that the testator's property in England at the time of his decease consisted of the following particulars; *viz.* a sum of 784*l.* 17*s.* 6*d.*, being cash and bills in the hands of his bankers; certain wines which the executors had subsequently given up to the testator's widow; a box containing wearing apparel; the sum of 800*l.* 10*s.* 1*d.*, new four per cent. annuities standing in the names of trustees; the sum of 36*l.* 18*s.* 6*d.* the arrears of a pension payable out of the Exchequer; the sum of 50*l.* due on the balance of an account; and a reversionary interest in the dividends to accrue on the sum of 1,715*l.* 12*s.* in the three per cents. during the life of another person: On the one side it was contended that the widow, under this bequest of the testator's wines and property in England took nothing but the box of wearing apparel, on the ground of there being nothing else among the several articles and property in England *ejusdem generis* with the wines: On the other side it was insisted that the terms were general, and applied to every description of property to be found existing in England at the time of the testator's decease; and it was argued, on the part of the widow, that the bequest of the testator's wines could not be considered as limited to wines in England, but that it included all his wines, wherever existing: Lord Cottenham held, that the wines, as well as the property subsequently spoken of, were limited to the locality of England; but that the widow took all the several descriptions of the testator's property which the Master had reported to have been in England at the time of his death: And his Lordship observed, that the mere enumeration of particular articles, followed by a general bequest, obviously

ibid. 290. *Molyneux v. Rowe*, 127. *King v. George*, 5 C. D. 627.
8 De Gex, M. & G. 368. In the *Re Fleetwood*, 15 C. D. 594.
goods of *Goodyar*, 1 Sw. & Tr. (*h*) 2 M. & K. 365.

did not of necessity restrict the general bequest; because a testator often throws in such specific words, and then winds up the catalogue with some comprehensive expression, for the very purpose of preventing the bequest from being so restricted: The learned Judge added that he had been unable to discover any instance in which the word "property" had been confined to articles of the description before enumerated, unless where other expressions occurred from which it was clear that the word was not there used in its ordinary sense.

Again, the word "effects," when inserted in a *residuary* disposition, will not be confined to articles *ejusdem generis* with those preceding it: Thus where the bequest was of all the testator's sugar-house, &c., stock, with jewels, plate, household goods, furniture, and *all effects whatsoever*, the general residue passed (i).

An instance of the restraint of general words by the context may be adduced in the doctrine, that, where the legatee has a *money legacy*, this circumstance is to be considered as clearly manifesting an intention to confine the import of the word "goods" or the like, so as to prevent it passing ready money (k).

"Household Furniture:" By this expression, all personal chattels will pass that may contribute to the use or convenience of the householder, or the ornament of the house (l), as plate, linen, china, both useful and ornamental, and pic-

"Household
furniture."

(i) *Campbell v. Prescott*, 15 Ves. 500. *Mitchell v. Mitchell*, 5 Madd. 69. See also *Parker v. Marchant*, 1 Y. & Coll. Ch. C. 990. *Fisher v. Hepburn*, 14 Beav. 626. *Re Kendall's Trust*, 14 Beav. 608. *Everall v. Browne*, 1 Sm. & G. 368. *Dean v. Gibson*, L. R. 3 Eq. 713. In the goods of *Sharman*, L. R. 1 P. & D. 661. *Hodgson v. Jex*, 2 C. D. 122. So copyholds were held to pass by the words

"money, property, and effects" aided by the context. *Streatfield v. Cooper*, 27 Beav. 338.

(k) *Roberts v. Kuffin*, 2 Atk. 113. See *Brooke v. Turner*, ante, p. 1042.

(l) By Sir T. Clarke, M. R., in *Kelly v. Powlett*, Ambl. 610. See also *Cole v. Fitzgerald*, 1 Sim. & Stu. 189. *Tempest v. Tempest*, 2 Kay & J. 635. *Field v. Peckett* 29 Beav. 573.

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tures (*m*): But goods or plate in the possession of the testator in the way of his trade, will not pass (*n*): nor books (*o*): nor wines (*p*). As a general rule a bequest of "household furniture" will not pass the tenant's fixtures in a leasehold house occupied by the testator (*q*).

In *Cremorne v. Antrobus* (*s*), a testator by his Will bequeathed his leasehold dwelling-house, together with all his pictures, prints, drawings, or paintings in miniature or enamel, with all his gold and silver coins, medals, watches, and trinkets, of every kind whatsoever; as also his coaches, carriages, harness, and furniture to the same belonging; and also, all and singular the fixtures appurtenant to his said leasehold messuage, together with the household furniture, plate, linen, wines, liquors, and other his estate and effects whatsoever, in and about the same, and that should be in his possession at the time of his decease, or in and about his said dwelling-house, or the outhouses and offices appurtenant thereto, and by him held, used, occupied, and enjoyed therewith: By a codicil he made a different disposition of the house, "with all its furniture and appurtenances thereunto belonging:" It was held by Lord Lyndhurst, that pictures placed in the house as ornamental furniture, and

(*m*) *Kelly v. Powlett*, Amb. 462.
611. See *ante*, p. 1044, as to plate.
Whether a bust will pass under the words "household goods, furniture, fixtures," *quære*: See *Willis v. Curtois*, 1 Beav. 189.

(*n*) *Le Farrant v. Spencer*, 1 Ves. Sen. 97. *Manning v. Purcell*, 7 De Gex, M. & G. 65.

(*o*) *Bridgman v. Dove*, 3 Atk. 202. *Kelly v. Powlett*, Amb. 611. *Porter v. Tournay*, 3 Ves. 311. But books were held to pass upon an apparent intention that the testator's house should not be dismantled, but kept as a residence for his widow and children: *Ouseley v. Anstruther*, 10 Beav.

(*p*) *Porter v. Tournay*, 3 Ves. 311.

(*q*) *Finney v. Grice*, 10 C. D. 13. There may, however, be special circumstances in particular cases from which the intention of the testator to pass the fixtures under the word "furniture" may be gathered, as in *Paton v. Sheppard*, 10 Sim. 186. In *Slanning v. Style*, 3 P. Wms. 336, Lord Talbot held that the clock of the house if not fixed to it was included in a bequest of household goods.

(*r*) 5 Russ. 312.

the plate and linen, passed by the codicil: but that the codicil had no operation on the disposition made by the Will of the books, the gold and silver coins, trinkets, and things of that nature.

"Fixed
furniture."

In *Birch v. Dawson* (t), A. bequeathed his leasehold messuage, with the grates, stoves, coppers, locks, bolts, keys, bells, and other fixtures, and fixed furniture, to V. for life; and the household goods, furniture, plate, linen, china, books, wines, and liquors, and other properties in the messuage, not being comprehended under the preceding terms, *fixtures and fixed furniture*, to V. absolutely: There were in the messuage, looking-glasses, standing on chimney-pieces, and nailed to the wall; and a bookcase standing on (but not fastened to) brackets, and screwed to the wall: and the Court of King's Bench held, that V. took only a life interest in these, because they came within the term "fixed furniture."

"Household
effects:"

In *Cole v. Fitzgerald* (u), it was held by Sir John Leach, V. C., that the words "household furniture and other household effects, of or belonging to the testator's dwelling-house and premises at his decease," comprised all property in the house or on the premises intended for use or consumption therein, or for ornament thereof; and that it included pistols, apparatus for turning, models, pictures, an organ, a parrot, books (x), wine and liquors; but not a pony, cow, or fowling-pieces, unless it was proved they were kept for defence of the house: If a hay-stack was only for use, it would pass; if for sale, it would not: And this decision was afterwards affirmed by Lord Lyndhurst (y).

In *Fitzgerald v. Field* (z), the testator directed that his household furniture, &c., and utensils in and about his mansion-house at H. should go with the mansion-house, and

(t) 2 Adol. & Ell. 37.

(u) 1 Sim. & Stu. 189.

(x) So books will pass under a bequest of "other articles of domestic use and enjoyment:" *Cornwall v. Cornwall*, 12 Sim. 303.

(y) 3 Russ. Chanc. Cas. 301.

According to the latter reporter, the Vice Chancellor declared that the parrot did not pass.

(z) 1 Russ. Chanc. Cas. 427.

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that for that purpose, his trustees should make an inventory of the furniture, &c., and utensils, which should be found in and about his mansion-house and premises at the time of his decease: It was holden that those words did not pass farming utensils on lands at H. occupied by the testator along with the mansion-house.

"Stock on farm:" By this term, not only all *moveable* property upon or belonging to the farm will pass; but also, as it should seem, growing crops (a); and in one case, from the context, it was held to include stock in the malt trade (b). "Stock on farm:"

In *Steward v. Cotton* (c), a testator devised a farm to his wife for life, remainder to A. in fee, with all the stock which should be on it at the time of his decease, which it was his will should be kept up by his wife during her life, and go along with the farm: and he bequeathed the residue of his estate and effects, real and personal, to his wife absolutely: The testator died in July: The wife, having severed the growing crops and stacked them on the farm, died in the following September, when the remainderman entered and took possession both of the farm and of the crops which had been so severed: And it was held, that the personal representative of the wife was entitled to those crops.

"Utensils." Under this term plate or jewels will not pass, according to the opinion of the Judges, in *Dame Latimer's Case* (d). "Utensils"

(a) *Cox v. Godsalue*, 6 East, 604, note. *West v. Moore*, 8 East, 339. *Rudge v. Winnall*, 12 Beav. 357. But see *Vaisey v. Reynolds*, 5 Russ. 12, which, however, was disapproved in *Re Roose*, 17 C. D. 696. *Ante*, p. 627, note (a).

(b) *Brooksbank v. Wentworth*, 3 Atk. 64. As to what will pass by "Live and dead stock," see *Porter v. Tournay*, 3 Ves. 313. *Randall v. Russell*, 3 Meriv. 190. As to what passes by a bequest

of "Stock in Trade," see *Elliott v. Elliott*, 9 M. & W. 23. As to a gift of "Plant and goodwill in my business in — street," see *Blake v. Shaw*, Johns. 732. As to a gift of "Farming-stock and effects," see *Harvey v. Harvey*, 32 Beav. 441.

(c) 5 Russ. 17, *in notis, coram* Willes, Justice, and Masters Holford, Browning, and Orde.

(d) *Dyer*, 59, pl. 15.

"Money :

"Moneys." Where a testator gives to one person "all his moneys in hand," and to another "all his moneys out on securities," the balance at his banker's will pass as money in hand (*e*). Under a bequest of all the testator's "money" in his house at A., bank notes and ready money will alone pass, although he may leave in it mortgages, bonds, or receipts for government annuities (*f*). However, where the testator bequeathed all his *money* in the Bank of England, and never had any cash in the Bank, but was entitled to some three per cents. and five per cents. Bank annuities, Sir Wm. Grant, M. R., held, that the stock passed (*g*).

But though, upon the whole context of the Will, stock may pass by the term "money" (*h*), yet *money* does not, by the force of the word, include *stock* (*i*).

(*e*) *Vaisey v. Reynolds*, 5 Russ. 312. See also *Accord. Parker v. Marchant*, 1 Y. & Coll. Ch. C. 290, affirmed 1 Phill. Ch. C. 356. See also *Re Powell's Trusts*, Johns. 49. So under a bequest of "all my monies," money due on deposit notes of the testator's bankers as well as on the balance of his current account, and also money in the hands of a stakeholder on a bet, was held to pass : *Manning v. Purcell*, 1 Sm. & G. 284. This decision, however, was reversed on appeal as far as concerned the money in the hands of the stakeholder : 24 L. J. Ch. 522. But the expression "*cash or monies so called*," was held not to include a promissory note payable to the testator or order, or Long Annuities, or Columbian Bonds ; *Beales v. Crisford*, 13 Sim. 592. See also *Fryer v. Ranken*, 11 Sim. 55. *Smith v. Butler*, 1 Jones & Lat. 692. In *May v. Grave*, 3 De Gex & Sm. 462, K. Bruce, V.-C., held that unreceived dividends did not

pass under the words "ready money." But it is difficult, if not impossible, to reconcile this decision with that of *Shadwell, V.-C.*, in *Fryer v. Ranken*, 11 Sim. 55. See further, as to what will pass as "ready money," *Cooke v. Wagster*, 1 Sm. & G. 296. *Re Powell's Trusts*, Johns. 49. *Wylie v. Wylie*, 1 D. F. & J. 410.

(*f*) *Downing v. Townsend*, Amb. 280. See *ante*, p. 1042.

(*g*) *Gallini v. Noble*, 3 Meriv. 691. See *Benson v. Whittam*, 2 Sim. 493, as to a bequest of "money in the hands of any banker." See also *Howell v. Gayler*, 5 Beav. 157.

(*h*) See *Legge v. Asgill*, (1 Turn. & Russ. 265, note), as cited by Sir J. Leach, M. R. in *Kendall v. Kendall*, 4 Russ. Chanc. Cas. 369. *Waite v. Combes*, 5 De G. & Sm. 676. *Chapman v. Reynolds*, 28 Beav. 221.

(*i*) *Ommanney v. Butcher*, 1 Turn. & Russ. 272, by Lord Eldon. *Gosden v. Dotterill*, 1 M.

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In *Hastings v. Hane* (*k*), a testator, after giving specific and pecuniary legacies, willed that A. and B. should divide, equally, any monies which might remain to his account after payment of his debts and pecuniary legacies: The testator, at the date of his Will and at his death, had money accounts subsisting between him and his bankers, and other persons: and Sir L. Shadwell, V. C., held, that the bequest did not pass his residuary estate, but only the balances due on those accounts, subject to the debts and legacies.

The result of the cases seems to be, that, although a simple bequest of "money" will not of itself pass stock, yet the word "money" may be so used in a Will, as from the whole context to show that the testator meant it to pass stock and other personal estate not properly so called, or all the personal estate; and when this intention can be clearly collected, the Court will act upon it (*l*). Thus in *Dowson v. Gaskoin* (*m*), a testatrix whose personal property consisted chiefly of stock, after bequeathing a number of pecuniary and specific legacies,

& K. 56. *Willis v. Plaskett*, 4 Beav. 208. *Lowe v. Thomas, Kay*, 369. Affirmed on appeal, 5 De Gex, M. & G. 315. *Cowling v. Cowling*, 26 Beav. 448. So it was held by Lord Langdale, M. R., in *Douglas v. Congreve*, 1 Keen, 410, that a legacy of a sum of stock did not fall within the description of "pecuniary legacies." Where a testator gave to his wife any money that he might die possessed of, or which might be due and owing to him at the time of his decease, it was held that the moneys receivable under a policy of assurance on his own life, to which the testator was entitled, passed under the above bequest. *Petty v. Willson*, L. R. 4 Ch. 574. But where a testator made a testamentary gift "of any money of which I may die possessed," it was

held by Lord Selborne, L. C., that these words included cash in the house and money at the bankers, and any money of which, at the time of her death, she might have claimed immediate payment; but not the apportioned part of an annuity, or of interest payable to her which had accrued from the last stated days of payment to her death, nor a legacy due to her which had not been acknowledged as at her disposal: *Byrom v. Brandreth*, L. R. 16 Eq. 475.

(*k*) 6 Sim. 67.

(*l*) In the goods of Hand, 7 Notes of Cas. 60. *Prichard v. Prichard*, L. R. 11 Eq. 232. *Re Pringle*, 17 C. D. 819. In the goods of White, 7 P. D. 65. *Re Cadogan*, 25 C. D. 154.

(*m*) 2 Keen, 14.

and giving certain directions as to her funeral, gave 200*l.* to each of her executors for their trouble, and bequeathed whatever remained of *money* to the five children of E. D.: And Lord Langdale, M. R., held, that by the words, "whatever remains of money," the testatrix referred to her general residuary personal estate. Again in *Rogers v. Thomas* (n), a testatrix, whose property consisted chiefly of stock in the public funds, after giving various legacies of sums of money, gave and bequeathed to the inhabitants of Tawleaven Row, all which might remain of her *money* after her lawful debts and legacies were paid: And the same learned Judge held that the persons found to be inhabitants of Tawleaven Row were entitled to the residue of the testatrix's general personal estate. So in *Glendenning v. Glendenning* (o), where a testator bequeathed to his wife the interest of his *money* and the use of his goods for life; and at her death he gave certain legacies and the remainder of his property to his brothers and sisters; and at his death the principal part of his property consisted of money in the funds; it was held by the same Judge, that the widow was entitled to the residue for life (p).

But it must be observed that the rule of construction is that the word "money" does not extend beyond what is literally "money," unless the context requires it (q).

(n) 2 Keen, 8, compare *Borton v. Dunbar*, 2 D. F. & J. 338, affirming 2 Giff. 221.

(o) 9 Beav. 324.

(p) See also *Waite v. Combes*, 5 De G. & Sm. 676. *Cooke v. Wagster*, 2 Sm. & G. 296. In the goods of *Hand*, 7 Notes of Cas. 60. *Langdale v. Whitfield*, 4 Kay & J. 426. *Knight v. Knight*, 2 Giff. 616. *Boardman v. Stanley*, 7 Ir. R. Eq. 342. *Prichard v. Prichard*, L. R. 11 Eq. 232. So the words "sums of money" were held to comprise personal estate generally: *Whateley v. Spooner*, 3

Kay & J. 542. See also *Stocks v. Barré, Johns*, 54. A contrary construction was adopted of the context in *Lowe v. Thomas, Kay*, 269. 5 De Gex, M. & G. 315.

(q) *Montague v. Sandwich*, 33 Beav. 324. *Larner v. Larner*, 3 Drewr. 704. *Williams v. Williams*, 8 C. D. 789. In the goods of *Aston*, 6 P. D. 203. *Re Sutton*, 28 C. D. 464. A bequest of "all moneys, both in the house and out of it," was held not to pass the residue: *Collins v. Collins*, L. R. 12 Eq. 455. In *Langdale v. Whitfield*, 4 K. & J. 426, *Wood, V.-C.*

"Money" included all his property, whether real or personal, to be converted into such sum of money as should be paid in 3*l.* per cent. in England; the bonds, the interest of which was to be paid, were included in the subject of the bequest of "money." The testatrix's bequest of "money" passed Irish stock, and the testatrix's bequest of "money" passed the testatrix's bequest of "money" to others (s). The testatrix's bequest of "money" was accurately construed in amount, and the testatrix's bequest of "money" was different from the testatrix's bequest of "money" interest of "money" will not pass the testatrix's bequest of "money" Stock in

says, "The testatrix settled that property in the absence of any indication to the contrary, the word 'money' was to be construed as ready money." A different construction was gathered from the Will, and the effect will be that the property by *Baggallay v. Williams* (ubi supra) (r) *Burnie v. Burnie*, 324. In *Ellis v. Ellis*, 543, the words "the funds" were held to include the Will, to the securities for the foreign coin (s) *Mangin*

"Money in the Funds." In a case where a testator directed all his property, *except ready money, or money in the funds*, to be converted into money, and the clear monies arising from such conversion to be invested in the names of the executors in 3l. per cent. consols, or "other government securities" in England; it was held by Knight Bruce, V.-C., that Greek bonds, though guaranteed by this country, were not comprehended in the word "funds;" and that they were a proper subject of conversion under the terms of the Will (*r*). But a bequest of "all the funded property in my name" was held to pass Irish Bank stock, and Irish 3½ per cents. belonging to the testator and standing in his name jointly with three others (*s*). Where, however, the testator has stock which accurately answers the description in his Will, though different in amount, the description will not be extended to stock of a different species (*t*). Under a bequest of "the dividends and interest of all my money in the funds," unreceived dividends will not pass (*u*). Colonial bonds will not pass under a bequest of "foreign" bonds (*v*).

"Money in the funds:"

Colonial bonds.

Stock in a Railway Company will pass under the words Shares.

says, "The authorities have clearly settled that *primâ facie* and in the absence of anything in the Will to indicate a different intention, the word 'moneys' will be confined to ready money actually in hand. A different intention may be gathered from the words of the Will, and where that is the case, effect will be given to it." Cited by Baggallay, L. J., in *Williams v. Williams* (*ubi sup.*), at p. 793.

(*r*) *Burnie v. Getting*, 2 Coll. 324. In *Ellis v. Eden*, 23 Beav. 543, the words "stock in the foreign funds" were held, on the terms of the Will, to comprise all foreign securities for which the faith of the foreign country was pledged.

(*s*) *Mangin v. Mangin*, 16 Beav.

300. A sum in the Long Annuities was held to pass under a bequest of "my present funded stock or government securities," the testator having no other funded property: *Grosvenor v. Durston*, 25 Beav. 97. But where a testatrix was possessed of Consols, Reduced Annuities and Bank Stock, it was held that Bank Stock would not pass under a bequest of the "whole of my fortune now standing in the funds:" *Grainger v. Slingsby*, 8 De Gex, M. & G. 285. *Sub nom. Slingsby v. Grainger*, 7 H. L. C. 273.

(*t*) *Gilliat v. Gilliat*, 28 Beav. 481.

(*u*) *Shore v. Weekly*, 3 De G. & Sm. 467.

(*v*) *Hull v. Hill*, 4 C. D. 97.

"shares in a Railway Company," unless there is any indication in the Will to the contrary (*x*). But a bequest of all a testator's "shares" in a public company will not pass debenture stock (*y*).

'Securities
or money:'

"Securities for money." If there be nothing in the Will to control the force of this expression, stock in the funds will pass by it (*z*): but it seems doubtful whether it will include Bank stock, that being property wherein the owner is interested as a partner in a public trading company (*a*). Nor will it include money placed at a banker's on deposit notes (*b*). Canal shares will not pass under a bequest of property vested "in bonds or securities" (*c*).

It has been held that an I O U given to the testator for goods sold by him was not a "security for money," within the meaning of a bequest of "all my money and securities for money" (*d*). Nor will such a gift include a mere debt due to the testator (*e*). A bequest of "all securities for money" has been held to include money due to a testator in respect of which he had a vendor's lien for unpaid purchase money (*f*).

In *Galliers v. Moss* (*g*), the testator bequeathed to his executors, by a residuary clause, all his stock in trade, ready money, *securities for money*, personal estate, and effects of what nature and kind soever, in trust that they or the survivor, or the heirs, executors, administrators, &c. of such survivor, should sell the same, and invest the produce in the purchase of freehold estate: The Court of K. B. was of

(*x*) *Morrice v. Aylmer*, L. R. 7 H. L. 717.

(*y*) *Re Bodman* [1891], 3 Ch. 135.

(*z*) *Bescoby v. Pack*, 1 Sim. & Stu. 500.

(*a*) *Ibid.* See *Dicks v. Lambert*, 4 Ves. 725. *Ogle v. Knipe*, L. R. 8 Eq. 434.

(*b*) *Hopkins v. Abbott*, L. R. 19 Eq. 222.

(*c*) *Hudleston v. Gouldsbury*, 10

Beav. 547.

(*d*) *Barry v. Harding*, 1 Jones & Lat. 475. In this case, Sugden, C. of Ireland, said that a bill of exchange or promissory note is a security for money, in the legal and proper sense of the words.

(*e*) *Re Mason's Will*, 34 L. J., Ch. 603.

(*f*) *Callow v. Callow*, 42 C. D. 550.

(*g*) 9 B. & C. 267.

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opinion, that the legal estate in lands, of which the testator was seised as mortgagee, did not pass to the executors by the words "securities for money." But in the previous case of *Renvoise v. Cooper* (h), Sir J. Leach, V.-C., held, that a residuary clause of personalty, including the words "mortgages and other securities for money," passed the legal fee. And on a subsequent occasion, in *Ex parte Barber* (i), it was held by Sir L. Shadwell, V.-C., that a devise of all the testator's freehold estates, and all his farming stock, ready money, bills, bonds, notes and other securities for money, and all the residue of his personal estate, to trustees, *their heirs*, executors, &c., in trust to sell his real estates, and to sell, get in, and convert into money all his personal estate, would pass a mortgage in fee. Again in *Mather v. Thomas* (k), it was held by the same learned Judge, in conformity with a certificate by the Judges of the C. P. on a case sent by his Honor for their opinion, that a devise of all messuages, buildings, chattels real, ready money, securities for money, debts owing, and personal estate, save what were before otherwise disposed of, to trustees and *their heirs*, in trust to pay the rents and profits to C. for life, and after his decease to divide such residue among the children of J. C., would pass lands vested in the devisor as mortgagee in fee. It will be observed that in these two cases the word "*heirs*" is used in the bequest: But it should seem that it would be laying too much stress upon that word to say that it made the difference between them and *Galliers v. Moss*, which was treated by Parker, V.-C., in *Re King's Mortgage* (l), as overruled by the subsequent decisions; and that learned Judge accordingly held, that by a gift of "securities for money" the legal estate of the mortgagee passed: And it was held in *Doe v. Bennett* (m), to pass under a bequest of all "*monies on mortgage.*"

(h) 6 Madd. 371.

(i) 5 Sim. 451.

(k) 6 Sim. 115. 10 Bing. 44.
3 Moore, 684.

(l) 5 De G. & Sm. 644. See

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Accord. Knight v. Robinson, 2
Kay & J. 503. Rippen v. Priest,
13 C. B., N. S. 308. See also *Re*
Stevens' Will, L. R. 6 Eq. 597.

(m) 6 Exch. 892.

Where the "interest" or "produce" of a fund is bequeathed to a legatee, or in trust for him (*n*), *without any limitation as to continuance*, the principal will be regarded as bequeathed also (*o*): Thus an indefinite gift of the dividends gives the absolute property of the stock (*p*).

"Annuity."

But there is a marked distinction between the gift of the produce of a fund without limit as to time, and a simple gift of an annuity. An annuity may be perpetual, or for life, or for any period of years; but in the ordinary acceptation of the term used, if it should be said that a testator had left another an annuity of 100*l. per annum*, no doubt would occur of the gift being an annuity for the life of the donee (*q*). Accordingly it is perfectly settled, that a simple gift of an annuity to A. does not give an annuity beyond the life of A. (*r*). So it was decided by Knight Bruce, V.-C., in *Wilson*

(*n*) A bequest to a woman of a fund, with the interest thereon, to be vested in trustees, the income arising therefrom to be for her sole use and benefit, vest the capital for her separate use. *Adamson v. Armitage*, 19 Ves. 416. See also *Humphrey v. Humphrey*, 1 Sim., N. S. 536.

(*o*) *Elton v. Sheppard*, 1 Bro. C. C. 532. *Philipps v. Chamberlaine*, 4 Ves. 51. *Rawlings v. Jennings*, 13 Ves. 39. *Adamson v. Armitage*, 19 Ves. 418. *S. C. Cooper*, 283, 284. *Stretch v. Watkins*, 1 Madd. 253. *Clough v. Wynne*, 2 Madd. 188. *Haig v. Swiney*, 1 Sim. & Stu. 490. *Hawkins v. Hawkins*, 7 Sim. 178. *Clarke v. Gould*, *ibid.* 197. *Humphrey v. Humphrey*, 1 Sim., N. S. 536. *Jenings v. Bailey*, 17 Beav. 118. But see *Cooke v. Bowler*, 2 Keen, 54. *McDonald v. Bryce*, *ibid.* 517. See also *Blann v. Bell*, 5 De G. & Sm. 658, 663, where Parker, V.-C., said that the rule

which gives an absolute interest in the funds, when there is a general gift of the income, is not a very strong one; and that in all such cases the Court is obliged to find out the meaning from the context. See likewise *Wetherell v. Wetherell*, 4 Giff. 51. 1 De Gex, J. & S. 134. *Page v. Young*, L. R. 19 Eq. 501. Where the entire fund or the entire interest of a fund is given for a particular purpose which fails, the Court holds the donee entitled to the whole fund, treating the purpose merely as the motive for the gift: *Secus*, where the gift is of the whole or any part of the fund: *Re Sanderson's Trusts*, 3 Kay & J. 497.

(*p*) *Page v. Leapingwell*, 18 Ves. 463. *Haig v. Swiney*, 1 Sim. & Stu. 487, 490. *Southouse v. Bute*, 16 Beav. 132.

(*q*) *Blewitt v. Roberts*, 1 Cr. & Ph. 274, 280.

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v. *Maddison* (s), that a bequest of 30*l.* a year "from the interest of my funded property in the Bank of England," did not amount to a bequest of so much stock as would produce that annual sum, but constituted an annual charge of 30*l.* upon the funded property for the life of the legatee: His Honor observing that what the testator gave was an annuity of 30*l.* a year charged on the stock; not an annuity of 30*l.* a year, part of the stock.

Still where, in effect, the bequest is a gift of property which will produce the amount of the annuity, or, in other words, where the Will dedicates the *corpus* of a fund to the purchase of the annuity, it is a gift in perpetuity (t). So, where the Will deals with the annuity as being in existence and operative beyond the period of the life of him who is first to enjoy it, and no other period can be fixed for such further duration short of making it perpetual (u), the annuity must be considered as given in perpetuity; that is to say, it is a bequest of so much property as will produce the income which the testator prescribes as the amount of the gift he intends for the legatee. And though if an annuity be given to one for life, and after his death to another simply, the latter does not necessarily take an absolute interest in the annuity, yet there may be other circumstances affecting the construction which are sufficient to show an intention to give the annuity indefinitely (v). A gift of an annuity for a term or *pur autre*

2 De Gex, M. & G. 583, by Lord St. Leonards. *Blewitt v. Roberts*, 1 Cr. & Ph. 274, overruling the decree of the V.-C., 10 Sim. 491, and also *semble*, *Tweedale v. Tweedale*, Sim. 453. *Potter v. Baker*, 13 Beav. 273. *Re Groves's Trust*, 1 Giff. 74. *Blight v. Hartnoll*, 19 C. D. 294, 296, *per* Fry, J.

(s) 2 Y. & Coll. Ch. C. 372.

(t) *Stokes v. Heron*, 12 Cl. & F. 161. *Kerr v. Middlesex Hospital*, 2 De Gex, M. & G. 577, 584. *Hill v. Rattey*, 2 Johns. & H. 634.

Hedges v. Harpur, 3 De G. & J. 129. *Ross v. Borer*, 2 Johns. & H. 469. *Bent v. Cullen*, L. R. 6 Ch. 235. *Hicks v. Ross*, L. R. 14 Eq. 141. *Evans v. Walker*, 3 C. D. 211.

(u) *Stokes v. Heron*, 12 Cl. & F. 194. *Robinson v. Hunt*, 4 Beav. 451.

(v) *Potter v. Baker*, 13 Beav. 273. 15 Beav. 489. See further on this subject, *Pawson v. Pawson*, 19 Beav. 146.

vie is a gift to the annuitant and his personal representatives during the term, or the life of the *cestui que vie*, and is not limited to the life of the annuitant (*w*). And a gift of the income to arise from a fund during the life of A. to B. for his maintenance is an absolute gift to B. his executors and administrators during the life of A., and is not confined to the joint lives of A. and B. (*x*).

As already stated, as a general rule, there can be no doubt that the gift of an annuity to A. is a gift during the life of A. and nothing more: on the other hand, where a testator indicates the existence of the annuity without limit after the death of the person named, and therefore implies that it is to exist beyond the life of the annuitant, the annuity is presumed to be a perpetual annuity, and the bequest of the annuity is equivalent to a bequest of so much property as will produce the annuity spoken of (*y*). But it does seem to be true (notwithstanding the decision in *Evans v. Walker* (*z*)), that a gift of an annuity beyond the life of the first taker is of itself a sufficient indication that it should be perpetual (*a*). To make an annuity created by Will perpetual there must be express words in the Will so describing it, or the testator must by some language in the Will indicate an intention to that effect. The most common indication is a direction by the testator to segregate and appropriate a portion of his property from the interest or profits of which the annuity is to be paid. When this is done, the annuity when mentioned in the Will represents the *corpus* so appropriated and, the *corpus* passing by the bequest of the annuity, the annuity may be said to be per-

(*w*) *Re Ord*, 9 C. D. 667. 12 C. D. 22.

(*x*) *Attwood v. Alford*, L. R. 2 Eq. 479.

(*y*) *Blight v. Hartnoll*, 19 C. D. 294.

(*a*) 3 C. D. 211.

(*a*) *Blewitt v. Roberts*, 10 Sim. 491. 1 Cr. & Ph. 274. *Lett v. Randall*, 2 De G. F. & J. 388.

Blight v. Hartnoll (*ubi sup.*), p. 297.

It will be observed that the fact of the first interest being expressly limited to life does not afford an argument that the second interest is not so limited on the principle of the maxim "*expressio unius*," &c., because the duration of the life of the first taker is expressed, not for the purpose of limiting the gift to

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(*c*) *Innes v.*
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petual (b). Neither, however, does it seem to be true that an appropriation of property to meet an annuity is a sufficient indication (c). It is plain that a distinction between an annuity for life with a remainder over, charged on a fund, and a gift of part of the produce of a fund for life with a remainder over is very fine, and yet it would seem that in the former case the first and second taker were held alike to take mere life estates in the annuity while in the latter case the second taker was held to take a perpetual interest equivalent to the *corpus* of the fund (d). The distinction between these cases does not seem, having regard to the observations of Lord Hatherley in *Bent v. Cullen* (e), to turn on the use of the word "annuity," nor on the fact that the annuity may happen to be charged on part of the income of a fund as was the case in *Blight v. Hartnoll*. The distinction would rather seem to be based on what appears from the words of the will to be the subject-matter of the bequest. If, primarily, the testator would seem to be dealing with an annuity then the mere incident that he charges the annuity on a fund is not sufficient to give a second taker the *corpus* or more than a life estate, whereas if the testator is dealing primarily with a gift of the produce or a part of the produce of a fund the mere incident that he gives the first taker a life estate is not sufficient to prevent the second taker taking the *corpus* of the fund as the taker of an unlimited gift of income.

It may be here mentioned, that it is established by several cases (f), that where money is bequeathed to be invested in the purchase of an annuity for the life of the legatee, and the legatee dies before it is laid out, or even before the fund is available, as during the life of the person after whose death

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the first taker, but of limiting the commencement of the gift to the second. See *Blight v. Hartnoll*, *ubi sup.*, per Fry, L. J., p. 297.

(b) *Lett v. Randall*, 2 De G. F. & J. 388, 392.

(c) *Innes v. Mitchell*, 9 Ves. 212.

(d) *Bent v. Cullen*, L. R. 6 Ch. 235.

(e) *Ibid.* p. 238.

(f) *Yates v. Compton*, 2 P. Wms. 309. *Barnes v. Rowley*, 3 Ves. 482. *Palmer v. Craufurd*, 3 Swanst. 305. See *Re Mabbett* [1891], 1 Ch. 707.

the investment is to be made (*g*), yet still it is a vested legacy, from the death of the testator, and the sum will belong to the personal representatives of the legatee: And it is further established, that the legatee for whose benefit it was intended, having survived the testator, may elect either to take the sum (*h*), or to have it laid out in an annuity (*i*).

"Debts."

"Debts." Under a bequest of "whatever debts may be due to me at the time of my death," it has been held, that a bill

(*g*) *Bayley v. Bishop*, 9 Ves. 6. In the case of *Day v. Day*, 1 Drewr. 569, Sir R. Kindersley, V.-C., seems to have decided that the rule in the text applied, although the bequest of the annuity was coupled not only with the words intended to restrain anticipation, but also with a gift over in case the legatee should assign, encumber, or anticipate, or take the benefit of any Act for the relief of insolvent debtors. But *Malins, V.-C.*, in *Power v. Hayne*, L. R. 8 Eq. 262, disapproved of the decision in *Day v. Day*, and held in the case of a legacy, coupled with a similar clause that, where a testator directed his executors, after the death of his wife, to invest one-sixth of his residuary estate in the purchase of an annuity during the life of the legatee, and to pay the annuity into his proper hands for his support and maintenance, and the legatee died in the lifetime of the testator's widow without having assigned or encumbered the annuity, or become bankrupt or insolvent, the representatives of the legatee were not entitled to claim the one sixth, but that there was an intestacy as to that sixth. Where, however, the money is bequeathed to trustees to be invested in the purchase

of an annuity to be paid to a married woman with restraint on anticipation, the rule in the text would seem to apply. *Woodmeston v. Walker*, 2 Russ. & M. 197.

(*h*) Where an annuitant, entitled to a perpetual annuity, adequately secured, is willing to receive a present payment of cash in lieu of his annuity, the amount of such cash payment ought to be such a sum as at the price of the day will purchase 2½ per cent. Government Stock sufficient to produce the annuity, excluding any charge for brokerage. *Hicks v. Ross* [1891], 3 Ch. 499.

(*i*) *Dawson v. Hearn*, 1 Russ. & M. 606, 608. *Kerr v. Middlesex Hospital*, 2 D. M. & G. 584, per Lord St. Leonards. *Ford v. Batley*, 17 Beav. 303. *Stokes v. Cheek*, 28 Beav. 620. But where one of the liabilities of the testator's estate is a life annuity, the annuitant is not, in the administration of the estate, entitled to the value of the annuity as a gross sum: *Yates v. Yates*, 28 Beav. 637. As to whether, in the construction of the word "legacies" in a Will, annuities bequeathed are to be included, see *Cornfield v. Wyndham*, 2 Coll. 184. *Bromley v. Wright*, 7 Hare, 334. *Heath v. Weston*, 3 De Gex, M. & G. 601.

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of exchange, drawn in the testator's favour, and delivered by him to his banker, and a cash balance in his banker's hands, passed to the legatee (*j*).

And under a bequest of "all and every sum or sums of money which may be due to me at my decease," it has been held, that damages recovered in an action by an executor for a breach of covenant committed in the lifetime of the testator will pass (*k*). And moneys receivable under a policy of assurance on the testator's life to which he was entitled, were held to pass under a bequest of "any money that I may die possessed of, or which may be due and owing to me at the time of my decease" (*l*).

But, where a testator bequeathed all his ships and money due to him at the time of his decease, to A. B., it was held that freight earned by a ship under a charter-party executed after the date of the Will, and in respect of a voyage not completed until after the testator's death, did not pass to A. B. either as "money due," or as incident to the ship (*m*).

Where the testator bequeathed all his ready money and debts due and owing to him *at his death* to A., and all his government stock and funds, and personal estate, to B.; and after making his Will, sold out a certain sum of stock, and lent it upon bond, conditioned for replacing the stock on a day specified, *which day he survived*: Sir Wm. Grant held, that this bond passed to A., under the bequest of the testator's *debts*, the question depending on what was the actual description of the property at the time of his death, and the circumstance that the debtor might still transfer

(*j*) Carr v. Carr, 1 Meriv. 541, note to Devaynes v. Noble. See also Parker v. Marchant, 1 Phill. Ch. C. 361, per Lord Lyndhurst. Accord.

(*k*) Bide v. Harrison, L. R. 17 Eq. 76.

(*l*) Petty v. Willson, L. R. 4 Ch. 574.

(*m*) Stephenson v. Dowson, 3 Beav. 342. This case was decided on the ground that the freight was not a debt due to the testator at the time of his death, because no debt accrued until the service had been completed, which did not happen till after the death of the testator.

the stock, not being allowed to alter or affect the rights of parties (*n*).

In the case of *Stenhouse v. Mitchell* (*o*), Lord Eldon was of opinion, that the words "debts due at my death from A., whether by bonds or mortgages, or open accounts," would have passed only debts *ejusdem generis* with the securities specified, and would, therefore, not have included a judgment debt, had not the context of the will disclosed a larger intention (*p*).

The bequest of a debt due on a particular security will pass the capital only, and not arrears of interest due at the testator's death (*q*); and *e converso*, the bequest of arrears of a debt will not pass the principal (*r*).

In *Collins v. Doyle* (*s*), a testatrix who was entitled to a distributive share of the assets of an intestate, to whom, at her death, no administration had been taken out, bequeathed "all such sums of money as should be owing to me at the time of my decease from G. B.:" And it was holden by Lord Gifford, that these words would not pass her beneficial interest in a sum of money which was then due from G. B. to the estate of the intestate.

But in *Bainbridge v. Bainbridge* (*t*), where testatrix being

(*n*) *Essington v. Vashon*, 3 Meriv. 434.

(*o*) 11 Ves. 356.

(*p*) But see *Bridges v. Bridges*, Vin. Abr. tit. Devise (O. b.) pl. 13. *Chalmers v. Storil*, 2 Ves. & Bea. 222.

(*q*) *Roberts v. Kuffin*, 2 Atk. 112. *Harvey v. Cooke*, 4 Russ. Chanc. Cas. 34. But where the bequest was of "all my interest and claim on household property in W. on which I have a mortgage of 1,500L," the legatee was held entitled to the arrears of interest due upon the mortgage at the time of the testator's death. *Gibbon*

v. Gibbon, 13 C. B. 205. And where a testator gave "the amount of the bond from J. H.," it was held that the legatee was entitled to the arrears of interest upon the bond as well as to the principal. *Harcourt v. Morgan*, 2 Keen, 274.

(*r*) *Hamilton v. Lloyd*, 2 Ves. Jun. 416.

(*s*) 1 Russ. Chanc. Cas. 135.

(*t*) 9 Sim. 16. But, it seems that the estate out of which the money bequeathed is payable, must have been got in by the executor so as to constitute a debt from him. It is otherwise if the estate has not been so got in:

entitled to was unascertained any debts will collect Shadwell, request.

"Jewels" testatrix directed except a portion to a friend's rings, her cornelians, disposition of her jewels by instrument third testatrix trinkets and which were was possessed and of a various diamonds bequeathed diamond specifically B.: His passed to and did not

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Martin v. H. and see the L. J., in the *Bainbridge*

(u) 5 Russ. found by ex

entitled to her son's residuary estate (the amount of which was unascertained at her death), bequeathed as follows: "If any debts due to me at my decease, I request my executors will collect and pay into the hands of my children;" Sir L. Shadwell, V.-C., held, that the son's residue passed by the request.

"Jewels." In the *Attorney-General v. Harley* (u), a testatrix directed all her jewels to be sold to pay her debts, except a particular ring set with diamonds, which she gave to a friend, and she then bequeathed the remainder of her rings, her necklaces of every description, pearls, garnets, cornelians, and watches, to B.; by a subsequent testamentary disposition she gave all her trinkets of every denomination, her jewels excepted, to C.; and, in another part of the same instrument, directed her jewels to be sold; afterwards, by a third testamentary instrument, she bequeathed to C. all her trinkets and pearls, with various specific articles, among which were some rings set with diamonds; the testatrix was possessed of a very valuable diamond necklace and cross, and of a pearl necklace, beside other necklaces, and of various diamond rings, besides those which were specifically bequeathed: And it was held by Lord Lyndhurst, that the diamond necklace and cross, and the diamond rings, not specifically mentioned, were not to be sold, and did pass to B.: His Lordship further held, that the pearl necklaces passed to B., under the gift of necklaces of every description, and did not pass to C. under the gift of pearls.

The term "plate" has been held to be confined to articles of solid silver and not to include a plated service (x).

"Books." In *Willis v. Curtois* (y), a question arose under the Will of the celebrated Dr. Willis, whether a collection of

Martin v. Hobson, L. R. 8 Ch. 401; and see the observations of James, L. J., in that case on the case of *Bainbridge v. Bainbridge*, *ib.* 405.

(u) 5 Russ. 173. A bag of coins found by executors in a testator's

strong box were held not to pass under a bequest of "jewellery." *Sudbury v. Brown*, 4 W. R. 736.

(x) *Holden v. Ramsbottom*, 4 Giff. 205.

(y) 1 Beav. 189.

"Jewels."
"Pearls."
"Necklaces."

Plate.

"Books."

books bound into volumes, which contained manuscript notes of his attendance upon King George III., would pass by a bequest to his nephew, a gentleman engaged in the like branch of the medical profession as the testator, of "all and every the books in and about my house in Tenterden Street:" Lord Langdale, M. R., held in the affirmative.

"Personal ornaments."

"Personal ornaments." In the construction of the same Will, his Lordship held, that a pocket-book and a case of instruments, usually carried about the person of the testator, did not pass under a bequest of "personal ornaments." But the learned judge inclined to be of opinion that a gold pencil case, toothpick case, lip-salve box, and eye-glass, similarly circumstanced, would pass.

"Linen and clothes."

"Linen." Under this term, without qualification, table and bed linen, and every article to which that general word can be applied will pass: But where there is a bequest of "all linen and clothes of all kinds," it has been held, that only body linen will pass (z).

"Medals."

"Medals." By this word, curious pieces of current coin, which have been kept by the testator with his medals, have been held to pass (a).

"Portraits."

"Portraits." Where a testator bequeathed the *portraits* of himself, of his grandfather and grandmother, and of his mother, and of the Duke of Schomberg, to A. B.; and the testator had one portrait of himself, one of his grandfather and grandmother, and one of his mother, and a three-quarter portrait and a portrait in crayon of the Duke of Schomberg, and also a picture in which the duke is represented on horseback, with a battle in the distance; it was held that that picture was a portrait of the duke, and that it passed, together with all the other portraits, by the bequest (b).

"Plantation"

It should seem, that by a devise of a West Indian

(z) Hunt v. Hort, 3 Bro. C. C. 311.

(a) Bridgman v. Dove, 3 Atk. 202.

(b) Duke of Leeds v. Amherst, 13 Sim. 459, affirmed by Lord Lyndhurst, C.

plantation pass (c).

Mistakenly described terms of taken to

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(c) Lus 435. See Amb. 39 (d) An note (g).

(e) Pt. Godolph. (f) 1 pl. 16. (g) See ves. 306

plantation, the stock, implements, utensils, &c., upon it will pass (c). in the West Indies.

Mistakes in the description of legacies, like those in the description of legatees, may be rectified by reference to the terms of the gift, and evidence of extrinsic circumstance, taken together (d). Mistakes in the description of a legacy.

The error of the testator, says Swinburne (e), in the proper name of the thing bequeathed, did not hurt the validity of the legacy, so that the body or substance of the thing bequeathed is certain: As for instance, the testator bequeathed his horse Cripple, when the name of the horse was Tulip; this mistake shall not make the legacy void; for the legatary may have the horse by the last denomination; for the testator's meaning was certain, that he should have the horse; if therefore he hath the thing devised, it is not material if he hath it by the right or the wrong name.

Accordingly, in *Door v. Geary* (f), where a husband bequeathed to his wife 700*l.* East India stock, having none; but there was 700*l.* Bank stock, to the surplus of which the wife was entitled as an executrix, after payment of her testator's debts, and which the husband afterwards transferred in his own name: Lord Hardwicke held, that the 700*l.* Bank stock should go to the wife; the learned Judge being of opinion, that, as it was a case merely of error of description, the words "East India" should be rejected: and his Lordship said it was no greater mistake than the devise of a black horse, the testator having only a white horse, where the word "black" shall be rejected (g).

(c) *Lushington v. Sewell*, 1 Sim. 435. See *Wood v. Gaynon*, 1 Amb. 395. *Ante*, 650.

(d) *Ante*, p. 101*c*, *et seq.*, and *post*, note (g).

(e) Pt. 7, s. 5, pl. 7. See also *Godolph. Pt. 3, c. 25, s. 10*.

(f) 1 Ves. Sen. 255.

(g) See also *Swinb. Pt. 7, s. 5, pl. 16*. See *Selwood v. Mildmay*, 3 Ves. 306, 310, and the remarks

on this case of *Tindal, C. J.*, in *Miller v. Travers*, 8 Bingh. 252, and of Lord Langdale, *Lindgren v. Lindgren*, 9 Beav. 362, 363, 365. *Gallini v. Noble*, 3 Meriv. 691. *Alford v. Green*, 5 Madd. 92. *King v. Wright*, 14 Sim. 400. *Howard v. Conway*, 1 Coll. 87. *Purchase v. Shallis*, 2 H. & Tw. 354. *Quennell v. Turner*, 13 Beav. 240. *Goodlad v.*

Where intention plain, a mistake in calculation will not defeat it.

Again, where the intention of the testator is plain, a mistake in his calculation shall not defeat that intention. Thus in *Milner v. Milner* (h), Sir W. Milner bequeathed a legacy in this manner: "I give my daughter Mary 3,500*l.*, which with 6,000*l.* she is entitled to by my marriage settlement, and 500*l.* from her father-in-law, make up 10,000*l.*, which I design for her fortune." In fact she was entitled only to 5,000*l.* by the settlement: And Lord Hardwicke held, that she was entitled to have 4,500*l.* under the Will. Again, in *Ouseley v. Anstruther* (i), a testator after reciting, inaccurately, that his wife was entitled for life to 39,000*l.* settled on his marriage, which he stated would, at four per cent., yield 1,560*l.*, directed his trustees to add an annuity of 440*l.* to raise her jointure to 2,000*l.*: And it was held that she was entitled to have her annuity made up to 2,000*l.* at all events (k).

So in *Trevor v. Trevor* (l), a testator gave his wife an annuity of 100*l.* and the sum of 1,000*l.*, which he considered would, with the property she was entitled to after his death, make up to her an income of 2,500*l.* a-year. In fact those gifts made up her income only to 1,800*l.* a-year: And Sir John Leach, M. R., held, that she was entitled to have the deficiency supplied out of the testator's residuary estate. Again, in *Jordan v. Fortescue* (m), a testator by a codicil gave to a legatee "500*l.* in addition to 1,500*l.* which I had before bequeathed to him:" The testator had in fact bequeathed to him 1000*l.* only: And it was held that the legatee was entitled to 2,000*l.* by implication.

But in a late case, where a testator after reciting that he had advanced to a legatee a certain sum directed that sum to be considered as a payment on account of the legacy, and the

Burnett, 1 Kay & J. 341. Edmunds v. Waugh, 4 Drew. 275. Waters v. Wood, 5 De G. & Sm. 717. Thompson v. Whitelock, 4 De G. & J. 490. Morgan v. Middlemiss, 35 Beav. 278. Ives v. Dodgson, L. R. 9 Eq. 401.

(h) 1 Ves. Sen. 106.

(i) 10 Beav. 459.

(k) See also Read v. Strangeways, 14 Beav. 139.

(l) 5 Russ. 24.

(m) 10 Beav. 259.

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advance in fact made was less than the sum recited as having been advanced, the legatee was held to be bound by the erroneous recital, and the sum mentioned by the testator was deducted from the legacy (*n*).

And it has been held that where a testator has given a certain sum as a debt due to the person to whom he gives it, the circumstance that he does not owe to that person so much as he has given will, in the absence of evidence of intention to confer a bounty on the donee, either express or to be inferred from the whole Will, cut down the amount of the bequest to the amount of the debt actually due from the testator. Thus in *Wilson v. Morley* (*o*) a testator directed his debts to be paid, "including a debt of 300*l.* owing from me to my daughter." He owed his daughter 150*l.* only. It was held that she was not entitled to receive more than the 150*l.*

The rules, which there already has been occasion to state (*p*) as to the admissibility of evidence of extrinsic facts, and of extrinsic evidence of intention, in order to enable the Court to identify the *person* intended by the testator to be the object of his bounty, are equally applicable, *mutatis mutandis*, as to the admissibility of such evidence for the purpose of making certain the *thing* intended to be bequeathed by him (*q*).

Admissibility of evidence to ascertain the thing bequeathed.

(*n*) *Re Aird's Estate*, 12 C. D. 291. This was followed in *Re Wood*, 32 C. D. 517, in which case *Re Taylor's Estate*, 22 C. D. 495, was referred to in argument as in effect overruling *Re Aird*. North, J., however, held that he was not bound by *Re Taylor*, inasmuch as that case did not in terms overrule *Re Aird*, and as the decision of the Court of Appeal therein was based on the very special words of the Will and codicil.

(*o*) 5 C. D. 776. In this case Fry, J., distinguished the case of

Whitfield v. Clement, 1 Mer. 402, on the ground that in that case there was inferred an intention to confer a bounty.

(*p*) *Ante*, p. 1012, *et seq.*

(*q*) See further, on this subject, *Lindgren v. Lindgren*, 9 Beav. 358. *Ricketts v. Turquand*, 1 H. L. C. 472. *Webb v. Byng*, 1 Kay & J. 580. *Hewson v. Reed*, 5 Madd. 431. See also *Castle v. Fox*, L. R. 11 Eq. 542. If, on such evidence being admitted, it appears that there was property correctly answering to the speci-

Property contracted for by testator will pass by a description of it as testator's actual property.

It may here be observed that what a party is entitled to under a contract he may well be taken to consider as his own. Thus lands contracted for will pass by a general devise of all the testator's lands and of all the lands purchased by him, although he had other lands purchased and actually conveyed (*r*). And so if a testator contract for the purchase and transfer of a particular description of stock, and then bequeaths all he possesses or has of such stock, it will pass (*s*). So if a testator, having contracted for the purchase of a large quantity of wool, should make his Will, bequeathing to one person all his personal estate except his wool, and to another all his wool, this would be a good bequest of the wool, although the party contracting to sell it had it not himself, but had to procure it to enable him to fulfil his contract (*t*).

fied description, no evidence can be admitted to show that the bequest was intended to apply to other property: *Horwood v. Griffith*, 4 De Gex, M. & G. 708, by Lord Justice Turner. *Webber v. Stanley*, 16 C. B. N. S. 698. Two rules which have been laid down with reference to uncertain description of lands the subject of devises, and the admissibility of extrinsic evidence, seem equally applicable to bequests of personalty. These rules are firstly: that, when a devise is made in terms which apply specifically to a definite subject, the operation of that devise cannot be extended beyond the very terms in which it is expressed; nor can evidence be resorted to for the purpose of showing that something different from the description was intended by the testator. Secondly, that if the words of description when examined do not fit with accuracy, and if there must be some modification of some

part of them, in order to place a sensible construction on the Will, the whole thing must be looked at fairly, in order to see what are the leading words of description and what is subordinate matter, and for this purpose evidence of extrinsic facts may be regarded. *Whitfield v. Langdale*, 1 C. D. 61, 74. *Hardwick v. Hardwick*, L. R. 16 Eq. 168, 175. See also *Gordon v. Gordon*, L. R. 5 H. L. 254. *Hall v. Hill*, 4 Ir. Eq. Rep. 27. *Millard v. Bailey*, L. R. 1 Eq. 378.

(*r*) *Acherley v. Vernon*, 10 Mod. 518, 526.

(*s*) *Collison v. Girling*, 4 M. & Cr. 63, 75. See also *Ellis v. Eden*, 25 Beav. 482.

(*t*) *Collison v. Girling*, 4 M. & Cr. 74, 75. See also *Field v. Peckett*, 29 Beav. 573, where cabinets ordered and made but not delivered to the testator before his death passed under a bequest of "furniture."

There is a contingent and possession of the executory contingent that continues particular extinguish

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The general death of the die before precedent lapses, and of the legatee treat, 1st. before the death of Of the lapse of the lapse of personality.

SECTION V.

Of Legacies Vested or Contingent.

There has already been occasion to show (u), that contingent and executory interests, though they do not vest in possession, may vest in right, so as to be transmissible to the executors or administrators of the party dying before the contingency on which they depend, takes effect: But where that contingency is the endurance of life of the party till a particular period, the interest will obviously be altogether extinguished by his death before that period.

The object of the present section is to ascertain the circumstances under which a legacy is to be regarded as a vested interest, or as contingent on the event of the endurance of the life of the legatee: or, in other words, in what cases the interest in a legacy will be so fixed as to be transmissible to the executor or administrator of the legatee, though he die before the time arrives for the payment of the money; and on the other hand, in what cases the legacy will lapse by the death of the legatee.

Object of section.

The general principle, as to the lapse of legacies by the death of the legatee, may be stated to be, that if the legatee die before the testator's decease, or before any other condition precedent to the vesting of the legacy is performed, the legacy lapses, and is not payable to the executors or administrators of the legatee. It is proposed, in pursuing this subject, to treat, 1st. Of legacies lapsed by the death of the legatee before the death of the testator: 2ndly. Of legacies lapsed by the death of the legatee after the death of the testator: 3rdly. Of the lapse of legacies charged on a real fund: 4th. Of the lapse of legacies charged on a mixed fund of realty and personalty.

General principle as to lapse of legacies by death of legatee

(u) *Ante*, p. 773.

1. *Of Legacies lapsed by the death of the Legatee before the Testator.*

General rule that unless the legatee survive the testator the legacy lapses :

It has been established from the earliest periods, both in the Ecclesiastical Courts and in Equity, that unless the legatee survive the testator, the legacy is extinguished: neither can the executors or administrators of the legatee demand the same (v). And Swinburne puts the case of the testator and legatee being drowned in the same ship, or both being struck to death by the fall of a house, in which case he lays it down, that as they both died at the same time, the legacy is not due, and consequently not transmissible to the executors or administrators of the legatee. In cases of this kind the question of survivorship is, by the law of England, a matter of evidence merely, and, in the absence of evidence, there is no rule or conclusion of law on the subject: And as the onus of proof lies on the representatives of the legatee, they cannot claim the legacy, unless they can produce positive evidence that he was the survivor (x).

(v) Swinb. Pt. 7, s. 23, pl. 1. Godolph. Pt. 3, c. 25, s. 25. Wentw. Off. Ex. 436, 14th edit.

(x) Underwood v. Wing, 4 De Gex, M. & G. 633. 19 Beav. 453. Taylor v. Diplock, 2 Phillim. 261, ante, p. 492. Satterthwaite v. Powell, 1 Curt. 705. Barnett v. Tugwell, 31 Beav. 232. It will be observed that Swinburne, in the passage above cited, assumes that the testator and legatee must be taken to have died at the same time: And it appears to have been sometimes deemed a rule in the Ecclesiastical Court, that they must, under such circumstances, be presumed to have perished at the same moment, unless proof can be obtained as to the exact time when either of them died:

In the goods of Selwyn, 3 Hagg. 749. But it can hardly be assumed as a fact that two human beings ceased to breathe at the same moment of time: Underwood v. Wing, 4 De Gex, M. & G. 661, by Lord Cranworth, C. And in the same case, in the House of Lords, *sub nom.* Wing v. Angrave, 8 H. L. C. 183, it was laid down that there is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause: Nor is there any presumption of law that all died at the same time. But the question is one of fact, depending wholly on evidence; and if the evidence does not establish the survivorship of any one, the law will treat it as matter incapable

Not only in possession of the testator, but in the estate of the testator, and the devise in *Maitland* 400l., with a bond in the Will amounting to 400l. fore lapsed it was a leg

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Not only in cases of bequests of money, or of other chattels in possession, but also of a debt due from the legatee to the testator, the legacy will lapse by his death before the testator, and the executor of the legatee must pay the money: Thus in *Maitland v. Adair* (y), the words in the Will were, "I devise to my brother 2,000*l.*: I also return him his bond for 400*l.*, with interest thereon, which he owes me:" The brother died in the lifetime of the testator: The bond was a joint bond in the Scotch form, by the testator's brother and son: The question was, whether the disposition of the bond by the Will amounted to a release, or was only a legacy, and therefore lapsed: Lord Loughborough, C., held very clearly, that it was a legacy to the brother which had lapsed (z).

Where, however, a testator by his Will declared that one-fifth of the residue of his personal estate should be divided amongst certain of his creditors named in a schedule to his Will, and the schedule contained both the names of the creditors and the debts due to them respectively, the remedy for the recovery of which was barred by the Statute of Limitations: it was held by Lord Lyndhurst, C. B., and afterwards by Alderson, B., that the parties so named in the schedule were not to be considered as legatees, but as creditors, and consequently that the representatives of such as

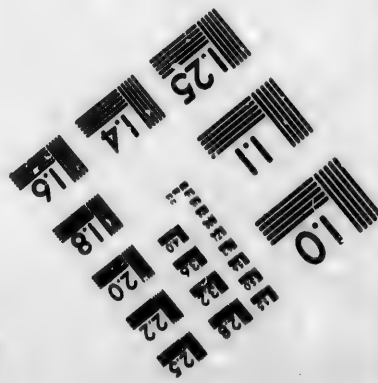
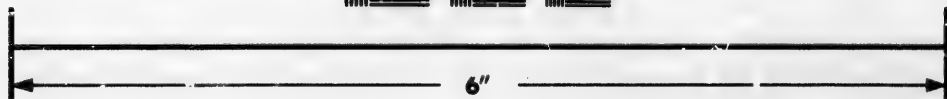
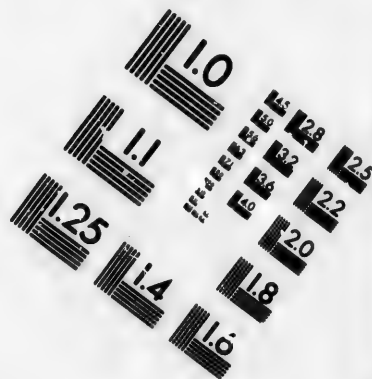
of being determined: The *onus probandi* is on the person asserting the affirmative: See In the goods of Shilling, Dea. & Sw. 183. See also, on this subject, *Wright v. Sarmuda*, reported in the notes to 2 Phillim. 266, and in Evans's edit. of 2 Salk. 593 (*nomine* *Wright v. Netherwood*). General Stanwix's case, reported as *Rex v. Dr. Hay*, 1 W. Bl. 640. *Broughton v. Randall*, Cro. Eliz. 503. *Hitchcock v. Beardsley*, West's Cas. temp. Hard. 445 (stated *ante*, p. 742). *Colvin v. Procurator-Gen.*, 1 Hagg. 92. *Sillick v. Booth*, 1

Y. & Coll. Ch. C. 117, 126. *Ommaney v. Stilwell*, 23 Beav. 328. In the goods of Wainwright, 1 Sw. & Tr. 257. In the goods of Wheeler, 31 L. J., P. M. & A. 40. In the goods of Carmichael, 32 L. J., P. M. & A. 70. *Re Green's Settlement*, L. R. 1 Eq. 288. In the goods of Alston, [1892] P. 142.

(y) 3 Ves. 231.

(z) See further on this subject, *Elliott v. Davenport*, 1 P. Wms. 83. *Toplis v. Baker*, 2 Cox, 118. *Izon v. Butler*, 2 Price, 34. *Att.-Gen. v. Holbrook*, 3 Y. & J. 114; S. C. 12 Price, 407.





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died in the testator's lifetime were entitled to the benefit of the Will (a).

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Even in a case where a legacy is given to a man and his executors, administrators, and assigns, or to a man and his representatives, if the legatee dies before the testator, though the executors are named, yet the legacy is lost: for the words "executors, administrators and assigns, &c.," are considered as only descriptive of the interest bequeathed; and those who take by representation only cannot be entitled to anything to which the person they represent never had any title (b).

So where a legacy is given to A. for life, and after the death of A. to B. or his proper representatives, in case of his dying before A., if B. dies in the lifetime of the testator, the legacy lapses (c). Again, if a legacy be given to a man, and directed to be paid to him or his executors, or administrators, or personal representatives, or to his heirs, at the end of a year after the testator's death, and the legatee die before the testator, the legacy intended for him will lapse (d).

But if instead of the words "personal representatives," the word "heirs" be used, it has been held that this shows an

(a) *Williamson v. Naylor*, 3 Y. & Coll. 208. See also *Accord. Philips v. Philips*, 3 Hare, 281. Where a testator, who was a certificated bankrupt, directed his executors to pay in full all his creditors who had proved in the bankruptcy, it was held that this direction must be regarded as a bounty, not only in favour of those creditors who survived the testator, but of the representatives of those who predeceased him; for that his object was to discharge a moral duty, which object could not be attained if his bounty was to be limited to those creditors who survived him: *Re Sowerby's Trust*, *coram* Wood, V.-C., 2 Kay & J. 630. S. C., *nomine* Turner v.

Martin, *coram* Lord Cranworth, C., 7 De Gex, M. & G. 429.

(b) *Elliott v. Davenport*, 1 P. Wms. 83. *Corbyn v. French*, 4 Ves. 435. *Shuttleworth v. Greaves*, 4 Mylne & Cr. 35. *Ante*, pp. 991, 992.

(c) *Corbyn v. French*, 4 Ves. 418, 435. It will be observed, that the substitution of the executors in this case did not refer to the legatee's dying before the testator, but to his dying before the time of the payment of the legacy: See *Accord. Bone v. Cook*, *M'Clell.* 165. S. C. 13 Price, 332.

(d) *Tidwell v. Ariel*, 3 Madd. 403. See also *Smith v. Oliver*, 11 Beav. 494. *Thompson v. White-lock*, 4 De G. & J. 490.

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intention on the part of the testator, that the persons he designates as "heirs" are to take by way of substitution whenever the legatee may die, and there shall be no lapse though he die in the lifetime of the testator (e). In such a case the heirs do not take by way of transmission or as representatives, but as *personæ designatæ* (f).

In *Edwards v. Salway* (g) there was a gift of residue to the testator's wife for life to her separate use, with an absolute power of appointing the principal by deed or Will, and a gift in default of such appointment to her next of kin, as in case of an intestacy: And Lord Cottenham, C., held, that the gift of the principal had not lapsed by the death of the wife in the testator's lifetime, but that her next of kin, according to the statute, were entitled to the benefit of it (h).

But this general rule may be controlled by the manifest intention of the testator, appearing on the face of the Will, that the legacy shall not lapse, and by his distinctly providing a substitute for the legatee dying in his lifetime (i); though, in order to effect this object, he must declare either expressly, or in terms from which his intention can be with sufficient clearness collected, what person or persons he intends to substitute for the legatee dying in his lifetime (k).

Thus where there is a bequest "to A. or his personal

this rule controlled by the manifest intention of testator, a substitute being declared for the legatee:

substitution implied by a

(e) *Re Porter's Trusts*, 4 Kay & J. 168; and see the observations of Wood, V.-C., 4 Kay & J. 196, as to the construction put on the word "heir" in *Tidwell v. Ariel*, *ubi sup.* But where a testator bequeathed a silver cup to Lord S. and his heirs as a heirloom, and the person who was Lord S. at the date of the Will died before the testator leaving a successor to the title, it was held that the bequest lapsed. *Re Whorwood*, 34 C. D. 446.

(f) See *ante*, p. 967, *et seq.*, as to the meaning of the word "heir" in such cases.

(g) 2 Phil. C. C. 625.

(h) See *accord.* *Nicholls v. Haviland*, 1 K. & J. 504. But see *Baker v. Hanbury*, 3 Russ. Ch. C. 340.

(i) *Sibley v. Cook*, 3 Atk. 572. *Toplis v. Baker*, 2 Cox, 121. *Bridge v. Abbott*, 3 Bro. C. C. 224. *Browne v. Hope*, L. R. 14 Eq. 343. But it is not allowable to prove this intention by evidence *dehors* the Will. *Maybank v. Brooks*, 1 Bro. C. C. 84.

(k) *Browne v. Hope*, L. R. 14 Eq. 343.

bequest to "A. or his personal representatives," or to "A. or his heirs:"

representatives," or "to A. or his heirs," the word "or," generally speaking, implies a substitution, so as to prevent a lapse (*l*).

But in the case of a bequest to children, &c., in a class, and the representatives of such as are dead, a question may arise whether the representatives are to take by way of original substantive limitation, or by way of substitution only. If by the latter, none are entitled but such as represent parties who could have taken as original legatees. A gift to issue is *substitutional*, when the share which the issue are to take is, by a prior clause, expressed to be given to the parent of such issue, and a gift to issue is an *original* gift, when the share which the issue are to take is not, by a prior clause, expressed to be given to the parent of such issue (*m*).

(*l*) Gittings v. McDermott, 2 M. & K. 69, and the authorities collected *ante*, pp. 977, 978; compare pp. 967, 968.

(*m*) Lanphier v. Buck, 2 Dr. & Sm. 494. Christopherson v. Naylor, 1 Mer. 320. Butter v. Ommaney, 4 Russ. 73. See also *Re Webster's Estate*, 23 C. D. 737, in which case Kay, J. says: "The law was settled long ago in the case of Christopherson v. Naylor. There a rule was laid down that where there is a gift to a class and then a substitutionary gift of the share of any one of the class who should die in the lifetime of the testator, no one can take under the substitutionary gift who is not able to predicate that his parent might have been one of the original class, and consequently, if the parent was dead at the date of the Will, and therefore by no possibility could have taken as one of the original class, his issue are not able to take under the substitutionary gift." Now, beyond all doubt, that is still the law. It was

laid down in the case of Christopherson v. Naylor, and that case has been recognised by James, L.J., in *Re Hotchkiss's Trusts*, L. R. 8 Eq. 643, and by the Court of Appeal in the cases of Hunter v. Cheshire, L. R. 8 Ch. 751, West v. Orr, 8 C. D. 60, and *Re Musther*, 43 C. D. 569. But the rule in Christopherson v. Naylor has not always been accepted without question: see Parsons v. Gulliford, 10 Jur., N. S. 231. Gowing v. Thompson, L. R. 11 Eq. 366 (*n*). *Re Potter's Trust*, L. R. 8 Eq. 52. Adams v. Adams, L. R. 14 Eq. 246. *Re Speakman*, 4 C. D. 620 (dissenting from Stewart v. Jones, 3 De G. & J. 532). *Re Lucas's Will*, 17 C. D. 788: and there is a good deal of authority to show that the rule is subject to the rule laid down in *Re Potter's Trust* (*ubi sup.*), viz. that, where there is a gift to a class of persons, with substitution to their issue in case of their dying, that means, that whether they are dead when the Will is made or die after

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But if there is an original substantive gift to two classes of legatees, viz. first to the children of a legatee for life, living at the time of his decease: and, secondly, to the issue of such of them as shall then be dead leaving issue, the issue of a child who was dead at the date of the will may be entitled to a share (n).

wards, the substituted class takes in each case. The two rules are difficult to reconcile, but the great majority of cases in which the rule in *Re Potter's Trust* has been applied, may be explained upon the principle of *Loring v. Thomas*, 1 Dr. & Sm. 497, in which Kindersley, V.-C. (disapproving the decision of Sir J. Leach, M. R., in *Waugh v. Waugh*, 2 M. & K. 41, upon a Will containing the words "so that the children should take only the share which their parent would have taken if living,") pointed out that such a gift was not necessarily to be construed as a substitutional gift in the sense of *Christopherson v. Naylor*, but a gift to the issue, not of the share of the deceased parent, but of the share which the parent of the issue would have taken if living at the death of the testator, which might well include the children of a parent who was dead at the date of the Will. Probably the rule in *Christopherson v. Naylor* will be applied in cases where the gift is a gift to the children or their heirs without more, but, where there is something more, the question will always be, whether an intention that the gift should not be treated as substitutional can be extracted from the Will on grounds similar to those acted on in *Tytherleigh v. Harbin*, 6 Sim. 329. *Loring v. Thomas* (ubi sup.). *Re Philips' Will*, L. R.

7 Eq. 151. *Habergham v. Ridehalgh*, L. R. 9 Eq. 395 (per James, V.-C.). *Re Smith's Trusts*, 5 C. D. 497 (n.). *Re Sibley's Trusts*, 5 C. D. 494. *Wingfield v. Wingfield*, 9 C. D. 658. *Re Woolrich*, 11 C. D. 663. The recent cases of *Re Chinery*, 39 C. D. 614 (in which *Stirling, J.* refused to follow *Re Smith's Trusts*, ubi sup.), and *Re Musther*, 43 C. D. 569, strongly confirm the rule in *Christopherson v. Naylor*.

(n) *Tytherleigh v. Harbin*, 6 Sim. 329. So in *Giles v. Giles*, 8 Sim. 360, a testator bequeathed his residue to trustees, in trust for all his children living at the decease of his wife as tenants in common, and, if any such children should die before his wife and should leave issue, then the children of such, his son or daughter, should be entitled to the portion of such his son or daughter who might be deceased before the decease of his wife: provided that, until the portions thereby provided for any of the said children of his said sons or daughters, who might have died before their mother, should become vested, it should be lawful for his trustees to apply the interest of the portion to which any such child might be entitled in expectancy for the maintenance of such child. The testator at the date of his Will had four sons and one daughter, and he had had another daughter who was then dead leaving children who

With regard to the exclusion of those claiming under a substitutional gift who cannot predicate of the person first named as taker that he might have taken, the distinction must be remembered between a substitutional gift after a bequest to a class and one following a gift to individuals named in the Will. In the former case the test must necessarily be this, was the deceased, whose share is claimed, a member of the class? In the latter case the substituted legatee is presumed to have been introduced into the Will in order to prevent a lapse. This distinction has been recognised and acted upon in many cases (*o*).

survived the testator. Sir L. Shadwell, V.-C., held that those children were entitled to a share of the residue, being of opinion, that looking at the Will altogether, the true construction of it was that the testator adverted as much to the children of the daughter who had died as he did to the children who had survived but might die. Again, in the case of a gift to a niece for life and after her death to the children of A. (deceased) then living, and the issue then living of any child of A. dying in the lifetime of the niece, such issue to take the parent's share, it was held that the issue of the children took as objects of the gift and not in substitution for their parent: *Coulthurst v. Carter*, 15 Beav. 421. It is obviously impossible to lay down any general rule as to what words shall, and what shall not, render a gift substitutional, but it may be useful to cite a few instances of words the presence of which in a testamentary clause has been held not necessarily to import that the gift is substitutional. Thus the words "shall die," "should die," have

been held not to have that effect: *Loring v. Thomas*, 1 Dr. & Sm. 497, even though coupled with the provisions that the issue of the children so dying should have the parent's share: *Smith v. Smith*, 8 Sim. 353 (disapproving *Thornhill v. Thornhill*, 4 Madd. 377). Again the use of the word "or" is not conclusive that the gift is substitutional; nor, on the other hand, is the use of the word "and," as introducing the second gift, conclusive that such gift is original: see *Re Merrick's Trusts*, L. R. 1 Eq. 551. *Hurry v. Hurry*, L. R. 10 Eq. 346.

(*o*) See *Ive v. King*, 16 Beav. 46, and the cases cited *post*, p. 1083, note (*f*). See also *Hodgson v. Smithson*, 8 De G. M. & G. 604 (affirming S. C. 21 Beav. 356). *Cambridge v. Rous*, 25 Beav. 409. *King v. Cleaveland*, 4 De G. & J. 477 (affirming S. C. 26 Beav. 26). *Re Faulding's Trust*, 26 Beav. 263. *Timins v. Stackhouse*, 27 Beav. 434. *Ashling v. Knowles*, 3 Drew. 593. *Re Porter's Trusts*, 4 K. & J. 188, 192. *Hobgen v. Neale*, L. R. 11 Eq. 48. Compare *Re Potter's Trust*, L. R. 3 Eq. 52. It may here

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be observed description substituted for substituted is take vested parents life issue, who are not entitled: *Re J.* 280. C. H. 207. H. Dr. & Sm. 2 Dr. & S. Trusts, L. v. Hurry, the rule h. ferent when an original was decided tion, by Lanphier they need in order to gauge of the

The general rule of equity relating to lapses is equally applicable, whether the legacy be given under a Will, made by virtue of donorship flowing originally from the testator, or whether it be given under a power created for the purpose; for, in the latter case, although the legatee will take under the authority of the power, yet he will not be considered as taking from the time of its creation, so as to prevent a lapse, occasioned by the death of the legatee before the appointor when the power is executed by Will; and for the following reasons: The legatee does not take under the power solely and exclusively, but under it and the Will jointly: The Will so made is to be construed and considered like all others: It is, therefore, ambulatory, revocable, and incomplete, till the death of the testator; consequently, no person can take under it, who does not survive him. If, then, an appointee by Will made under a general power, die before the testator,

Lapse of legacy given under a power by death of legatee before appointor.

be observed that, in gifts of this description, where issue are substituted for their parents, the substituted issue can in no case take vested interests during their parents lifetime, and consequently issue, who predecease their parent, are not entitled to any share in the fund: *Re Bennett's Trust*, 3 K. & J. 280. *Crause v. Cooper*, 1 J. & H. 207. *Humfrey v. Humfrey*, 2 Dr. & Sm. 40. *Lanphier v. Buck*, 2 Dr. & Sm. 484. *Re Merrick's Trusts*, L. R. 1 Eq. 551. *Hurry v. Hurry*, L. R. 10 Eq. 346. But the rule has been held to be different where the gift to the issue is an original gift. In such a case it was decided, after much consideration, by Kindersley, V.-C., in *Lanphier v. Buck* (*ubi sup.*), that they need not survive their parent in order to take; unless the language of the Will precludes chil-

dren from taking who do not survive their parent, as when the gift is to the issue of such nephews and nieces as should have died before the tenant for life, leaving issue: for in such a case such children only as were left by the parent, i.e., as survive him, are to take. See, however, *Re Smith's Trusts*, 7 C. D. 665. But whether the gift to the issue be original or substituted, the issue, in order to take, need not survive the tenant for life: *Re Wildman's Trusts*, 1 J. & H. 299. *Re Pell's Trusts*, 3 Giff. 152. *Lanphier v. Buck*, 2 Dr. & Sm. 484. *Martin v. Holgate*, L. R. 1 H. L. 175, reversing S. C. *sub nom.* *Holgate v. Jennings*, 34 Beav. 79. *Re Orton's Trust*, L. R. 3 Eq. 375. See, however, *Re Kirkman's Trusts*, 3 De G. & J. 558. *Re Corrie's Will*, 32 Beav. 426.

his legacy will not be transmissible to his executors or administrators (*p*).

As to legacies
given to joint
tenants :

It is requisite further to consider the general rule above stated, as applied to legacies given in joint-tenancy, or in tenancy in common. If a legacy be given to two persons jointly, although one of them happen to die before the testator, such interest will not be considered lapsed or undisposed of, but will survive to the other legatee (*q*).

to tenants in
common :

But where legacies are given to legatees, as tenants in common, as where an aggregate fund is to be divided among them, *nominatim*, in equal shares, if any of them die before the testator, what was intended for those legatees will lapse into the residue (*r*).

effect of
revocation :

The law is the same, as to survivorship in cases of joint-tenants (*s*), and as to lapse in cases of tenants in common (*t*), when the testator revokes the interest originally given to one of them.

to tenants in
common in a
class :

But it must be observed, that where a legacy is given to a class of persons in general terms as tenants in common, as the children of A., the death of one of them before the tes-

(*p*) Oke v. Heath, 1 Ves. Sen. 135, 141. Duke of Marlborough v. Godolphin, 2 Ves. Sen. 73. Vanderzee v. Aclom, 4 Ves. 771. Burges v. Mawbey, 10 Ves. 319, 326. Easum v. Appleford, 5 M. & Cr. 56. Master v. Laprimaudaye, 2 Coll. 443. Woodcock v. Renneck, 1 Phill. Ch. C. 72. Jones v. Southall, 32 Beav. 31.

(*q*) Buffar v. Bradford, 2 Atk. 220. Dowset v. Sweet, Ambl. 175. Morley v. Bird, 3 Ves. 628. But in *Re Kerr's Trusts*, 4 C. D. 600, Jessel, M. R., refused to apply the rule in the case of an appointment to an object of the power and a stranger. It may be that he thought that the words created a tenancy in common, but on no

ground is it easy to explain the case.

(*r*) Bagwell v. Dry, 1 P. Wms. 700. Owen v. Owen, 1 Atk. 494. Peat v. Chapman, 1 Ves. Sen. 252. Baxter v. Losh, 14 Beav. 612.

(*s*) Humphrey v. Tayleur, Ambl. 136. Young v. Davies, 2 Dr. & Sm. 167.

(*t*) Cresswell v. Chealyn, 2 Eden, 123. Shaw v. M'Mahon, 4 Dr. & W. 431. Sykes v. Sykes, L. R. 3 Ch. 301. In *Harris v. Davis*, 1 Coll. 416, no doubt was thrown upon the principle, though the operation of *Cresswell v. Chealyn, ubi sup.*, was excluded by the very special words in the codicil, *per Lord Cairns, C.*, in *Sykes v. Sykes, ubi sup.*

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tator will not occasion a lapse of any part of the fund; but those of the described class, who survive the testator, will take the whole (u).

A further exception, as to the doctrine of lapse in cases of legacies given to tenants in common, occurs in instances where the Will contains a limitation over of the legacy to the survivors (x). Thus in *Mackinnon v. Peach* (y), the testator bequeathed to his two daughters his plate and plated ware, together with the pearls, &c., in his possession, share and share alike, and upon the demise of either of them without lawful issue, then the share of her so dying to go to her sister: One of the daughters died unmarried

to tenants in common with a clause of survivorship:

(u) *Viner v. Francis*, 2 Cox, 100. *Shuttleworth v. Greaves*, 4 Mylne & Cr. 38. *Cort v. Winder*, 1 Coll. 320. *Lee v. Pain*, 4 Hare, 250. *Shaw v. McMahon*, 4 Dr. & W. 431, 438. *Leigh v. Leigh*, 17 Beav. 605. *Fitzroy v. Richmond*, 27 Beav. 186. *Re Stanhope's Trust*, *ibid.* 201. *Re Coleman*, 4 C. D. 165. *Fell v. Biddolph*, L. R. 10 C. P. 701. *Re Jackson*, 25 C. D. 162. *Re Colley's Trusts*, L. R. 1 Eq. 496. *Dimond v. Bos-tock*, L. R. 10 Ch. 358. *Secus*, where it appears that the testator did not intend to give to a class incapable of being ascertained at the time, but to individuals who are, or who are capable of being, enumerated: *Bain v. Lescher*, 11 Sim. 397. *Havergal v. Harrison*, 7 Beav. 49. *Re Smith's Trusts*, 9 C. D. 117. *Re Stansfield*, 15 C. D. 84: Or where the survivors would not take the fund in the same manner, or in the same shares and proportions, as the testator says they are to take it: *Re Ham's Trust*, 2 Sim., N. S. 106. As to the distinction between a gift to

persons of aliquot parts of a fund and a gift to persons as a class, see *Ramsay v. Shelmerdine*, L. R. 1 Eq. 129. The naming of one individual member does not prevent the gift being a gift to a class. *Re Jackson*, *ubi sup.*: but, in order to constitute a named person a member of a class, he must have a common character with the unnamed members of the class. *Re Featherstone's Trusts*, 22 C. D. 111. A bequest to a brother for life, and at his death "to be equally divided amongst his surviving children, and my niece, R. W.," is not a gift to a class: *Drakeford v. Drakeford*, 33 Beav. 43. A bequest to persons "hereinbefore named," or "hereinafter named" or "hereinbefore mentioned" or "hereinafter mentioned," cannot be regarded as a gift to a class: *Re Gibson*, 2 Johns. & H. 656. See *post*, p. 1083, note (d).

(x) See *Baxter v. Losh*, 14 Beav. 612. See also *Smith v. Pybus*, 9 Ves. 566, and the cases collected, *post*, p. 1083, note (f).

(y) 2 Keen, 555.

in the testator's lifetime: And Lord Langdale, M. R., held, that the surviving daughter was entitled to the whole of the articles bequeathed; for that the circumstance of the deceased daughter, who would have taken as tenant in common if both had survived the testator, having died in his lifetime, did not prevent the gift over to her sister from taking effect (z).

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In such cases, if more than one of the legatees happen to die before the testator, a question arises, whether the original shares only, or the accrued as well as the original, pass to the survivors. The general rule is, that where distinct legacies are given with survivorship, the clause of survivorship, unless extended by particular words, attaches only to the original shares, and does not affect the accruing shares (a): But an exception to this rule has been admitted, where the disposition is, not of separate legacies, but of one aggregate fund, which the testator meant should remain an aggregate fund, and should not be broken into fragments, if some of the persons, to whom interests in it were given, happen to die (b).

to executors
in a class.

In *Knight v. Gould* (c), a testatrix bequeathed the residue of her property "to my executors hereinafter named, to enable them to pay my debts, legacies, funeral, and testamentary charges, and also to recompense them for their

(z) And see *Sanders v. Ashford*, 28 Beav. 609, and *post*, p. 1083, n. (f).

(a) See *Perkins v. Micklethwaite*, 1 P. Wms. 275. *Rudge v. Barker*, Cas. temp. Talb. 124. *Ex parte West*, 1 Bro. C. C. 575. *Vandergucht v. Blake*, 2 Ves. 534. *Barker v. Lea*, 1 Turn. & Russ. 415. *Crowder v. Stone*, 3 Russ. Chanc. Cas. 217. *Bright v. Rowe*, 3 Mylne & K. 316. *Rickett v. Guillemard*, 12 Sim. 89. *Macgregor v. Macgregor*, 2 Coll. 192. *Goodwin v. Finlayson*, 25 Beav. 65. *Evans v. Evans*, *ibid.* 81.

Re Chaston, 18 C. D. 218.

(b) See *Pain v. Benson*, 3 Atk. 78. *Worlidge v. Churchill*, 3 Bro. C. C. 465. *Barker v. Lea*, 1 Turn. & Russ. 413, 415. *Eyre v. Marsden*, 2 Keen, 564; 4 Mylne & Cr. 231. *Sillick v. Booth*, 1 Y. & Coll. Ch. C. 121. *Leeming v. Sherratt*, 2 Hare, 14. *Doe v. Birkhead*, 4 Exch. 110. *Douglas v. Andrews*, 14 Beav. 347. *Dutton v. Crowdy*, 33 Beav. 272. *Re Crawhall's Trust*, 8 De Gex, M. & G. 480.

(c) 2 M. & K. 295.

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trouble, equally between them:" She then proceeded to nominate three persons to be her executors: One of them died in the lifetime of the testatrix: And it was held by Sir John Leach, M. R., and afterwards by Lord Brougham, on appeal, that the whole residue vested in the two survivors: His Lordship, in giving his judgment, observed, that it was not necessary to decide whether these legatees took as joint-tenants, or as tenants in common; because it was clear on the construction of the Will, that the testatrix meant to give the residue to her executors as a class of persons in their official character: The learned Judge added, it did not follow that a bequest of a residue to executors equally must, in all cases, be a gift to them in their representative capacity, and so survive to those who live to take the office (d).

It is necessary in this place to consider what effect the death of a prior legatee, in the lifetime of the testator, will produce on the interest of another legatee in remainder.

In the case of a legacy to a legatee for life, with remainder to another legatee, if the tenant for life dies before the testator, the remainder over takes effect upon the death of the testator (e). So, if a legacy be given to a person, with a limitation over, if he should die under twenty-one, or before the happening of any other event, and he dies, in the lifetime of the testator, under the prescribed age, or before such other event happens, the legacy over does not lapse (f).

(d) See *Barber v. Barber*, 3 Myl. & Cr. 688. *Post*, p. 1334. *Re Gibson*, 2 Johns. & H. 656, where Wood, V.-C., said that, with the exception of *Knight v. Gould*, he knew of no case where a bequest to persons referred to in the Will by the terms "hereinafter named," or "hereinafter named," or "hereinafter mentioned," or "hereinafter mentioned," has been held to

be a bequest to those persons as a class. See also *Hoare v. Osborne*, 33 L. J. Ch. 586.

(e) *Hardwick v. Thurston*, 4 Russ. Ch. Cas. 383. *Lee v. Pain*, 4 Hare, 225. And it will make no difference that a power of appointment is given to the legatee for life: *Chatteris v. Young*, 6 Madd. 30.

(f) *Miller v. Warren*, 2 Vern. 207. *Ledsome v. Hickman*, 2

In what cases a legacy in remainder, or by way of limitation over, will lapse by the death of the prior legatee in the lifetime of the testator.

But the rule is different, where a legatee, to whom the legacy is given absolutely, with an executory limitation over, dies in the lifetime of the testator, *but after the event has happened, on the non-occurrence of which the limitation over depends*: for in such case every part of the bequest lapses.

Thus in *Calthorpe v. Gough* (g), a legacy was given to trustees, in trust for Lady Gough for life, and in case she should die in the lifetime of her husband, as she should appoint, and in default of appointment, to her children, but if she should survive her husband, then to her absolutely: She *survived her husband*, and died in the lifetime of the testator: And Lord Alvanley held, that the legacy lapsed, and the children were not entitled. Again in *Williams v. Jones* (h), a testator after bequeathing a sum of Long Annuities to his wife for life, gave the capital, after her death, to A., if he should be living at her decease, and if not, to A.'s son: A. *outlived the wife*, but died in the

Vern. 611. *Willing v. Baine*, 3 P. Wms. 113. *Walker v. Main*, 1 Jac. & Walk. 1. *Humberstone v. Stanton*, 1 Ves. & Beam. 388. *Humphreys v. Howes*, 1 Russ. & M. 639. *Varley v. Winn*, 2 Kay & J. 700. *Re Gaitskell's Trusts*, L. R. 15 Eq. 386. *Ive v. King*, 16 Beav. 46, 54; in which last case, Romilly, M. R., said that the gift over in some of these cases takes effect upon the presumption that such ulterior legatee was substituted in order to prevent the lapse of the legacy. See also *Re Green's Estate*, 1 Dr. & Sm. 68. *Hannam v. Sims*, 2 De G. & J. 151: in the latter of which cases it was held that the words "shall happen to die" included the case of the testator's brother named in the Will, but dead at the date of it, and that the gift in favour of

his children took effect. See also *Re Sheppard's Trust*, 1 Kay & J. 269. *Barnaby v. Tassell*, L. R. 11 Eq. 363. But if a testator possessed of a specific chattel, or a chattel real, bequeath it to A. and the heirs of his body, and in default of such issue, to B., the death of A. in the testator's lifetime, without issue, does not enable B., though surviving the testator, to take under his Will, but causes a lapse; for such a bequest to A. is, in truth, a gift to him absolutely (see *ante*, p. 967), and the gift over to B. a mere nullity: *Harris v. Davis*, 1 Coll. 416, 424, 425. See also *Andrew v. Andrew*, *ibid.* 690.

(g) 3 Bro. C. C. 394, note to *Doo v. Brabant*.

(h) 1 Russ. Ch. C. 517.

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testator's lifetime: And it was holden that the legacy to A. lapsed, and that the gift to his son did not take effect (i). So in *Doo v. Brabant* (k), a legacy was given in trust for Sarah Counsell, until she attained the age of twenty-one, and then to pay the same to her; if she should die under twenty-one, leaving a child or children, then in trust for such a child or children; but in case she should die under twenty-one, without having any child or children, then over to other persons: Sarah Counsell attained twenty-one, and married; but she died in the lifetime of the testator, leaving two children: And it was holden that the legacy lapsed, and the children were not entitled. So in *Humberstone v. Stanton* (l), there was a bequest to the son of the testator on his accomplishing his apprenticeship, with the dividends in the meantime for maintenance; and in case he should die before he accomplished his apprenticeship, then and in such case to the other children: The legatee lived to accomplish his apprenticeship, but afterwards died in testator's lifetime: And it was holden that the legacy lapsed, and the bequest over could not take place; for the event which was to bar the claim of the brothers and sisters had happened (m).

By stat. 1 Vict. c. 26, s. 33, "where any person being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect, as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the Will."

This enactment does not substitute the issue for the

1 Vict. c. 26:
gifts to children or other issue who leave issue living at the testator's death shall not lapse.

(i) But see *Gaskell v. Holmes*, 3 Hare, 438.

(k) 3 Bro. C. C. 393.

(l) 1 Ves. & Beam. 384.

(m) As to cases where somewhat similar limitations over have been held to take effect, see *post*, Pt. III. Bk. III. Ch. II. § VI.

deceased legatee, but gives the legacy to him absolutely as though he had survived the testator (n): and it is therefore disposable by the Will of the legatee (o).

Application of section.

This section of the Act applies to a testamentary appointment in the exercise of a general power (p). But it does not apply to a testamentary appointment made under a limited power (q). And it does not apply to gifts to a class (r): For the intention was to provide against lapse merely, and not to alter the construction to be put on the Will (s).

Legatee in trust.

In conclusion of this portion of the subject of lapses, it may be mentioned, that where a bequest is made to a man as trustee for another person, the legacy will not lapse by the death of the trustee in the testator's lifetime (t).

2. Of Legacies lapsed by the death of the Legatee after the death of the Testator.

Where no period for payment is specified.

If a legacy be given generally, without specifying the time when it is to be paid, it is due on the day of the death of the

(n) *Re Hone's Trusts*, 22 C. D. 603. And this probate duty is payable by the executor of the legatee as if he had survived the testator. *Executors of Perry v. The Queen*, L. R. 4 Exch. 27.

(o) *Johnson v. Johnson*, 3 Hare, 167. In the goods of Parker, 1 Sw. & Tr. 523. It is doubtful whether such Will should be construed as if the legatee had survived the testator, or as if the testator had predeceased the legatee: *Re Mason's Will*, 34 L. J. 603. So where a father by his Will devised a freehold house to his son, and the son died in his father's lifetime leaving issue and having 1 his Will devised all his real estate to his father, it was held that by virtue of this section the

property passed to the son absolutely under the father's Will, and that as the son must be deemed to have survived his father the devise under the son's Will failed, and there was an intestacy in respect of it. *Re Hensler*, 19 C. D. 612. See also *Pickersgill v. Rodger*, 5 C. D. 103.

(p) *Eccles v. Cheyne*, 2 Kay & J. 670.

(q) *Griffiths v. Gale*, 12 Sim. 354. *Holyland v. Lewin*, 26 C. D. 266.

(r) *Ante*, p. 1081. *Re Stansfield*, 15 C. D. 84.

(s) *Olney v. Bates*, 3 Drew. 310. *Browne v. Hammond*, Johns. 210. See also *Re More's Trust*, 10 Har. 178.

(t) *Oke v. Heath*, 1 Ves. Sen. 81.

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testator (*u*), though not payable till the end of a year next after the testator's death. This delay is merely an allowance of time for the convenience of the executor, and does not prevent the interest vesting immediately on the testator's death (*x*): Hence, if the legatee happen to die within the year, his personal representative will be entitled to the legacy (*y*).

But when a future time for the payment of the legacy is defined by the Will, the legacy will be vested or contingent, according as, upon construing the Will, it appears whether the testator meant to annex the time to the payment of the legacy, or to the gift of it.

Where a future time for payment is appointed :

In ascertaining the intention of the testator in this respect, the Courts of Equity have established two positive rules of construction : 1st, That a bequest to a person payable or to be paid at or when he shall attain twenty-one years of age, or at the end of any other certain determinate term, confers on him a vested interest immediately on the testator's death, as *debitum in presenti solvendum in futuro*, and transmissible to his executors or administrators : for the words "payable" or "to be paid," are supposed to disannex the time from the gift of the legacy, so as to leave the gift immediate, in the same manner, in respect of its vesting, as if the bequest stood singly, and contained no mention of time (*x*). 2nd, That if

(u) Swinb. Pt. 7, s. 23, pl. 1.

(x) Garthshore v. Challe, 10 Ves. 13. See Collins v. Macpherson, 2 Sim. 87.

(y) So where a testatrix bequeathed several legacies, and amongst others, one to a servant, if he should be residing with her at the time of her decease, but not otherwise : and she directed the said legacies to be paid within six months after her decease ; and declared that the legacies should not be vested until payable ; and the legatee died before the expira-

tion of the six months ; it was held that his representatives were entitled to the legacy : Lucas v. Carline, 2 Beav. 367. See also Packham v. Gregory, 4 Hare, 390, 397. Nevertheless the intention of the testator that his gift should not vest in the legatee until it should be actually remitted to him, will prevail, when clearly expressed, provided the remittance be not delayed by negligence or accident : Law v. Thompson, 4 Russ. Chanc. Cas. 92.

(z) Swinb. Pt. 7, s. 23, pl. 9 ;

the words "payable" or "to be paid" are omitted, and the legacies are given *at twenty-one, or if, when, in case, or provided* the legatees attain twenty-one or any other future definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right to it depend on his being alive at the time fixed for his payment. Consequently, if the legatee happens to die before that period arrives, his personal representative will not be entitled to the legacy (a).

The Courts of Equity have adopted these rules from the established practice of the Ecclesiastical Courts (which in these matters had formerly concurrent jurisdiction) more in compliance with such practice than from any conviction of the soundness of the rules themselves.

Rule 1: where the bequest is immediate, and payment postponed, the legacy is vested.

As to the first rule, viz., that where the bequest is in terms immediate, and the payment alone postponed, the legacy is vested; it may be desirable, first, to give some cases illustrative of it, and then to point out certain exceptions to its application.

In *Jackson v. Jackson* (b), the testator bequeathed to his son 400*l.* to be paid to him at the end of one year next after his (the testator's) death, and the further sum of 100*l.* at the death of his mother: The son died before his mother: The question was, whether he took a vested interest in the 100*l.*: And Lord Hardwicke determined in the affirmative, observing, that the legacy of that sum was plainly vested, and the time of payment only postponed; for the former words "to be paid," were to be carried on, as they would clearly be, if turned into any other language.

In *Sydney v. Vaughan* (c), a legacy of 100*l.* was bequeathed to an apprentice, to be paid to him within six months after he should have fully served out his apprenticeship: The legatee, instead of serving his time, ran away from his master and

Godolph. Pt. 3, ch. 24, s. 25. Ves. 245.

Shrimpton v. Shrimpton, 31 Beav. 425.

(a) See *Hanson v. Graham*, 6

(b) 1 Ves. Sen. 217.

(c) 2 Bro. Parl. Ca. 254.

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died intestate after the period of his apprenticeship expired : The Court of Great Sessions, on the Brecon circuit, decreed the legacy to his administrator, with interest from the end of six months after the expiration of the apprenticeship : And the House of Lords confirmed this decree.

In *Bolger v. Mackell* (d), the testatrix gave her residuary estate to Catherine, the daughter of James Winter, and to the lawful children of her (the testatrix's) brothers, John and James Snowden, in equal shares, the shares of the sons with the interest or accumulations to be paid at their ages of twenty-one, and of the daughters at twenty-one or marriage, after a deduction of what might be laid out for their maintenance and preferment in the world : John Snowden died without issue, but James died leaving two sons, neither of whom attained twenty-one : The question was, whether, notwithstanding that circumstance, two-thirds of the residue vested in them, so as to be transmissible to their legal personal representatives : And Lord Rosslyn was of opinion, that the two sons took vested interests, remarking, that the present was a mere bequest of the residue of personal estate, payable at twenty-one, so that the rule as to vesting must take place ; which was not prevented by the addition of a direction that maintenance should be deducted (e).

It may here be observed, that a gift in terms which import a present vested interest, with a postponed time of payment, is not made contingent by a direction to accumulate till the time of payment arrives (f).

The following exceptions to this rule may be remarked :
1st. The rule itself is always subservient to the intention of

Rule controlled by the intention of testator, apparent from the context :

(d) 5 Ves. 509.

(e) The rule is the same where a gift to children, &c., in a class is immediate, and the time of division only is postponed until they attain a certain age respectively : *Farmer v. Francis*, 2 Sim. & Stu. 505. *Kevern v. Williams*, 5 Sim. 171.

(f) *Blease v. Burgh*, 2 Beav.

226. "There is a strong, or I may say a stringent, rule that if we have words clearly making a vested gift, clear words are required to convert it into a contingent one : " *per James, L.J., in Re Duke*, 16 C. D. 112, 114.

the testator: and, therefore, if upon construing the whole Will, it *clearly* appears that the testator meant the time of payment to be the time when the legacy should vest, no interest will be transmissible to the executors or administrators, if the legatee dies before the period of payment; although the words "to be paid" or "payable at" or other terms of immediate gift be employed in the Will (g).

This exception may be found in operation in cases where the testator has shown a clear intention that the legacies shall not vest till his debts are satisfied (h), or till his property has been sold or realized, and got in by his executors, or been laid out in a purchase: For if the testator thinks proper to say distinctly that his legatees, general or residuary, shall not be entitled to the property unless they live to *receive* it, there is no law against such intention, if clearly expressed (i).

(g) Mackell v. Winter, 3 Ves. 536. Howes v. Herring, 1 M'Clel. & Y. 295. Hunter v. Judd, 4 Sim. 455.

(h) Bernard v. Montague, 1 Meriv. 422.

(i) It was said by Wood, V.-C., in *Martin v. Martin*, L. R. 2 Eq. 404, that the Court cannot give effect to a testator's intention that if a legatee should die before the property is actually received it should go over but gives it to him absolutely: and Lord Selborne in *Minors v. Battison*, 1 App. Cas. 428, 452, says: "It was decided in *Hutcheon v. Mannington* (1 Ves. 365) and *Martin v. Martin* (*ubi sup.*), that such a divesting clause, if it refers to the time of actual receipt, is too uncertain and indefinite to be capable of being carried into effect." Jessel, M. R., however, in *Johnson v. Crook*, 12 C. D. 639, expressed his disapproval of *Martin v. Martin*, and asserted that the authorities prior

to *Martin v. Martin*, such as *Hutcheon v. Mannington* (*ubi sup.*); *Elwin v. Elwin*, 8 Ves. 547; *Gaskell v. Harman*, 11 Ves. 489, 497; *Law v. Thompson*, 4 Russ. 92, 100; *Re Arrowsmith's Trusts*, 2 De G. F. & J. 474, show that there is no law established that it cannot be done, only that it must be clearly expressed, and Fry, J., in *Re Chaston*, 18 C. D. 218, 227, says: "I believe all the earlier cases proceed simply on this enquiry, Is the contingency expressed with definite certainty?" It should be observed that, whichever of these views may be right, none of the cases go to show that the gift over is void for uncertainty where the words may be construed, not as referring to the time of actual payment and receipt, but to the time appointed for payment, or the termination of the period which the law usually allows for the payment of legacies, viz., twelve months from the ta-

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But in these cases the intention of the testator, that the legacies shall not vest, must be expressed *with certainty* to prevent the operation of the general rule; for although the payment of the legacies be expressly postponed till the testator's debts be discharged, or till the sale of an estate be effected, or till after the residue of personal estate shall be laid out in the purchase of lands, yet the general rule that the gift is immediate, and the payment alone postponed, will operate; and the legacy will be transmissible, though the legatee died before the discharge of debts, or other event until which the payment is expressly postponed (*k*).

In the instances where this exception, by reason of the manifest intention of the testator, prevents the operation of the rule, it must be observed, that the legacies will, at all events, be considered vested at the period when the debts of the testator *might* have been paid, or the sale or purchase *might* have been effected, upon a due administration of the affairs of the testator: And a Court of Equity will inquire into what that period might have been; for that Court will not suffer the rights of legatees to be prejudiced by the fraudulent or unnecessary delay of executors or trustees (*l*).

Another exception to the rule may be stated to be; that if the event, upon which the legacy is directed to be paid, be uncertain as to its taking place, then the legacy becomes a conditional legacy, and will not devolve on the executors or administrators of the legatee, unless the condition be performed by the happening of the event (*m*).

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tator's death. See the observations of Kindersley, V.-C., in *Re Arrowsmith's Trusts*, 29 L. J. Ch. 774, 777 (approved by Knight Bruce, L.J. S. C. on appeal, 2 De G. F. & J. 474) and of Fry, J., in *Re Collison*, 12 C. D. 834.

(*k*) *Hutcheon v. Mannington*, 1 Ves. 365. See also *Bubb v. Padwick*, 12 C. D. 517. This case, however, has been disapproved in

Re Chaston, 18 C. D. 218. *Minors v. Battison*, 1 App. Cas. 428.

(*l*) *Re Dodgson's Trusts*, 1 Drew. 440. *Re Arrowsmith's Trusts*, 2 De Gex, F. & J. 474, *per* Turner, L. J. See also *Re Chaston*, 18 C. D. 218. *Re Wilkins*, 18 C. D. 634.

(*m*) *Swinb. Pt. 7, s. 23*, pl. 10. *Godolph. Pt. 3, c. 26, s. 25*.

Thus in *Atkins v. Hiccocks* (n), the bequest was of 200*l.* to Eliz. Hiccocks, to be paid at time of her marriage, or within three months afterwards, provided she married with the approbation of, &c.: The testator also gave to Elizabeth an annuity until that event took place: She died without ever having been married, after having attained the age of twenty-one: The question was, whether Elizabeth took such a vested interest in the legacy, as was transmissible to her administrator: And Lord Hardwicke determined in the negative: upon which occasion he remarked, that in the common cases of legacies to be paid at the age of twenty-one, there was a certain time fixed, not to the thing itself, but to the execution of it; and the time so fixed must necessarily arrive: But that when the time annexed to the payment was merely eventual, and might or might not come, and the person died before the contingency happened, his Lordship could find no instance where it had been decided that the legacy should be paid at all events.

But this exception will not apply when it is apparent from the whole of the Will, that it was not the intention of the testator to make the legacy conditional: Thus in *Booth v. Booth* (o), the testator, having two great nieces, both of age, named Phœbe and Ann, devised the residue of his estate to trustees, in trust, to place it out at interest, and pay the annual produce to Phœbe and Ann, until their respective marriages, and immediately after their respective marriages, to assign to them respectively their several shares: Phœbe, after surviving the testator, died without ever being married: And the question was, whether, notwithstanding Phœbe never married, she took a vested interest in her moiety, which was transmissible at her death to her personal representatives, one of whom was her sister Ann; Lord Alvanley held, on the ground of the bequest being a residue (p), and given to per-

(n) 1 Atk. 500.

(o) 4 Ves. 399. See the observations of Stuart, V.-C., on this case in *West v. West*, 4 Giff. 201.(p) See also *Jones v. Mackilwain*, 1 Russ. Chanc. Cas. 223. There has always been a strong disposition in the Court to con-

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sons of maturity, as also upon the words of the devise, that the case was one where the maxim *dis incertus conditionem facit* could not be applied; and that Phœbe took a vested interest in her share, to which Ann, as her residuary legatee, was immediately entitled, although Ann could not claim her original share previous to her own marriage. So a bequest to a daughter on marriage with interest in the meantime is vested (q).

It remains to consider the other positive rule on this subject: viz., that if the words "payable" or "to be paid," are omitted, and the legacy is given *at* twenty-one, or *if, when, in case, or provided*, the legatee attains twenty-one, or "*on*" his attaining that age, or any other future definite period, this confers on him a contingent interest, which depends for its vesting, and its transmissibility to his executors or administrators, on his being alive at the period specified.

In *Onslow v. South* (r), the testator being possessed of considerable personal estate in Jamaica and in England, bequeathed as follows: "I give to J. S. now under the custody of R. D. 2,000*l.* at the age of twenty-one years, to be paid by my executors in England:" J. S. died under

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strue a residuary clause so as to prevent an intestacy with respect to any part of the testator's property: by Sir W. Grant, in *Leake v. Robinson*, 3 Meriv. 386. See also *Leeming v. Sherratt*, 2 Hare, 23, by Wigram, V.-C., citing *Love v. L'Estrange*, 5 Bro. P. C. 59. Toml. edit. *Pearman v. Pearman*, 33 Beav. 396. However, in *Addison v. Busk*, 14 Beav. 461, 462, Romilly, M. R., said he could not give to the same words a different construction when used in relation to a residue from that which he should when applied to a simple legacy.

(q) *Vize v. Stoney*, 1 Dr. & Warr.

337. See also *West v. West*, 4 Giff. 201. *Lang v. Pugh*, 1 Y. & Coll. Ch. C. 718. So in *Re Wrey*, 30 C. D. 507, a testatrix by her Will, after specific bequests of bonds, gave all the rest of her stocks and shares upon trust to pay the income to her nephew G. until his marriage, and at the time of his marriage to hand over the stocks and shares to him: and it was held that G. took a vested interest under the gift, and being of age was entitled to have the stocks and shares comprised therein transferred to him, although he had not married.

(r) 1 Eq. Cas. Abr. 205, pl. 6.

the age of twenty-one, but having attained the age of eighteen, he bequeathed this legacy to the defendant South, the validity of which disposition depended upon the question, whether J. S. took a vested interest in the money before the age of twenty-one: And the Lord Chancellor determined that the legacy did not pass to the defendant; since J. S.'s interest in it was not vested, but contingent; and his Lordship remarked, that the word "now" was merely descriptive of the condition of the legatee; and that the word "paid" was only applicable to the persons by whom the money was to be satisfied.

So in *Cruse v. Barley* (s), the testator gave to his son 200*l.* at his age of twenty-one: The son died under twenty-one: And it was determined that the legacy never vested in him; as the age was annexed to the gift and not to the payment; and, consequently, his personal representative could not be entitled to the money.

In *Smell v. Dee* (t), the bequest was of "100*l.* a-piece to the two children of J. S. at the end of ten years next after my decease:" The legatees died before the expiration of the ten years: And Lord Cowper held the legacies to be extinct: and said, "that wherever the time is annexed to the legacy, and not to the payment of it (as in the present case), if the legatee die before the day of payment, the legacy is lapsed" (u).

In *Stapleton v. Cheales* (x), it was clearly held, that the

(s) 3 P. Wms. 20.

(t) 2 Salk. 415.

(u) See also *Accord. Bruce v. Charlton*, 13 Sim. 65, 68.

(x) Prec. Chanc. 317. That is to say that these expressions "if" and "when" will generally receive such a construction standing alone and unaffected by preceding or subsequent context: but the context frequently shows that the words "if," "when," "as soon as," must be construed not to im-

port contingency in the sense of condition precedent to the vesting, but to mean a proviso or condition subsequent operating as a defeasance of an estate vested. Thus in *Andrew v. Andrew*, 1 C. D. 410, a testator by a Will dated in 1832 devised lands to F. A. for life, and from and after the decease of F. A. to his eldest son if he should have arrived at the age of twenty-one years, and, in default of his having a son, then over. F. A. died leaving

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expressions "at twenty-one," or "if," or "when he shall attain twenty-one," were all one and the same, and in each of those cases, if the legatee died before that age, the legacy lapsed. This is fully confirmed in *Hanson v. Graham* (y) by Sir W. Grant, who observed that in the civil law the words "cum" and "si," as referred to this subject, are precisely equivalent; and from that law we borrow all, or at least the greatest part of our rules upon legacies (z).

Again it was held in *Re Wrangham's Trust* (a), that a gift "on:" to legatees on their attaining the ages of twenty-one is a contingent and not a vested gift.

In *Atkinson v. Turner* (b), the testator gave two-thirds of "provided:" three-eighths of his joint-stock and trade to his grandson, provided he should attain the full age of twenty-one, with remainder over if he did not live to that period: The grandson died under twenty-one; and the question was, whether his administrator was entitled to the profits which accrued

an eldest son, a minor. It was held by the Court of Appeal that on the death of F. A. the eldest son took an estate in fee, liable to be divested on his dying under twenty-one. In thus construing the word "if" as not importing a contingency, Lord Justice James placed great reliance on the fact that the gift was in the Will expressed to be "from and after" the death of the tenant for life, saying that to construe the word "if" as contingent one would have to strike the words "from and after" out of the Will. North, J., however, in the case of *Re Jobson*, 44 C. D. 154, in a Will in which the words were "and from and after her (the tenant for life) decease the premises shall be in trust for all her children, in equal shares as tenants in common, on their respectively attaining the age of

twenty-one years," declined to give this effect to the words "from and after," and held that the children did not take vested interests till they attained the age of twenty-one.

(y) 6 Ves. 243, 245.

(z) In the case of *May v. Wood*, 3 Bro. C. C. 473, 474, Lord Alvanley broadly laid down a different doctrine. But Sir W. Grant, in *Hanson v. Graham*, 6 Ves. 243, demonstrates that the principle on which his Lordship proceeded was an erroneous one. See also *Lane v. Goudge*, 9 Ves. 230; and the observations of Lord Brougham, in *Phipps v. Ackers*, 3 Cl. & Fin. 700, 715.

(a) 1 Dr. & Sm. 358.

(b) 2 Atk. 41. See also *Watson v. Hayes*, 5 M. & Cr. 125, 132, 133. *Young v. Macintosh*, 13 Sim. 445.

from the death of the testator to the infant's decease; which depended upon the circumstance whether he took a vested interest in the legacy during minority: And the Master of the Rolls determined in the negative; considering, that by the words of the Will, nothing vested in the legatee, since he did not attain the age of twenty-one (c).

"in case:"

In *Elton v. Elton* (d), where a testator gave to his granddaughter 1,500*l.* to be at her disposal, *in case* she married with consent, &c., Lord Hardwicke held, that marriage was a condition precedent to the vesting of the legacy: observing, that whether the testator said, "in case she marry, I give," or, "I give, in case she marry," made no difference; for in both instances marriage is annexed to the substance of the devise.

It is to be observed with reference to all these words which would seem *prima facie* to create a contingent and not a vested interest, such as "if," "when," "or," "provided," "in case," that the inference is only *prima facie*, and liable to be ousted by the context or the inferences to be drawn from the Will as a whole (e).

Direction to transfer "from and after," or "to divide and pay at," a future period, without any previous gift:

Where there is no gift but by a direction to pay, or divide and pay, at a future time, or on a given event, or to transfer "from and after" a given event, the vesting will be postponed till after that time has arrived, or that event has happened, unless, from particular circumstances, a contrary intention is to be collected (f).

(c) But see *Simmonds v. Cocks*, 29 Beav. 455.

(d) 3 Atk. 504. *Knight v. Cameron*, 14 Ves. 389.

(e) See *Simmonds v. Cocks*, 29 Beav. 455. *Bree v. Perfect*, 1 Coll. 128. *King v. Isaacson*, 1 Sm. & G. 371.

(f) *Leake v. Robinson*, 2 Meriv. 363, 387. *Booth v. Booth*, 4 Ves. 399. *Ford v. Rawlins*, 1 Sim. & Stu. 328. *Jones v. Mackilwain*, 1 Russ. Chanc. Cas. 223. *Vawdry v. Geddes*, 1 Russ. & M. 203. *Murray*

v. Tancred, 10 Sim. 465. *Watson v. Hayes*, 5 M. & Cr. 125, 133. *Davies v. Fisher*, 5 Beav. 201, 209, per Lord Langdale. *Beck v. Burn*, 7 Beav. 492. *Chevaux v. Aislabie*, 13 Sim. 71. *Walker v. Mower*, 16 Beav. 365. *Shum v. Hobbs*, 3 Drewr. 93. *Laxton v. Eedle*, 19 Beav. 321. *Adams v. Robarts*, 25 Beav. 658. But see *Leeming v. Sherratt*, 2 Hare, 14, 17, 21. *Packham v. Gregory*, 4 Hare, 396, 397, 398. 7 Hare, 228. *Re Minor's Trusts*, 28 Beav. 50.

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(g) *Leem* 14, 18.

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(i) *Fear* note by Mr rim interes sumed that immediate purpose of legacy is to rated from perty: By S v. Geddes, 1 also Saunde Ph. 248, by cord. *Re V* And compar 154, in whic the terms of

This doctrine, in fact, only assimilates the gift of a legacy under the form of a direction to pay or divide at a future time, or on a given event, to the instance already considered of a simple and direct bequest of a legacy at a like future time, or a like event (g): And it is plainly inapplicable where a Will contains a direct gift, independently of the direction to pay at a future period to the legatee; as where such direction is followed by the words, "to whom I give and bequeath the same accordingly" (h).

It may now be proper to ascertain the exceptions prevalent with respect to this latter rule. 1st. Where a testator bequeaths a legacy to a person at a future time, and either gives him the intermediate interest, or directs it to be applied for his benefit, the Court there considers the disposition of the interest to be an indication of the testator's intention that the legatee should at all events have the principal, and on this ground holds such legacies to be vested (i).

Exceptions to
2nd Rule:
gift of interim
interest:

(g) *Leeming v. Sherratt*, 2 Hare, 14, 18.

(h) *Re Bartholomew*, 16 Sim. 585. Affirmed on appeal, 1 Mac. & G. 354. See also *Smith v. Palmer*, 7 Hare, 228, 229, by Wigram, V.-C., *Williams v. Clark*, 4 De G. & Sm. 472, 473, 474.

(i) *Fearne*, Cont. Rem. 553, note by Mr. Butler. Where interim interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest the particular legacy is to be immediately separated from the bulk of the property: By Sir J. Leach in *Vawdry v. Geddes*, 1 Russ. & M. 208. See also *Saunders v. Vautier*, 1 Cr. & Ph. 248, by Lord Cottenham. *Accord. Re Wrey*, 30 C. D. 507. And compare *Re Jobson*, 44 C. D. 154, in which case it was held on the terms of that Will that there

was no clear separation of the fund from the rest of the estate, nor any express appropriation of it, and therefore no presumption of an immediate gift. It has been said that the presumption of an immediate gift, from the circumstance of the interim interest being given, fails entirely when the testator has expressly declared that the legacy is to go over in case of the death of the legatee before a particular period: By Sir J. Leach, in *Vawdry v. Geddes*, 1 Russ. & M. 208. But see *contra*, 1 Jarman on Wills, 4th ed. 858, and also *Davies v. Fisher*, 5 Beav. 201, 213. The above proposition as to the effect of the gift over as negating the presumption of an immediate gift arising from the gift of interim interest seems to be recognised by Kay, J., in *Re Wrey (ubi sup.)*, 507, 509.

Thus in *Fonereau v. Fonereau* (k), the bequest was of 1,000*l.* to Claudius Fonereau, when he should have attained the age of twenty-five: The testator empowered his executors and trustees to place the money at interest, which he directed to be applied at their discretion for the education of Claudius, as also part of the principal to put him apprentice, and the remainder to be paid to him when he should have attained the age of twenty-five, and not before; Claudius having died under that age, the question was, whether his personal representative was entitled to the legacy; which depended upon this, whether he took a vested interest: And Lord Hardwicke decided in the affirmative.

In *Hoath v. Hoath* (l), the testator gave 100*l.* to Thomas Hoath at the age of twenty-one, and directed the intermediate interest to be paid to his mother for his maintenance: Thomas having died under twenty-one, the question was whether this was a vested legacy: And Lord Thurlow determined in the affirmative, in consequence of the interest having been given for the benefit of Thomas, before his legacy became payable.

In *Hanson v. Graham* (m), the testator bequeathed to his three grandchildren 500*l.* a-piece, four per cent. consols, when they should respectively attain the age of twenty-one or be married, providing the marriages were had with the consent of his executors and trustees; and he directed the interest of the annuities to be laid out, at the discretion of his executors and trustees as they should think proper, for the benefit of the legatees, until they attained twenty-one or married, and for

(k) 3 Atk. 645.

(l) 2 Bro. C. C. 4.

(m) 6 Ves. 239. It will be observed that in this case there was a bequest to each child of 500*l.* In *Re Hunter's Trusts*, L. R. 1 Eq. 295, Wood, V.-C., points out that the principle of *Hanson v. Graham* has no application where the income of a fund is given as a common fund towards maintenance

and education of members of a class during infancy, and there is no division of the property until a future date or future event. This case seems to account for the suggestion of James, V.-C., in *Re Ashmore's Trusts*, L. R. 9 Eq. 99, 102, which Jessel, M. R., in *Fox v. Fox*, L. R. 19 Eq. 286, 290, seemed to think was without authority.

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no other use, intent, or purpose: The testator then gave his residuary personal estate to his son Isaac Graham, whom he appointed executor: One of the grandchildren died intestate at the age of nine years, after surviving the testator; and the question was, whether the plaintiffs, its next of kin, or the residuary legatee of the testator, were entitled to the legacy; which depended upon this circumstance, whether the deceased grandchild took a vested interest in it: And Sir W. Grant determined in favour of the plaintiffs, the next of kin, upon the principle, that the gift of the whole interest for the benefit of the legatees, which gave them the absolute property in it, as it became due, also gave them immediate vested interests in the legacies, and consequently, that the next of kin of the deceased grandchild were entitled to the 500*l.* bequeathed to it (*n*).

Accordingly, it is an established doctrine, that directions to pay or divide, &c., at a future time, or on a given event, which, as it has already been shown (*o*), of themselves import a postponement of the vesting, may be so controlled by a direction to apply the interest for the benefit of the legatee, as to postpone payment or possession only, and not the vesting (*p*).

Postponement of vesting may be controlled by direction to pay interest for benefit of legatee:

(*n*) For examples of the above exception to the rule, see *Lane v. Goudge*, 9 Ves. 229. *Murray v. Addenbrook*, 4 Russ. 407. *Stephens v. Frost*, 2 Y. & C. 302. *Vivian v. Mills*, 1 Beav. 315. *Vize v. Stoney*, 1 Dr. & Warr. 337. *Parker v. Golding*, 13 Sim. 418. *Lister v. Bradley*, 1 Hare, 10, 13. *Hobbs v. Parsons*, 2 Sm. & G. 212. *Re Grove's Trusts*, 3 Giff. 575. *Shrimpton v. Shrimpton*, 31 Beav. 425. *Bird v. Maybury*, 33 Beav. 361. *Re Hart's Trusts*, 3 De G. & J. 195. *Hardcastle v. Hardcastle*, 1 H. & M. 405. *Fox v. Fox*, L. R. 19 Eq. 286. *Re Bunn*, 16 C. D. 47. *Re Wrey*, 30 C. D. 507.

Scotney v. Lomer, 31 C. D. 380.

(*o*) *Ante*, p. 1096. But see also *post*, p. 1107, note (*k*), and 1108, note (*n*).

(*p*) *Parker v. Golding*, 13 Sim. 418. *Milroy v. Milroy*, 14 Sim. 48. *Hammond v. Maule*, 1 Coll. 281. *Harrison v. Grimwood*, 12 Beav. 192. *Leeming v. Sherratt*, 2 Hare, 14. *Packham v. Gregory*, 4 Hare, 396. *Tatham v. Vernon*, 29 Beav. 605. *Boulton v. Pilcher*, *ibid.* 633. *Pearman v. Pearman*, 33 Beav. 394. *Re Peek's Trusts*, L. R. 16 Eq. 22. This doctrine only applies where there is one gift of principal and interest, and the possession of the principal is

In *Davies v. Fisher* (q), a gift of personalty to trustees for A. for life, and after his death, in trust for the children of A., "as they severally attained twenty-five years," the income to be applied during their respective minorities by their guardian for their maintenance, &c., with a gift over in case no child should live to attain twenty-five, was held by Lord Langdale to be vested, notwithstanding the interval between the twenty-first and twenty-fifth year of each child, during which there was no direction as to the application of the interest (r).

postponed, and does not apply where the interest alone is the subject of gift up to a particular time, and the principal is then for the first time given; for in such case the prior gift of the interest or dividends will not vest the principal. *Spencer v. Wilson*, L. R. 16 Eq. 501. *Watson v. Hayes*, 9 Sim. 500, revd. 5 M. & C. 124. See *post*, p. 1102.

(q) 5 Beav. 201.

(r) See also *Milroy v. Milroy*, 14 Sim. 48, and compare *Lloyd v. Lloyd*, 3 K. & J. 26, in which case there was a devise of land to trustees in fee, upon trust to pay the rents to A. for life and after her death to apply them in the maintenance of all and every her child and children during their minority, and when and as soon as all such children should have attained twenty-one to divide the corpus amongst all the children share and share alike, if more than one, and, if only one, the whole to such child. And it was held that one of several children who survived the testator having died under twenty-one took no share. See and compare *Re Grove's Trusts*, 3 Giff. 575. It will be seen that the difference between *Davies*

v. Fisher (*ubi sup.*) and *Lloyd v. Lloyd* (*ubi sup.*), which resulted in the gifts being held vested in the one case by reason of the gift of the income for maintenance during minority and not in the other, is that in the former case the gift was to the individuals "as they severally attained twenty-five years," whereas in the latter case the gift was to a class from which individuals, not attaining the prescribed age, would be excluded. And in *Re Parker*, 16 C. D. 44, *Jessel, M. R.*, says: "It appears to me that this case is different from that of *Fox v. Fox*, L. R. 19 Eq. 286. In my opinion when a legacy is payable at a certain age, but is in terms contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given, and, not the less so, when there is superadded a direction that the trustees 'shall pay the whole or such part of the interest as they shall think fit:' but I am not aware of any case where, the gift being of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in

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But, generally speaking, if the gift of maintenance be not co-extensive with the whole amount of the interest (s), or if

the meantime for their maintenance has been held to create a vested interest in a member of the class who does not attain that age." And thus in *Dewar v. Brooke*, 14 C. D. 529, in which case a testator directed his trustees to hold the trust fund for all his children, or any his child, who, being sons or a son, should attain twenty-five, or being daughters or a daughter, should attain twenty-one or marry, and if more than one in equal shares, to be divided and paid on the youngest of his said children attaining twenty-one, and empowered his trustees to apply the whole or such part as they should think fit of the annual income to which any child should be entitled in expectancy towards the maintenance or education of such child, it was held upon a petition by a son presented after the youngest child (a daughter) had attained twenty-one, but before he himself had attained twenty-five, that his interest under the will was not vested but contingent on his attaining twenty-five, and Hall, V.-C., distinguished *Fox v. Fox* (*ubi sup.*) on the ground that in that case the trust was not for children who attain a prescribed age, but for sons as and when they attain a prescribed age, and that the division as well as the payment was not postponed as in *Dewar v. Brooke*.

(s) *Pilsford v. Hunter*, 3 Bro. C. C. 416. *Hanson v. Graham*, 6 Ves. 239, 249. *Leake v. Robinson*, 2 Meriv. 386, 387. *Vawdry v. Ged-*

des, 1 Russ. & M. 203. *Watson v. Hayes*, 5 M. & Cr. 124. *Re Ashmore's Trusts*, L. R. 9 Eq. 99. *Thomas v. Wilberforce*, 31 Beav. 299. *Re Sanderson's Trusts*, 3 K. & J. 497, 504. This is because it is the giving of the interest and not the giving of the maintenance which is held to effect the vesting. See *per* Lord Cottenham in *Watson v. Hayes*, 5 M. & Cr. 125, 133. The giving of the whole interest is in effect a direction that the legacy shall carry interest. *Re Hart's Trusts*, 3 De G. & J. 195, 200, 202. And a legacy payable at a prescribed age with interest in the meantime vests immediately. See *ante*, p. 1097. In order, however, that an inference of an immediate gift of the principal may be drawn from a direction that the whole income be applied to maintenance, it is necessary that there should be a first gift of the capital fund itself, and not merely of income. See *Spencer v. Wilson*, L. R. 16 Eq. 501. *Re Grinshaw's Trusts*, 11 C. D. 406; for there is an obvious difference between a gift of the interest for maintenance and a gift of maintenance out of the interest. If, however, there be a gift of the corpus to individuals or a class payable at a future time, coupled with a direction to apply the whole income to maintenance of the individual or the members of the class, the inference that the gift is vested does not the less arise because there is a discretion conferred on the trustees to apply less than the whole income to

it be made out of another fund, in neither case will the legacies vest, prior to the arrival of the periods at which they are made payable: for such provisions afford no presumption that the testators intended the legacies to vest before they became due.

Again, in the cases above cited, the *corpus* of the property was given with a postponement of the payment, and the interest or fund directed to be applied or managed for the benefit of the legatee: But it has been laid down, that the exception will not apply where the interest or dividends alone are the subject of bequest until a particular time, and the principal is not sooner taken out of the residue, but directed for the first time to be taken out of it, and paid or transferred to the legatee, *at the end of that period*: because the gift and payment of it are one and the same, and it was the intention of the testator to make the gifts of the interest and the capital separate and distinct, so as to constitute the time appointed for payment of the principal the very essence of the gift of it (*t*).

that purpose. See *per* Jessel, M. R., in *Fox v. Fox*, 19 Eq. 286, and also *Harrison v. Grimwood*, 12 Beav. 192, which, however, has not always been accepted as an authority. See *Hawkins on Wills*, p. 229. It would seem from the cases of *Puisford v. Hunter*, 3 Bro. C. C. 416, and *Re Ashmore's Trusts*, L. R. 9 Eq. 99, that a gift even of the whole income of a fund for maintenance does not necessarily give rise to a presumption of a vested interest in the principal. See, however, the observations on these cases of Jessel, M. R., in *Fox v. Fox* (*ubi sup.*), and compare therewith the judgment of Hall, V.-C., in *Re Grimshaw's Trusts* (*ubi sup.*). The result of the comparison would seem to be that no absolute rule of con-

struction arises on a direction to apply the whole income for maintenance "at the discretion of trustees or otherwise," but in each case the whole frame of the Will must be looked at to ascertain whether the gift is of the interest for maintenance or a gift of maintenance out of interest.

(*t*) This statement of the principle of the cases was approved of, and acted upon, by Alderson, B., in *Cromek v. Lumb*, 3 Younge & C. 576. See *ante*, p. 1099, note (*p*). *Batsford v. Kebbell*, 3 Ves. 263. This case has been sometimes cited to show that a future gift expressed in the terms "pay and distribute," is contingent by force of the expressions only: But this is not so; the judgment proceeded emphatically on the ground

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It must further be remarked, with respect to this exception, that a contingent gift of the interest will not vest the principal: Thus a legacy to A., as soon as she attains twenty-one, *with interest*, is contingent (*u*). But a bequest by a testator of one-third of his personal estate to his daughter, and in case of his decease, to have the interest therein and principal when she attained the age of twenty-five, was held to give a vested interest to the daughter, though she died under that age (*x*).

And it should be here observed, that there is an important distinction between a case where the legacy is to be severed *instantly* from the general estate, for the use and benefit of the legatee, and a case where a legacy is to be severed from the estate only upon the happening of a particular event. Thus in *Saunders v. Vautier* (*y*), a testator bequeathed to his executors or trustees all the East India stock which should be standing in his name at his death, upon trust to accumulate the dividends until D. W. V. should attain twenty-five, and then to transfer the principal, together with such accumulations, to D. W. V. his executors, administrators or assigns, absolutely: The Will also contained a residuary bequest: The testator had 2,000*l.* India stock standing in his name at his death: And it was held by Lord Cottenham, that D. W. V. took an immediate vested interest in that legacy, although he was a minor at the testator's death; and accordingly the Court ordered the stock, with its accumulations, to be transferred to him on his attaining twenty-one: And his Lordship observed, that there was not only a gift of the intermediate interest, but a positive direction to separate the legacy

that the subject of the future gift was not the same as, but different from, the previous gift for life: *Smith v. Palmer*, 7 Hare, 228, by Wigram, V.-C. See also the comments of Kindersley, V.-C., on this case in *Westwood v. Southey*, 2 Sim. N. S. 198, 200, and of

Kay, J., in *Re Wrey*, 30 C. D. 507, 510.

(*u*) *Knight v. Knight*, 2 Sim. & Stu. 493.

(*z*) *Breedon v. Tugman*, 3 M. & K. 289.

(*y*) 1 Cr. & Ph. 240.

where a previous estate is given to another.

from the estate, and to hold it in trust for the legatee when he should attain twenty-five (2).

A second exception to the latter rule (a) is, that where a person bequeaths a sum of money or other personal estate to one for life, and after his decease to another, the interest of the second legatee is vested: and his personal representatives will be entitled to the property, though he dies in the lifetime of the person to whom the property is bequeathed for life (b).

Thus, in *Monkhouse v. Holme* (c), the testator gave 880*l.* to trustees, to pay to his wife the interest for life, and from and after her death he disposed of the sum of 800*l.* in manner following, &c.: Then the testator, after several intermediate devises and bequests, gave the legacy, upon which the question arose; "I also give to Jonathan Monkhouse, son of my brother George, the sum of 100*l.*" Jonathan having survived the testator, died before the widow; and the question was, whether he took a vested interest in the legacy, so as to transmit it to his personal representatives:

(2) See also *Accord. Greet v. Greet*, 5 Beav. 123. *Lister v. Bradley*, 1 Hare, 10. See also *Dundas v. Murray*, 1 Wemm. & M. 425. *Oldie v. Brown*, 4 De G. & J. 179, 194. *Pearson v. Dolman*, L. R. 3 Eq. 315. *Re Bevan's Trusts*, 34 C. D. 716. And compare *Re Jobson*, 44 C. D. 154, 160, in which case there was held to be no separation. But the mere necessity of making such a severance in some events only (as in the case of the residue becoming payable before the legacy itself is payable, or other cause unconnected with the legacy itself) is not sufficient to vest the legacy: *Festing v. Allen*, 5 Hare, 575, 578.

(a) I.e., the rule stated *ante*, p. 1093, as extended by the doctrine of *Leake v. Robinson*, *ante*,

p. 1096.

(b) *Fearne Cont. Rem.* 554, note. And it is immaterial whether the testator uses words of remainder, or whether the future gift is expressed in a direction to pay and distribute: *Smith v. Palmer*, 7 Hare, 228, by Wigram, V.-C. See also *King v. Isaacson*, 1 Sm. & G. 371. In *Re Duke*, 16 C. D. 112, it was held that the interest of children taking after the determination of prior life estates was not made contingent by a direction in the Will that the division should only be among children living at the period of distribution, and that the investment of the fund should not be altered until the period of distribution arrived.

(c) 1 Bro. C. C. 295.

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And Lord Rosslyn decided in the affirmative; His Lordship remarking that the 800*l.* was given to the trustees to pay the interest to the wife for life, and then in parts and shares; which showed that the testator intended to give vested interests to the several legatees.

So in *Blamire v. Geldart* (d), the testator gave to George Pringle 200*l.* three per cent. Consols, at his wife's decease, and appointed her, Pringle, and another person, executors, to manage the property and fulfil the intentions of his Will: Pringle, the legatee, died before the wife; and the question was, whether he took a vested interest in the Consols, which entitled his personal representative to a transfer of them, the testator's widow being dead: and Sir W. Grant, M. R., determined in the affirmative, and thus expressed himself: "If the testator had given the stock to his wife for life, and at her death to Pringle, it would have been clear that he would have a vested interest in the nature of a remainder: In a Will, it is not material in what order the clauses are arranged: The question is, what is the effect upon the whole: This testator begins by giving to Pringle the stock at the death of his wife, and then gives to his wife the whole of his property: Consequently, she has a life interest in that stock so given to Pringle at her death; for it is part of the testator's property not antecedently disposed of: Thus the Will, no matter in what order, divides the fund between these two persons; giving to one the interest for her life, and to the other the capital at her decease; In effect and substance Pringle took a remainder, which became vested immediately upon the testator's death, and was not defeated by his own death in the lifetime of the wife" (e).

(d) 16 Ves. 314.

(e) See further on the subject of this exception, Atty.-Gen. *v.* Crispin, 1 Bro. C. C. 386. Exel *v.* Wallace, 2 Ves. Sen. 119. Benyon *v.* Maddison, 2 Bro. C. C. 75. Scurfield *v.* Howes, 3 Bro. C. C.

90. Taylor *v.* Langford, 3 Ves. 119. Wadley *v.* North, 3 Ves. 364. Hallifax *v.* Wilson, 16 Ves. 168. Walker *v.* Main, 1 Jac. & Walk. 1. Cousins *v.* Schroder, 4 Sim. 23. Watson *v.* Watson, 11 Sim. 73. Peters *v.* Dipple, 12 Sim. 101.

Within the principle of this exception may be considered the cases, where the fund, which is the subject of the legacy, is given, not as in cases within the first exception, for the benefit of the legatee himself, but to another person beneficially, till the legatee arrive at a particular age, as till he attains twenty-one: or for a certain purpose, as till a certain quantity of debt be paid: These bequests mean to give all to a particular person, but to carve out a certain interest to endure a certain time, merely by way of exception out of the whole property meant to vest in the legatee (*f*).

In these instances the person to whom the absolute property is limited will take an immediate vested interest in the subject; since such bequests are in the nature of remainders; the rule as to which is, that the interests of the first and subsequent takers vest together (*g*).

But this exception will not apply in cases where the principal itself is not bequeathed, but the *interest only* or income is given to a person for life, or some other period, and at the decease of the first taker, or the end of the period, the *capital* is bequeathed to another, and *where it appears from the context of the Will, that no interest in the capital was intended to pass till the determination of the life estate*, or other particular period: for in such cases the gift of the income and the gift of the capital are considered as distinct gifts; and when the legatee of the principal dies during the preceding period, the legacy is not transmissible to the executors or administrators (*h*).

Kimberley v. Tew, 4 Dr. & Warr. 139. Locker v. Bradley, 5 Beav. 593. Hammond v. Maule, 1 Coll. 281, 283, 284. Butterworth v. Harvey, 9 Beav. 130. Roberts v. Burder, 2 Coll. 130. Packham v. Gregory, 4 Hare, 396. Salmon v. Green, 11 Beav. 453. M'Lachlan v. Taitt, 28 Beav. 407: affirmed 2 De Gex, F. & J. 449. Strother v. Dutton, 1 De G. & J. 675. *Re Bright's Trusts*, 21 Beav. 67.

Partridge v. Baylis, 17 C. D. 835.

(*f*) Boraston's case, 3 Co. 21. Phipps v. Ackers, 9 Cl. & F. 583, 591. Lane v. Gouge, 9 Ves. 230, by Sir Wm. Grant. Parkin v. Knight, 15 Sim. 83, *post*, 1111, note (*y*).

(*g*) See Balmain v. Shore, 9 Ves. 507.

(*h*) Fearne, Cont. Rem. 554, note.

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Thus, in *Billingsley v. Wills* (i), the testator gave to his brother, Capel Billingsley, the *interest* of 1,500*l.*, for life, and from and after his decease, he gave the *said sum* of 1,500*l.* to all the younger sons, and to all the daughters of Capel, equally, to be paid to them at their ages of twenty-one; declaring, that no elder son, if there should be more than one son, nor any elder daughter, if there were only daughters of Capel, living at his death, should have any share or interest in the 1,500*l.*: But if all the children of Capel, except one, died before twenty-one, then he gave 1,000*l.*, part of the 1,500*l.* to such surviving only child, to be paid at twenty-one: Capel had three children when the Will was made, and another child after the testator's death: Letitia, one of the three children, married and attained twenty-one, but died before her father: The question was, whether she, having attained twenty-one, but dying during the life of her father, was, notwithstanding, entitled to a vested interest in a share of the 1,500*l.*, so as to transmit it to her husband, the defendant, her personal representative: Lord Hardwicke determined, that Letitia took no vested interest, but that the shares in remainder were contingent during the life of Capel Billingsley; since there was no gift of the capital previously to his death, the objects to take it being uncertain till that event happened, and consequently, the time of payment being annexed to the substance of the gift of the legacy (which was at the death of Capel), as Letitia was not then living, she took no interest in it which she could transmit to her personal representative (k).

(i) 3 Atk. 219.

(k) In *Packham v. Gregory*, 4 Hare, 399, it was said by Wigram, V.-C., that, after very great pains, Lord Hardwicke put this case upon the particular circumstances. See also the observations of Parker, V.-C., in *Tribe v. Newland*, 5 De G. & Sm. 238, on *Billingsley v. Wills*; and also the comments of Kindersley, V.-C., in *Westwood*

v. Southey, 2 Sim., N. S. 198, 200, who denied that *Billingsley v. Wills*, *supra*, and *Batsford v. Keble* (*ante*, p. 1102, note (i)) established any rule, that if in the first instance there is a gift of the dividends only, and then a gift of the principal with a limitation over, for that reason alone there is no vesting.

It must be confessed that the cases which have been above cited, and the various distinctions created thereby, have left the law in a state of some confusion as well with respect to the doctrine of controlling a gift at a future time, or a direction to pay and divide at a future time or on a given event (or other expressions denoting a postponement of the vesting of a legacy), by reason of its being a bequest in the nature of a remainder; as also with respect to the doctrine previously discussed of controlling such expressions by a gift of the intermediate interest of the fund to the legatee. A general proposition has been laid down on the subject by an eminent writer (*l*), which appears to have met with the approval of Wigram, V.-C., in *Packham v. Gregory* (*m*), viz., that though there be no other gift than in the direction to pay or distribute *in futuro*, yet if such payment or distribution appear to be postponed for the convenience of the fund or property (as where the future gift is only postponed to let in some other interest), the vesting will not be deferred till the period in question (*n*).

Where gift is postponed for the convenience of the fund, it is vested :

secus, where the attaining of a certain

This general proposition, however, must not be understood as applicable to cases where the attainment of a particular age

(*l*) 1 Jarman on Wills, 4th ed. 840.

(*m*) 4 Hare, 398. Thus, under a bequest to trustees in trust for A. during his life and after his death to pay and divide among his children, the shares of the children dying in the lifetime of A. are vested and pass to their representatives. *Hallifax v. Wilson*, 16 Ves. 171. *Hawkins on Wills*, p. 232.

(*n*) See *Accord*. *Adams v. Roberts*, 25 Beav. 658. *Re Minor's Trusts*, 28 Beav. 50. *Re Bright's Trusts*, 21 Beav. 67. See also *Re Bennett's Trusts*, 3 K. & J. 280, where it was laid down by Wood, V.-C., that the use of such words

as "pay and transfer," as the only words of gift in a deferred bequest, do not make such a bequest contingent. The true criterion is what was the reason for the postponement. If it was the position of the fund, as in a gift to one for life and after his death to others, the bequest in remainder vests at once; but if it was the position of the legatee, as where the gift is by a direction to pay the fund to the legatee when he shall attain twenty-one, it is contingent. The law was laid down by the same judge to the same effect, *Re Theed's Settlement*, 3 Kay & J. 379.

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is introduced into, and made a constituent part of, the description or character of the objects of the gift; as where the bequest is to *the children who shall attain, or to such children as shall attain the age of twenty-one years*; there being in such cases no gift except to the persons who answer the qualification which the testator has annexed to the enjoyment of his bounty (o). Moreover, it is to be remembered that wherever there is no other gift than in the direction to pay and distribute, then the attainment of the age at which that payment or division is to take place is, *prima facie*, a condition precedent to the vesting (p).

Difficult questions connected with this subject have arisen

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(o) 1 Jarman on Wills, 4th edit. 854. *Supra*, note (n), by Wood, V.-C. See also *Packham v. Gregory*, 4 Hare, 397, 398, 399, where Wigram, V.-C., expressed an opinion that the decisions of *Batsford v. Kebbell* (3 Ves. 263), and *Vawdry v. Geddes* (1 Russ. & M. 203), are referable to this principle. See further as to bequests of this kind (and also as to bequests to children when, or as soon as, they attain a certain age), *Newman v. Newman*, 10 Sim. 51. *Bull v. Pritchard*, 1 Russ. 213. 5 Hare, 567, *post*, 1113, note (a). *Festing v. Allen*, 12 M. & W. 479. 5 Hare, 575. *Lord Bute v. Harman*, 9 Beav. 320 (corrected in 16 Beav. 166). *Harrison v. Grimwood*, 12 Beav. 192. *Toller v. Attwood*, 15 Q. B. 929, 953. *Boreham v. Bignall*, 8 Hare, 131. *Southern v. Wollaston*, 16 Beav. 166. *Boulton v. Beard*, 3 De Gex, M. & G. 608, 613. *Stead v. Platt*, 18 Beav. 50. *Atcherley v. Du Moulin*, 2 Kay & J. 186, 191. *Barnett v. Blake*, 2 Dr. & Sm. 117. *Tracey v. Butcher*, 24 Beav. 438. *Gardiner v. Slater*, 25 Beav. 509.

Pearman v. Pearman, 33 Beav. 394. The test would seem to be whether or not in the particular Will the words "attain the age of twenty-one" and such like, are a part of the description of the devisee. *Muskett v. Eaton*, 1 C. D. 435. Where there is a gift of a fund to the testator's children in a class, so soon as the youngest shall attain twenty-one, no child who does not attain that age is entitled to share, the testator having postponed the division till the youngest child attained that age, (though a child who attained that age, but died before the time of division, is entitled to a share): *Leeming v. Sherratt*, 2 Hare, 23. *Lloyd v. Lloyd*, 3 Kay & J. 20. And it makes no difference that the income is directed to be applied for the maintenance of all the children during their minority: *ibid.* 25. But the rule is different where the bequest is not to a class, but to individuals: *Cooper v. Cooper*, 29 Beav. 229.

(p) *Locke v. Lamb*, L. R. 4 Eq. 372. *Merry v. Hill*, L. R. 8 Eq. 619.

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on the construction of Wills, by which legacies are limited over on a contingency, by way of executory bequest.

The general rule appears to be, that a limitation over on a contingency does not, of itself, and without more, prevent any of the shares of the legatees from vesting in the meantime, provided the words of bequest be, in other respects, sufficient to pass a present interest (*q*); though such a limitation over of the entirety may be called in aid of other circumstances to show that no present interest was intended to pass (*r*).

Accordingly, in *Skey v. Barnes* (*s*), a testator gave his personal estate to trustees, upon trust to pay the interest to his daughter E. S. for life, and after her decease to pay and divide the principal among the children of his said daughter, and the issue of a deceased child, as she should appoint, and in default of appointment, to go and be equally divided among them; and if but one, then to such only child; the portions of sons to be paid at their respective ages of twenty-one, and of daughters at their respective ages of twenty-one or marriage: If no issue, or all died before their respective portions became payable, then over: One of the children of E. S., having survived her, died under twenty-one and unmarried: It was contended, that the evident intention was that the shares should not vest till twenty-one, but that, in the event of the death of any under that age, the others should take by survivorship: But Sir W. Grant held, that the shares were so given as to vest immediately in the children, though liable to be divested by all dying under twenty-one, without issue: and that, therefore, the share of a child dying under twenty-one passed to its representative. So in *Templeman v. Warrington* (*t*), a testatrix bequeathed the residue of her funded property in

(*q*) *Skey v. Barnes*, 3 Meriv. 340. *Davies v. Fisher*, 5 Beav. 314.

(*r*) *Ibid.* Indeed the limitation over has been sometimes considered

as affording an argument in favour of an immediate vesting. See *post*, p. 1111, n. (*y*).

(*s*) 3 Meriv. 335, 340.

(*t*) 13 Sim. 267.

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trust for her niece for life, and after her death, to be equally divided amongst all her children, whether sons or daughters, share and share alike; and in case it should happen there was but one child at the niece's death, then to go to that only child; and in failure of issue, to go as the niece should appoint by her Will: The niece had eleven children, three of whom, having survived the testatrix, died in the lifetime of the niece: And it was held by Shadwell, V.-C., that all the children took vested interests; and as more than one survived their mother, there was no divesting of interest; and his Honor said that *Skey v. Barnes* was clearly in point (*u*).

In *Bland v. Williams* (*x*), there was a bequest to trustees of the testator's residuary estate, with a direction to apply so much of the interest, dividends, and profits as might be necessary for the maintenance and education of the children of the testator's daughter until they should respectively attain the age of twenty-four, and then to divide the principal equally between them, with a gift over in case any of them should die under twenty-four, without leaving issue: And it was held by Sir J. Leach, M. R., that the bequest was not void as too remote; but gave a present vested interest, with an executory bequest over in case of death under twenty-four without leaving issue: And his Honor observed that "whether in a gift of this nature the time of vesting is postponed, or only the time of payment, depends altogether upon the whole context of the Will. If the gift over is simply upon the death under twenty-four, then the gift could not vest before that age (*y*). In this case,

(*u*) See *Accord*, *Davies v. Fisher*, 5 Beav. 201, 214. *Locker v. Bradley*, *ibid.* 593. *Kinberley v. Tew*, 4 Dr. & Warr. 139. See also *Davidson v. Dallas*, 14 Ves. 577: *Williams v. Clark*, 4 De G. & Sm. 472. *Re Bright's Trusts*, 21 Beav. 67. *Hardcastle v. Hardcastle*, 1 Hemm. & M. 403. *Jopp v. Wood*, 28 Beav.

53; affirmed, 2 De Gex, J. & Sm. 323.

(*x*) 3 M. & K. 411.

(*y*) "Why not?" is asked in 1 Jarman on Wills, 4th ed., 857, note (*g*), commenting on this passage. And that learned author expresses an opinion that a bequest in the terms supposed may admit

the gift over is not simply upon the death under twenty-four, but upon the death under twenty-four without leaving

of the application of the principle of the cases of *Edwards v. Hammond*, 3 Lev. 132. *Doe v. Moore*, 14 East, 601. *Doe v. Nowell*, 1 M. & S. 327. *Bromfield v. Crowder*, 1 New Rep. 313, and *Doe v. Ward*, 9 A. & E. 582, which are cited in another part of the same work (vol. 1, p. 812, *et seq.*), as establishing the proposition, with respect to devises of *real estate*, that though a devise to a person, if he should live to attain a particular age, standing alone, would be contingent, yet if it be followed by a limitation over, in case he die under such age, the devise over is considered as explanatory of the sense in which the testator intended the devisee's interest in the property to depend on his attaining the specified age, namely, that at that age it should become absolute and indefeasible; the interest in question, therefore, must be construed to vest *instantly*. This class of cases was fully discussed in the House of Lords, in *Phipps v. Ackers*, 9 Cl. & F. 583 (on appeal from the decision of Shadwell, V.-C., in *Phipps v. Williams*, 5 Sim. 44), where the judges delivered their opinion (which was adopted by the House), that if a testator devises real estate to C. D., when and so soon as he shall attain his age of twenty-one years, but in case C. D. shall die under the age of twenty-one, without leaving issue, then that the said estate shall sink into and form part of the testator's residuary real estate, and he gives all the residue of real estates to J. C., (subject to various

limitations affecting the same); the devisee C. D., on the death of the testator, takes an estate in fee simple, subject to be divested in the event of his dying under twenty-one and without issue: And Tindal, C. J., in delivering the opinion of the judges, said that the class of cases in question went on the principle that the subsequent gift over, in the event of the devisee dying under twenty-one, sufficiently shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which of course gives him the immediate interest, subject only to the chance of its being divested on a future contingency: And that whether the doctrine on which this class of cases has rested was originally altogether satisfactory or not, it was sufficient to say that it clearly had been established and recognized, not only in the Court below, but in the House of Lords itself; and that it governed the present case. In the subsequent case of *Festing v. Allen*, 12 M. & W. 301, the Barons of the Exchequer said that they should not feel inclined to extend the doctrine of *Doe v. Moore*, and *Phipps v. Ackers* to cases not precisely similar. It was said by Parker, V.-C. (3 De G. & Sm. 200) that the passage in Sir John Leach's judgment, on which the above comments are made in Jarman on Wills, obviously refers to the Will then before him, and was not meant for general application. See

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issue. If upon a death under twenty-four, at whatever age, issue was left, then the gift over is not to take place. It is in effect, therefore, a vested interest with an executory devise over in case of death under twenty-four without leaving issue. All the cases upon the subject (z), except *Bull v. Pritchard* (a), before Lord Gifford, are reconcilable with this distinction " (b).

In construing a settlement or Will, which makes a provision for children subject to a prior life-interest, the Court leans strongly in favour of that construction by which the children will take a vested interest at twenty-one or mar-

Presumption in favour of bequests, by way of portions to children, vesting at twenty-one or marriage.

further as to doctrines discussed in this note, *Browne v. Browne*, 3 Sm. & Giff. 568. *Jull v. Jacobs*, 3 C. D. 703, in which case Malins, V.-C., throws doubt on *Festing v. Allen*, *ubi sup.* *Re Mid Kent Railway*, Johns. 387. *Simmonds v. Cocks*, 29 Beav. 455. *Finch v. Lane*, L. R. 10 Eq. 591. *Williams v. Haythorne*, L. R. 6 Ch. 782. *Muskett v. Eaton*, 1 C. D. 435. *Andrew v. Andrew*, 1 C. D. 410.

(z) *Leake v. Robinson*, 2 Meriv. 363. *Farmer v. Francis*, 2 Sim. & Stu. 505. *Vawdry v. Geddes*, 1 Russ. & M. 203. *Judd v. Judd*, 3 Sim. 525. *Hunter v. Judd*, 4 Sim. 455.

(a) 1 Russ. Chanc. Cas. 213. If that case be examined, it will be found to form no exception to the rule as above stated by Sir John Leach; for the gift there was not to all the children, but only to a particular class, namely, those who should live to attain twenty-three: *Taylor v. Frobisher*, 5 De G. & Sm. 191, 200, by Parker, V.-C. The testator bequeathed personal property to his trustees and executors upon trust, to pay the dividends

to his daughter during her life to her separate use, and after her decease, to pay the principal unto all and every her children who should live to attain twenty-three years of age, share and share alike, with benefit of survivorship in case any of them died under that age; with limitations over, in case there should be no such child or children, or, being such, all of them should die under twenty-three, without lawful issue: The daughter had a child who died under age in the daughter's lifetime: And Lord Gifford held, that the attainment of the age of twenty-three was necessary to vest an interest in any of the children: and consequently that the bequests to them, and the subsequent limitations were too remote. See *Bull v. Pritchard*, 5 Hare, 567. *Doe v. Ward*, 9 A. & E. 582, 605. *Ante*, p. 1109, note (c).

(b) See also *Bree v. Perfect*, 1 Coll. 129. *Taylor v. Frobisher*, 5 De G. & Sm. 191. 1 Jarman on Wills, 4th ed., 858. *Re Bevan's Trusts*, 34 C. D. 716.

riage, whether they survive the tenant for life or not; and if the instrument is incorrectly or *ambiguously* expressed, or if it contains *conflicting* and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which, the shares are to vest, the rational presumption is, that the child acquires a vested and transmissible interest at the period when it is most needed, viz. at twenty-one, if a son, or on marriage or at that age, if a daughter (c).

Accordingly in *Wakefield v. Maffet* (d), by a marriage settlement, lands were conveyed upon trust for husband and wife successively for life, and, after the death of the survivor, to levy out of the said lands the sum of 3,000*l.* to be divided to and among all the children in equal shares and proportions as tenants in common and not as joint tenants, the share of a son or sons to be paid to him or them upon his or their respectively arriving at their full age of twenty-one years, and the share of a daughter or daughters on her or their attaining that age or marriage, with provisions for interest by way of maintenance and for benefit of survivorship, if any of the children died, before his her or their share or shares should become payable, unmarried, and without leaving issue. A son attained twenty-one and died in the lifetime of his father, and it was held that, there being no words indicating a clear

(c) *Emperor v. Rolfe*, 1 Ves. Sen. 208, the authority of which has been recognised by the House of Lords in *Wakefield v. Maffet*, 10 App. Cas. 422. *Woodcock v. Duke of Dorset*, 3 Bro. C. C. 569. *Howgrave v. Cartier*, 3 V. & B. 70, 85, 86. *Perfect v. Lord Curzon*, 5 Madd. 442. *Torres v. Franco*, 1 Russ. & M. 649. *Mocatta v. Lindo*, 9 Sim. 56. *Clutterbuck v. Edwards*, 2 Russ. & M. 577. *Mendham v. Williams*, L. R. 2 Eq. 396. *Jackson v. Dover*, 2 H. & M. 209. *Jeyes v. Savage*, L. R. 10 Ch. 555, explaining *Woodcock v. Duke of Dorset*, *ubi*

sup. The rule in *Emperor v. Rolfe* was originally established in relation to settlements, and was extended by *Jackson v. Dover*, *ubi sup.*, to Wills. *Re Knowles*, 21 C. D. 806. The rule generally will not be applied where the issue of a deceased child is provided for. *Re Wilmott's Trusts*, L. R. 7 Eq. 532. The rule is the same as to grandchildren where the settlor or testator is *in loco parentis*: but not otherwise: *Swallow v. Binns*, 1 Kay & J. 417. *Farrer v. Barker*, 9 Hare, 737.

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intention to make the vesting of children's shares contingent on their surviving both parents, the rule applied and the son took a vested interest on attaining twenty-one.

But when the testator has unequivocally expressed an intention, that a provision to be made for his children shall depend on their surviving both or either of their parents, the Court must give effect to that intention, and can only lean to the presumption in favour of children, where the intention of the testator is ambiguously expressed (e).

An illustration of these doctrines may be found in the decision of *Whatford v. Moore* (f); in the arguments of which case almost all the previous authorities on this subject were cited: And Lord Cottenham, in giving his judgment, made the following observations. "In a case of doubtful construction upon the whole instrument, the Court leans to that which will include children so dying (i.e. attaining their age in the lifetime of their parents and dying before them), as most convenient, and most likely to have been the intention of the parties. It may be thought that Courts have gone the full length that is justifiable in order to attain this object (g), but no case has gone so far as to do violence to the words, if no other part of the instrument be found inconsistent with them." His Lordship further observed, that, "the cases upon this subject turn upon such nice distinctions, and are so little reconcilable, that the only reasonable course is to adopt the rule which has been generally recognized, of leaning in favour of a construction which includes all the children, if the instrument affords fair grounds for doing so; but if not, to give effect to the plain meaning of the words

- (e) *Howgrave v. Cartier*, 3 V. & Beav. 29. *Re Williams*, 12 Beav. B. 85. *Hotchkin v. Humfrey*, 2 B. 317. *Farrer v. Barker*, 9 Hare, Madd. 65. *Fitzgerald v. Field*, 1 737. *Jeffery v. Jeffery*, 17 Sim. Russ. 430. *Tucker v. Harris*, 5 26. *Darby v. Radcliffe*, 3 C. D. 654. Sim. 538. *Tawney v. Ward*, 1 (f) 7 Sim. 574. 3 Mylne & Cr. Beav. 563. *Ex parte Hunter*, 3 270. *Jeyes v. Savage*, L. R. 10 Ch. Younge & C. 610. *Bright v. Rowe*, 555. (g) *Farrer v. Barker*, 9 Hare, 3 M. & K. 316. *Evans v. Scott*, 1 744, by Turner, V.-C. *Accord.* H. L. C. 4s. *Skipper v. King*, 12

used." And his Lordship added that the cases "have proceeded upon grounds so peculiar, and have departed so widely from the rule of construing instruments according to the obvious and natural meaning of the words used, that it is not possible to come to any very satisfactory conclusion upon any case which varies at all from former decisions."

A bequest to a class which is void for remoteness as to any member of that class, fails altogether.

It must be observed, however, that a gift to a class which is void as to any member of that class, by reason of being too remote, must fail altogether: Therefore if a bequest is made to a class of persons, in such a manner, that, with respect to some of the members of it, it is too remote, by reason of the interest not vesting within the legal limits during which a bequest may take effect, the whole gift fails, notwithstanding, with respect to others of the class, it may not be too remote; for what the Court has to determine is, *whether the class can take*; if not, the Court cannot split into portions the general bequest to the class, and say, that because the rule of law forbids the testator's intention from operating in favour of the whole case, his bequests shall be made, what he never intended them to be, *viz.*, a series of particular legacies to particular individuals, or distinct bequests, in each instance, to two different classes: for this, in effect, would be to make a new Will for the testator (*h*). Nor will this rule be varied, even in favour of a person who is *named* by the testator, and with respect to whom, individually, the

(*h*) *Leake v. Robinson*, 2 Mer. 363, 390. *Dungannon v. Smith*, 12 Cl. & F. 546. *Seaman v. Wood*, 22 Beav. 591. *Smith v. Smith*, L. R. 5 Ch. 342. *Hale v. Hale*, 3 C. D. 643. *Pearks v. Moseley*, 5 App. Cas. 714, approving *Re Moseley's Trusts*, 11 C. D. 555, and disapproving *Re Moseley's Trusts*, L. R. 11 Eq. 499. But where there is a gift or devise of a given sum of money or property to each member of a class, and the gift to each is wholly independent of the

same or similar gift to every member of the class, and cannot be augmented or diminished whatever be the number of the other members, then the gift may be good as to those within the limits allowed by law: *Storrs v. Benbow*, 3 De Gex, M. & G. 390. *Cattlin v. Brown*, 11 Hare, 377. *Wilkinson v. Duncan*, 30 Beav. 111. See also *Webster v. Boddington*, 28 Beav. 128, 137. *Bentinck v. Portland*, 7 C. D. 693.

bequest is of the class remote (*i*).

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bequest is not too remote, if he is mentioned as a member of the class, with respect to whom, as a class, the gift is too remote (i).

Another question, closely connected with these points, has frequently arisen, *viz.*, whether the terms of a legacy give to the legatee an absolute and indefeasible interest in the thing bequeathed, or an interest, which, though vested in him, is subject to an executory bequest over, on the happening of a particular event. But this inquiry will, perhaps, be more appropriately introduced hereafter (k), in conjunction with the doctrine of conditional legacies.

Vested legacies subject to executory bequest over.

8. *Of the Lapse of Legacies payable out of the Real Estate.*

As to legacies payable out of real estate only, the first rule above stated (l), as adopted with respect to legacies payable out of personal estate, *viz.*, that when the gift and the time of payment are distinct, the legacy vests immediately, does not hold, generally speaking.

Distinction between legacies payable out of real estate and legacies payable out of personal estate as to time of vesting.

The reason of this distinction is, that, in the civil law, a bequest to a person to be paid at a future time, was held to confer on him a present right to the legacy, notwithstanding the time of payment was future; so, that, immediately on the testator's decease, it became, in the eye of the civil law, a present debt, payable at a future time. Now, anciently, legatory matters arising on personal estate were solely under the jurisdiction of the Ecclesiastical Courts, and the decisions

(i) *Porter v. Fox*, 6 Sim. 485. See, however, *James v. Lord Wyndford*, 1 Sm. & G. 40, in which case Stuart, V.-C., says that he has some difficulty in following the decision in *Porter v. Fox*, which seems to him "not sustainable on an accurate view of what was said by Sir W. Grant in *Leake v. Robinson*." But *Porter v. Fox* would

seem to be in accordance with the later decisions if the amount of the share of the individual named could not be ascertained without ascertaining the whole number of shares, including the shares of those to whom the bequest would be too remote.

(k) *Post*, p. 1122, *et seq.*

(l) *Ante*, p. 1088.

of those Courts were regulated by the civil law : By degrees Courts of Equity took cognizance of them, and with a view to uniformity of decision, adopted the rule in question, in respect to such legacies : But legacies payable out of real estate never fell within the cognizance of the Ecclesiastical Courts ; there was not, therefore, the same reason for applying this rule to that description of legacies ; and, as it appeared contrary to the favour which the law shows to the owner of the inheritance, Courts of Equity rejected it as a general rule in respect to all such legacies (m).

The leading case generally referred to as establishing this distinction, is *Poulet v. Poulet*, or *Pawlett v. Pawlett* (n) : There Lord Pawlett settled by deed real property in trustees for a term of years in remainder after his death, upon trust, after payment of his debts, to pay such sums of money and maintenance for younger children as his Lordship should appoint by Will ; and in default of appointment to raise 4,000*l.* a-piece for each such child, payable at twenty-one or marriage, with maintenance in the intermediate time : Lord Pawlett appointed by Will to his two daughters, and only younger children, Susanna and Vere, 4,000*l.* each, to be raised and paid in money, and at the times, and with the maintenance prescribed by the deed : Both daughters survived him : But Vere died under age, and unmarried, before any part of her portion could be raised ; and her mother was her administratrix, who claimed her portion : The question was, whether such claim could be supported, as Vere died under twenty-one, and unmarried : And the Lord Keeper determined in the negative ; observing that " the portion was to come wholly out of the lands, and the personal estate no way subjected or made liable to the payment of it by the Will."

The rule of law laid down in the case of *Pawlett v. Pawlett* has been adopted in a numerous series of cases (o),

(m) *Fearne*, Cont. Rem. 555,
note by Mr. Butler.

(n) 2 *Ventr.* 366. 1 *Vern.* 204, 321.

(o) *Smith v. Smith*, 2 *Vern.* 92.
Yates v. Phetplace, 2 *Vern.* 416.

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and in conformity with the principle of it, it has been further decided, that a gift of interest until the legacy becomes due will not vest the principal, when the legacy is charged on land; but if the legatee dies before time of payment, the legacy is lost (*p*).

But a difference observable in the apparent motives for the postponement of legacies, has given rise to an extensive exception from this general rule respecting the vesting of legacies charged on land. Thus when a legacy is bequeathed to a child on its attaining twenty-one, or marrying, or on any other event personal to him, the legacy is evidently postponed to the time specified, from its being considered that the legatee will then want the benefit of the legacy; whereas when the estate is devised to a person for life, and after his decease is charged with a legacy, the legacy is evidently postponed till the decease of the devisee for life, from its being incompatible with his life estate, that it should be raised in his lifetime. The payment of the legacy is therefore considered to be postponed, in the first case from regard to circumstances personal to the legatee; and in the second from regard to the circumstances of the estate; and it has been inferred, that in cases of the first description, the testator does not intend the legatee shall receive the legacy, unless the circumstance happens on which the

v. Martin, 3 Atk. 335. *Jennings v. Looks*, 2 P. Wms. 276. *Duke of Chandos v. Talbot*, 2 P. Wms. 610. *Prowse v. Abingdon*, 1 Atk. 485. *Harrison v. Naylor*, 3 Bro. C. C. 108. *Parker v. Hodgson*, 1 Dr. & Sm. 568, and the authorities cited in the arguments and judgment in that case. The rule is not to be applied to legacies given out of monies to arise from the sale of land: *Re Hart's Trusts*, 3 De G. & J. 195, nor to legacies given out of a mixed fund consisting of the proceeds of the sale

of real estate directed to be sold, and pure personal estate. *Lloyd v. Lloyd*, 2 Sim. (N. S.) 255. *Bellairs v. Bellairs*, L. R. 18 Eq. 510, 517. The proceeds of realty and personalty directed to be applied to the same object are, it would seem, a mixed fund, to which the rules applicable to personalty apply. *Genery v. Fitzgerald*, Jac. 468.

(*p*) *Gawler v. Standewick*, 1 Bro. C. C. 106, in a note to *Green v. Pigot*.

testator made it payable; and that in cases of the second description, the testator intends the legatee shall receive it at all events. In the former cases, therefore, it has been held, that if the legatee dies while the time of payment is in suspense, the legacy sinks into the land for the benefit of the inheritance; and in the latter cases it has been held, that if the legatee dies during the continuance of the preceding estate or interest, his personal representatives will be entitled, on its determination, to have the legacy raised for their benefit (q).

The case of *King v. Withers* (r), which there has already been occasion to state, is the leading case by which this exception has been established, as to the vesting of legacies payable out of the real estate at a future time: and the principle of that decision has been adopted in a multitude of subsequent cases (s).

So the rule in question is always liable to the operation of the more general and powerful rule, namely, that the intention of the testator, to be gathered from the words of the Will, must prevail (t).

It must be further observed, with respect to this general rule, that it may clearly be controlled by a direction in the

(q) *Fearne*, Cont. Rem. 557, note by Mr. Butler.

(r) *Cas. temp. Talb.* 116, *ante*, p. 771.

(s) *Godwin v. Munday*, 1 Bro. Chanc. Cas. 191, and the cases in the notes thereto. *Hutchins v. Foy*, Com. Rep. 716, 723. *Lowther v. Condon*, 2 Atk. 128. *Emes v. Hancock*, 2 Atk. 507. *Sherman v. Collins*, 3 Atk. 319. *Hodgson v. Rawson*, 1 Ves. Sen. 44. *Tunstall v. Brachan*, Ambl. 167. S. C. 1 Bro. C. C. 124, note to *Dawson v. Killett*. *Embrey v. Martin*, Ambl. 230. *Manning v. Herbert*, Ambl. 575. *Jeale v. Titekenner*, Ambl.

703. S. C. 1 Bro. C. C. 120, in a note. *Clark v. Ross*, 2 Dick. 529. S. C. 1 Bro. C. C. 120, note. *Dawson v. Killett*, 1 Bro. C. C. 119, and the cases in the notes. *Walker v. Main*, 1 Jac. & Walk. 17. *Watkins v. Cheek*, 2 Sim. & Stu. 199. *Poole v. Terry*, 4 Sim. 294. *Murkin v. Phillipson*, 3 M. & K. 257. *Goulburn v. Brooks*, 2 Younge & C. 539. *Salisbury v. Petty*, 3 Hare, 86, 90, 91. *Evans v. Scott*, 1 H. L. C. 43, 57. *Remnant v. Hood*, 27 Beav. 74. 2 De Gex, F. & J. 396.

(t) 2 Y. & Coll. C. C. 134, 138.

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Will that the legacy should vest on the testator's death : Thus in the case of *Brown v. Wooler* (u), the testator gave legacies charged on his real estate to his two daughters, "the same to vest in them immediately on my death, but to be paid on their attaining the ages of twenty-one years, and the interest thereof in the meantime to be applied to their maintenance and education : " The daughters both died infants ; and it was contended, that the legacies, as against the real estate, must sink for the benefit of the devisee, but Sir John Leach, V.-C., held, that this was prevented by the express direction that the legacies should vest on the death of the testator : and, therefore, that the personal representatives of the daughters were entitled to the legacies.

4. *Of the Lapse of Legacies charged on a mixed fund of Realty and Personality.*

It sometimes happens that legacies are charged on a mixed fund, that is, both on real and personal estate : In that case, the personal estate is considered to be the primary fund, and the real estate to be the auxiliary fund for the payment of the legacies (x). So far as the personal fund will extend to pay them, the case is governed by the same rules as if the legacies were payable out of personal estate only ; and so far as the real estate must be resorted to for the payment of the legacies, the case is governed by the same rules as if they were charged on the real estate only (y).

In concluding the general inquiry into the doctrines by which it is ascertainable whether the legacies are vested or contingent, it may be proper to consider the question which arises on Wills in which the testator expressly declares that the legacies given by it shall or shall not be *vested* at or until

Effect of the testator's declaring that a legacy shall or shall not be vested at a particular period.

(u) *Watkins v. Cheek*, 2 Sim. & St. 199. *bot*, 2 L. Wms. 601. *Prowse v. Abingdon*, 1 Atk. 482. *Ac Hudson's Trusts*, 1 Dru. 6, t. Sugden, C. of Ireland.

(x) See *post*, p. 1561.

(y) *Fearne*, Cont. Rem. 557, note by Butler. *Chandos v. Tal-*

a particular period. In such cases the word "vested" has been frequently construed in a sense different from its strictly legal meaning. Thus it has been sometimes regarded as meaning "transmissible" (z), sometimes as meaning "vesting in possession" (a), or "payable" (b): sometimes as meaning "indefeasible" (c). But the distinct and definite meaning which the word legally bears must be attributed to it in construing the Will in which it is contained, unless there is evidence from the context that the testator did not mean to affix that meaning to the expression (d).

SECTION VI.

Of Legacies on Conditions.

In the preceding section one sort of conditional legacy has been considered: viz., where the condition is that the legatee shall be alive at a particular period: It is now proposed to treat of this species of legacy generally.

Conditional
legacy:
definition.

A conditional legacy is defined to be a bequest whose existence depends upon the happening, or not happening, of some uncertain event, by which it is either to take place or to be defeated.

No precise form of words is necessary in order to create

(z) *Taylor v. Frobisher*, 5 De G. & Sm. 191, 198.

(a) *King v. Cullen*, 2 De G. & Sm. 252. *Simpson v. Peach*, L. R. 16 Eq. 208. So the word "entitled" may mean "entitled in possession," i.e., entitled to payment: *Jopp v. Wood*, 28 Beav. 53; affirmed, 2 De Gex, J. & Sm. 323. *Umbers v. Jaggard*, L. R. 9 Eq. 200. *Re Noyce*, 31 C. D. 75. See *Greenhalgh v. Bates*, L. R. 2 P. & D. 47.

(b) *Sillick v. Booth*, 1 Y. & Coll. Ch. C. 121.

(c) *Berkeley v. Swinburne*, 16

Sim. 275. *Taylor v. Frobisher*, 5 De G. & Sm. 191. *Poole v. Bott*, 11 Hare, 33. *Re Thatcher's Trust*, 26 Beav. 365, 368. *Re Edmondson's Estate*, L. R. 5 Eq. 389. *Armstrong v. Wilkinson*, 3 App. Cas. 355.

(d) *Glanvill v. Glanvill*, 2 Mer. 38. *Re Thruston's Will*, 17 Sim. 21. *Re Blakemore's Settlement*, 20 Beav. 214. *Re Morse's Trust*, 21 Beav. 174. *Rowland v. Tawney*, 26 Beav. 67. *Re Thatcher's Trust*, 26 Beav. 365. *Re Arnold's Estate*, 33 Beav. 163. *Richardson v. Power*, 19 C. B., N. S. 780.

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conditions in Wills: but, whenever it clearly appears that it was the testator's intent to make a condition, that intent shall be carried into effect (e).

In the case of *Tattersall v. Howell* (f), a legacy was given provided the legatee changed his course of life and gave up all low company and frequenting public houses: And Sir W. Grant held, that this was a condition such as the Court would carry into effect, and directed the Master to inquire whether the legatee had discontinued to frequent public houses, keeping low company, &c.

Conditions are subject to the well-known division into conditions precedent, and conditions subsequent. When a condition is of the former sort, the legatee has no vested interest till the condition is performed: when it is of the latter, the interest of the legatee vests in the first instance, subject to be divested by the non-performance or breach of the condition (g). It has been held that a contingent gift or interest has a real existence, capable, as much as a vested interest or estate, of being operated upon by a condition subsequent, and being made to cease and determine (h).

Of conditions precedent or subsequent:

For example, in the instances already adduced of contingent legacies, the endurance of the life of the legatee till the period specified, was a condition precedent to the legacy vesting in him; and since, by reason of his death, he failed

(e) Godolph. Pt. 3, c. 4, s. 4. 738.
Egg v. Devey, 10 Beav. 444.

(f) 2 Meriv. 26. But see *Maud v. Maud*, 27 Beav. 615.

(g) See the authorities cited by Manning, Serjt., *arguendo*, in *Wynne v. Wynne*, 2 M. & Gr. 14, *et seq.* Every condition by the civil law suspends the legacy: so that a condition subsequent by the civil law is of the nature of a condition precedent at common law: *Harvey v. Aston*, Com. Rep.

(h) *Egerton v. Lord Brownlow*, 4 H. L. C. 1. Where, however, a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, the condition must be such that the Court can see from the beginning precisely and distinctly upon the happening of what event it was that the preceding vested estate was to determine: by *Lord Cranworth in Clavering v. Ellison*,

to perform the condition, he never acquired any vested interest.

subsequent :

For an example of a condition subsequent may be mentioned the case of *Nicholls v. Osborn* (i), where the testator bequeathed the surplus of his personal estate to his niece, about the age of seventeen, to be paid to her at the age of twenty-one; and if she should die before twenty-one or marriage, then over: And it was held, that the surplus vested in the niece, and that the bequest over was on a condition subsequent.

So in *Gray v. Garman* (k), there was a gift by a testator of his real and personal estate to his wife for her life, and the residue to be divided equally among her brothers and sisters: and in case any of them should be dead, at the time of her decease, leaving issue, such issue to stand in their parent's place: And it was held, that each of the brothers and sisters, who survived the testator, took vested interests in their shares, subject to be divested in the event of his or her death, leaving issue, in the lifetime of the widow: Consequently, that the brothers and sisters who died, without issue, in her lifetime were entitled to share in the residue; inasmuch as the event had not happened on which their vested interest was liable to be divested (l).

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considered as
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It may be observed that the tendency in modern times has been to depart from the strict interpretation adopted in earlier periods of our law, when these matters were considered only with reference to common law, and that where the language of the Will and the intention of the testator

7 H. L. C. 707, 725. Such limitations must be certain, not only in expression, but also in operation, and it is essential to their validity that it should be capable of ascertainment at any given moment of time whether the limitation has or has not taken effect: *Re Exmouth*, 23 C. D. 158.

(i) 2 P. Wms. 419.

(k) 2 Hare, 268.

(l) See also *Accord*. *Salisbury v. Petty*, 3 Hare, 86: and for further instances of vested legacies subject to be divested on a subsequent event, see *Heron v. Stokes*, 2 Dr. & W. 89—115. *Kimberley v. Tew*, 4 Dr. & W. 139. *Simmonds v. Cocks*, 29 Beav. 455.

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(m) *Wright v. Smith*, 232, 252.

(n) *Hinckley v. Cambridge*, 160. *Cambridge v. Ommaney*, 12; *Ommaney v. Schenk*, 291; *Schenk v. More*, 405; *Re More*, 171; *Re Haywood*, *Elliott v. Smith*. In *Re Haywood* thus states the doubt that where a person in testis that is followed the event of the person *sub modo* without issue of other limitation death a conting

admit of it, these bequests "on condition" are to be considered as imposing a trust, and not as conditions which shall take the property out of the legatee, if he does not comply with them (*m*).

It is fully established as a general rule, that a bequest to any person, "and in case of his death" to another, is an absolute gift to the first legatee, if he survives the testator; and this, whatever be the form of expression, as "if he die," "should he happen to die," "in case death should happen to him," and so forth: The event here contemplated being so inevitable, that it cannot be deemed a contingency, the Courts have held, that something else must be intended than merely to provide for the case of the legatee dying at some time or other; and have said, that they will rather suppose the testator to have contemplated and provided for the case of the legatee dying in his own lifetime; and so have read those words as if they had been "in case of his death during the testator's lifetime:" in which event alone they have allowed the bequest over to take effect (*n*). But in the case of an immediate bequest to any person, "and in case of his death *without children*" to another, it has been

Bequest to one and "in case of his death" to another.

(*m*) *Wright v. Wilkin*, 2 Best & Sm. 232, 252.

(*n*) *Hinckley v. Simmons*, 4 Ves. 160. *Cambridge v. Rous*, 8 Ves. 12; *Ommaney v. Bevan*, 18 Ves. 291; *Schenk v. Agnew*, 4 K. & J. 406; *Re More's Trust*, 10 Hare, 171; *Re Hayward*, 19 C. D. 470; *Elliott v. Smith*, 22 C. D. 236. In *Re Hayward*, *ubi sup.*, Fry, J., thus states the law: "There is no doubt that when a gift is made to a person in terms absolute, and that is followed by a gift over, in the event of the death of that person *sub modo* (that is to say, without issue or subject to any other limitation which makes the death a contingency), the effect of

the gift over is *prima facie* to prevent the first taker from taking absolutely, to convert the interest of the first taker into one subject to the contingent devise or bequest over. In such a case there is no reason to confine the meaning of the word "death" to death during the lifetime of the testator or death during the life of the tenant for life. The only reason, or the main reason, why that is done in certain cases is, that the testator has spoken of death which is certain, as a contingency, but when the testator has spoken of death *sub modo*, that being contingent, there is no need to render it contingent by introducing any limitation."

held, that if at any time, whether before or after the death of the testator, the legatee dies without leaving a child, the gift over takes effect; for the event spoken of is not a certain but a contingent event (*o*); and the introduction of a previous life estate will not alter that principle of construction unless a contrary intention appears in the Will (*p*).

On the other hand, if there is a bequest to one for life and after his decease to A., and "in case of A.'s death to B.," the contingency is held referable to the lifetime of the first legatee; and the bequest over only takes effect in case A. dies during the continuance of the life estate; he takes absolutely, if he survives the tenant for life (*q*).

Likewise, a bequest to A., when and if he attains the age of twenty-one, and "in case of his death" to B., is a gift absolute to A., unless he dies under age (*r*).

It is, however, plain that these general rules cease to be applicable, where it appears, from the words of the Will,

(*o*) *Galland v. Leonard*, 1 Swanst. 161. *Edwards v. Edwards*, 15 Beav. 357. *Bowers v. Bowers*, L. R. 5 Ch. 244.

(*p*) *Olivant v. Wright*, 1 C. D. 346. *O'Mahoney v. Burdett*, L. R. 7 H. L. 388. *Ingram v. Soutten*, L. R. 7 H. L. 408, overruling *Re Heathcote's Trusts*, L. R. 9 Ch. 45. *Besant v. Cox*, 6 C. D. 604. When a Will refers to the death of a legatee coupled with a contingency—as death without leaving issue—that *primâ facie* means death whenever it may happen, as was decided in *O'Mahoney v. Burdett* and *Ingram v. Soutten*; but the context may show that death before a particular period was really intended: *per Kay, J.*, in *Re Luddy*, 25 C. D. 394.

(*q*) *Hervey v. McLaughlin*, 1 Price, 264. *Salisbury v. Petty*, 3 Hare, 86, 93. *Edwards v. Edwards*,

15 Beav. 363, 364. *Re Hill's Trusts*, L. R. 12 Eq. 302. Where there is no antecedent estate the contingency is referred to death in the lifetime of the testator, and when the gift in fee is preceded by a life estate, the contingency has been held to refer to the death of the donee, either during the preceding life-estate or in the lifetime of the testator. But where the gift over is not on a certain event, *e.g.*, where death is coupled with the contingency of not leaving issue, there is no need to import any words, and consequently there is no necessity for limiting the event to the testator's lifetime. *Re Parry and Daggs*, 31 C. D. 130.

(*r*) *Home v. Pillans*, 2 M. & K. 15, 24, the doctrine of which was upheld in *Randfield v. Randfield*, 8 H. L. C. 225. See also *Re Dowling's Trust*, L. R. 14 Eq. 463.

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(*s*) *Re Ad*
N. S. 961.
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(*t*) 3 M. &

(*u*) See also
1 Bro. C. C.

that their application would frustrate the intention of the testator (s). Thus, in *Child v. Giblett* (t), a testator bequeathed the residue of his estate to his daughters Selina and Elizabeth, in equal proportions; and "in case of the death of either," the whole to the survivor of them; and in the event of their marrying and having children, then to the child or children of them, or the survivor of them, if they should attain the age of twenty-one years; but if not, then among the children of Paul Giblett: The daughters both survived the testator; Elizabeth died without having been married, and bequeathed the whole of her property to Selina: The question was whether Selina was entitled to an absolute interest in the residuary property of her father: And Sir John Leach, M. R., held, that she was not so entitled, but that the bequest to her continued subject to the executory bequest over, in favour of Paul Giblett's children: And his Honor observed, that the testator could not possibly have intended that the children of Paul Giblett should take in the event of a marriage of his daughters and their death without issue in his lifetime, and that they should not take in the event of a marriage of his daughters and their dying without children after the decease (u).

With respect to conditions precedent, which are impossible, a different rule is applicable to bequests of personal property from that which is prevalent respecting devises of realty. By the common law of England, if a condition precedent is impossible, as to drink up all the water in the sea, the devise will be void (x). But by the civil law, which on this subject has been adopted by the Courts of Equity (y), when a condition precedent to the vesting of a legacy is impossible, the

Impossible
conditions
precedent:

(s) *Re Adam's Trusts*, 11 Jur. N. S. 961. *Milner v. Milner*, 34 Beav. 276. *Smith v. Spencer*, 6 De Ger. M. & G. 631, 634, by Lord Cranworth. *Wilkins v. Jodrell*, 13 C. D. 564.

(t) 3 M. & K. 71.

(u) See also *Billings v. Sandom*, 1 Bro. C. C. 393. *Nowlan v. Nel-*

ligan, 1 Bro. C. C. 480. *Douglas v. Chalmer*, 2 Ves. 501. *Ex parte Hunter*, 3 Younge & C. 610. *Brotherton v. Bury*, 18 Beav. 95.

(x) Co. Lit. 206, b. *Roundel v. Curren*, 2 Bro. C. C. 73.

(y) *Lowther v. Cavendish*, 1 Eden, 116, 117.

bequest is single, *i.e.* discharged of the condition; and the legatee will be entitled as if the legacy were unconditional (2).

If indeed the impossibility of the condition were unknown to the testator, as where a legacy is given on condition the legatee marries the testator's daughter, who happens to be then dead; or where the impossibility arises from a subsequent act of God, as if she be living at the date of the Will, but dies before the marriage can be solemnized; the impracticability of the performance will be a bar to the claim of the legatee (a); in cases, at least, such as those mentioned, where the performance of the condition appears to be the motive of the bequest (aa).

Impossible
conditions
subsequent :

Illegal
conditions
precedent :

Where a condition subsequent is impossible, it is the doctrine as well of the common law as of the civil, that the condition is void, and the legacy single and absolute (b).

With regard to conditions precedent which are illegal, if performance requires an act which is *malum in se*, as to kill A., burn his house, or the like, then both by the common and civil law, not only the condition but the bequest itself is void (c). But where the illegality consists merely in the performance of the condition being against a rule or the policy of the law, there (although by the common law the devise as well as the condition is equally void as if there existed *malum in se*), by the civil law, the condition only is

(2) Swinb. Pt. 4, s. 6, pl. 2, 3. Harvey v. Aston, Com. Rep. 738.

(a) Swinb. Pt. 4, s. 6, pl. 8, 14. Lowther v. Cavendish, 1 Eden, 116, 117.

(aa) But an immediate gift will not be avoided because the testator does not do a future act contemplated by the words of such gift. Yates v. University College, London, L. R. 8 Ch. 454; in which case Lord Selborne says that when some of the authorities speak of some impossible conditions as not being enough to defeat a gift even when they are in form precedent, the real meaning is that a condi-

tion may be expressed with relation to some matters which are of such a nature that there is no condition at all unless those matters exist: *ibid*, p. 461. S. C. L. R. 7 H. L. 438.

(b) Co. Lit. 206, a, b. Lowther v. Cavendish, Ambl. 358. Thomas v. Howell, 1 Salk. 170. Harvey v. Aston, Com. Rep. 738. Aislable v. Rice, 3 Madd. 256. Burchett v. Woolward, Turn. & Russ. 442. Walker v. Walker, 2 De Gex, F. & J. 255.

(c) Swinb. Pt. 4, s. 6, pl. 16, and the note in Powell's edit. *Re* Moore, 39 C. D. 116, 122.

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void, and the bequest single and good (*d*). Thus, where the testator bequeathed to his niece 2*l.* a month if she lived with her husband, and 5*l.* a month *if she lived from him*, Lord Northington was of opinion that she was entitled to the 5*l.* a month payment : for the condition being *contra bonos mores*, the bequest was single (*e*).

Where the performance of a condition subsequent is illegal, then, as well at the common law, as by the civil law adopted in the Courts of Equity, the condition is void, and bequest freed from it, as though it had been given unconditionally (*f*).

On the same principle, an original vested gift shall not be qualified by a subsequent gift engrafted on it, which the law will not allow to take effect ; as by a gift over which is void by reason of being too remote (*g*). And the rule in general, that an absolute interest is not to be taken away by a gift over, unless that gift over may itself take effect (*h*).

Among illegal conditions subsequent, may be classed such as are repugnant. "I find it laid down as a rule long ago established," said Lord Alvanley, in *Bradley v. Peixoto* (*i*), "that where there is a gift with a condition inconsistent with

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(*d*) Swinb. Pt. 4, s. 6, pl. 16. Harvey v. Aston, Com. Rep. 738. *Re Moore, ubi sup.*

(*e*) Brown v. Peck, 1 Eden, 140. See also Tenant v. Bray, cited Toth. 141, in which case there was a devise to a daughter to pay her a sum of money if she should be divorced from her husband, and the gift was made good, though the condition was void. See further, as to the legality of the separation of husband and wife, Jones v. Waite, 1 Bing. N. C. 656. S. C. in error, 5 Bing. 341. In Dom. Proc. 4 M. & Gr. 1104. 9 Cl. & F. 101. Cocksedg v. Cocksedg, 14 Sim. 44. Wilson v. Wilson, 1 H. L. C. 538. Cartwright v. Cartwright, 10 Hare, 630, 3 De Gex, M. & G. 982. Webster v. Webster, 4 De Gex, M. & G. 437.

(*f*) Co. Lit. 236, *a, b*. Poor v. Mial, 6 Madd. 32. Ridgway v. Woodhouse, 7 Beav. 437. Egerton v. Lord Brownlow, 11. L. C. 1. So where the condition is too uncertain to enable the Court to say what is meant by it : Clavering v. Ellison, 7 H. L. C. 707 ; or whether it has or has not happened : *Re Exmouth*, 23 C. D. 158.

(*g*) Blease v. Burgh, 2 Beav. 221, 226. Ring v. Hardwick, *ibid.* 352.

(*h*) Green v. Harvey, 1 Hare, 428, 431. Winckworth v. Winckworth, 8 Beav. 576. Eaton v. Barker, 2 Coll. 124. Watkins v. Weston, 32 L. J., Ch. 396 ; affirmed, *ibid.* 609.

(*i*) 3 Ves. 325. This case has been lately approved in *Re Dugdale*, 38 C. D. 176.

and repugnant to such gift, the condition is wholly void : " In that case, the testator had given his son the dividends of 1,620*l.* Bank stock for his support during life, and at his death the principal and interest were given to his heirs, executors, administrators, and assigns ; but if he attempted to dispose of all or any part of the stock, such attempt should exclude him from any benefit under the Will, and be a forfeiture, and the fund should go to the testator's other children : The learned Judge was of opinion, that the legatee was entitled to the legacy discharged of the condition (*k*).

But though a condition, restraining the legatee from spending or disposing of the legacy generally, is repugnant and void ; yet it may be good if the restraint is confined to the disposal of it to a particular person (*l*), or (it has been said) before a particular time (*m*). But the case cited does not seem an authority for this latter proposition, because there the condition was attached merely to a gift in remainder so as to prevent its ever taking effect if the condition happened : and accordingly in the case of *Re Rosher* (*n*), Pearson, J. held that a condition restraining alienation, although limited to a particular time, was void. So the condition may be carried into effect, if it is so expressed as to amount to a limitation (*o*). " If property," said Lord Eldon, in *Brandon v. Robinson* (*p*), " is given to a man for his life, the donor cannot take away the incidents to a life

(*k*) See also *Ware v. Cann*, 10 B. & C. 433. *Billing v. Billing*, 5 Sim. 232. *Rishton v. Cobb*, 5 M. & Cr. 145, *post*, p. 1141, note (*g*). *Byng v. Lord Strafford*, 5 Beav. 568, 567. *Attwater v. Attwater*, 18 Beav. 330. *Hood v. Oglander*, 34 L. J. Ch. 528. *Hunt-Foulston v. Furber*, 3 C. D. 285. *Re Dugdale*, 38 C. D. 176. A "name clause" following a gift in fee simple is void, and the legatee incurs no forfeiture. *Musgrave v. Brooke*, 26 C. D. 792. Where there is a devise of an estate in

fee, a proviso determining such estate on bankruptcy as a condition is void, and such a clause will not be construed as a conditional limitation unless the gift is merely of an estate for life. *Re Machu*, 21 C. D. 838. And see *Re Dugdale*, 38 C. D. 176, 182.

(*l*) Litt. Sec. 361. *Swinb. Pt. 4*, s. 13, pl. 6.

(*m*) *Large's case*, 2 Leon. 82.

(*n*) 26 C. D. 801.

(*o*) *Wilkinson v. Wilkinson*, 2 Wils. C. C. 47.

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estate; and, as I have observed, a disposition to a man, until he shall become bankrupt, and, after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it: If that condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man or his assignees can have it beyond the period limited (g).

Another instance of a repugnant, and therefore void, condition may be found in the doctrine that if there be an absolute bequest of property, with a proviso that if the legatee dies without having disposed of it by Will, or otherwise, his interest in it shall cease, and it shall go over to another; the gift over is void and the legacy absolute (r). But whether the gift over would be void when the estate to which the repugnant gift is attached never becomes an estate in possession by reason of the death of the legatee in the testator's lifetime seems doubtful (s).

(g) See *Dommett v. Bedford*, 6 T. R. 684. *Shee v. Hale*, 13 Ves. 405. *Brandon v. Robinson*, 18 Ves. 429. *Cooper v. Wyatt*, 5 Madd. 482. As to the time when a condition subsequent must happen to operate as a forfeiture of the estate to which it is attached, and the effect of annulment in cases where bankruptcy is the condition subsequent on which forfeiture is to ensue, see *White v. Chitty*, L. R. 1 Eq. 372. *Lloyd v. Lloyd*, L. R. 2 Eq. 722. *Re Parnham's Trusts*, L. R. 13 Eq. 413. *Ancona v. Waddell*, 10 C. D. 157. *Samuel v. Samuel*, 12 C. D. 152. *Robertson v. Richardson*, 30 C. D. 623. *Metcalf v. Metcalf* [1891], 3 Ch. 1.

(r) *Ross v. Ross*, 1 Jac. & W. 134. *Cuthbert v. Parrier*, Jacob. 415. *Green v. Harvey*, 1 Hare,

428. *Borton v. Borton*, 16 Sim. 552. *Constable v. Bull*, 3 De G. & Sm. 411. *Watkins v. Williams*, 3 Mac. & G. 622. *Re Yalden*, 1 De Gex, M. & G. 53. *Hughes v. Ellis*, 20 Beav. 193. *Holmes v. Godson*, 8 De Gex, M. & G. 152. *Barton v. Barton*, 3 K. & J. 512. *Henderson v. Cross*, 29 Beav. 216. *Re Mortlock's Trust*, 3 Kay & J. 456. *Scott v. Josselyn*, 26 Beav. 174. *Perry v. Merritt*, L. R. 18 Eq. 152. *Re Wilcocks' Settlement*, 1 C. D. 229. *Shaw v. Ford*, 7 C. D. 669. *Re Percy*, 24 C. D. 616. *Re Parry and Dagge*, 31 C. D. 130. There is no distinction between realty and personalty: *Shaw v. Ford*, *ubi sup.*

(s) *Re Stringer's Estate*, 6 C. D. 1, questioning *Hughes v. Ellis* (*ubi sup.*), and *Greated v. Greated*, 26 Beav. 621.

Performance
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It is now proposed to consider the performance of conditions: And first, of conditions precedent: Although the general rule is, that they must be strictly performed (*t*), yet by the civil law, which has been it should seem, in this respect also adopted by Courts of Equity, if the condition is performed *cy-près*, as it is termed, that is, so as *substantially* to fulfil the testator's intention, it will be sufficient (*u*).

As an example of the doctrine of the civil law may be mentioned a case put by Swinburne (*x*): If A. bequeath a legacy to B. in case he erect a monument to A. *within three days* after A.'s death; although B. should not literally comply with the condition, he would be entitled to the legacy upon building the monument within a reasonable time; since the erection would be considered as a motive and essence of the bequest and the time appointed for the building but a means to expedite the business. So, in Courts of Equity where the condition requires a legatee to execute a release within a certain time, it has been held that if the release is in fact executed within a reasonable, though not within the specified time, the legatee will be entitled; on the principle that the period for executing the release was merely ancillary to the accomplishing of that object, and the procurement of that instrument was the end and substance of the condition (*y*).

But the observance of the time mentioned in the condition may be material to the due performance of it: as where the condition is that the legatee shall return to England within a time specified by the testator, and personally apply for his

(*t*) Robinson v. Wheelwright, 21 Beav. 214. Davis v. Angel, 31 Beav. 223. Priestley v. Holgate, 3 Kay & J. 286. Younge v. Furze, 8 De Gex, M. & G. 756.

(*u*) Swinb. Pt. 4, s. 7, pl. 4. "Where a literal compliance with the condition becomes impossible from unavoidable circumstances, and without any fault of the party,

it is sufficient that it is complied with, as nearly as it practically can be, or as it is technically called '*cy-près*.'" Story, Eq. Jur. s. 291.

(*x*) Pt. 4, s. 6, pl. 11.

(*y*) Taylor v. Popham, 1 Bro. C. C. 168. Simpson v. Vickers, 14 Ves. 341, 348. Paine v. Hyde, 4 Beav. 468. Wilkins v. Knipe, 5 Beav. 273.

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legacy (z). In *Hawkes v. Baldwin* (a), a testatrix gave legacies to A., B., and C., and declared that if any of them should be dead at her decease, or should not then be heard of to be then living, or should not respectively claim their respective legacies within twelve months after her death, then the legacies given to such of them as should be dead at her decease, or as should neglect to claim the same within the time aforesaid, should sink into her residuary estate: Three years after the testatrix's death, C., who had not been heard of for upwards of twenty years, claimed her legacy: And Sir L. Shadwell, V.-C., held that she was not entitled to it, although she had been ignorant, until a short time before, that her sister was dead. And it should seem that in all cases where there is a *limitation over* of the legacy, upon the legatee not performing a condition within the time prescribed for that purpose; if the terms be not literally complied with, the condition will be held not to be performed within the intent and meaning of the testator (b).

Moreover, instances have frequently occurred in which the Court has concluded, from the context of the Will, that the intention of the testator is effectually fulfilled by regarding a clause of apparent condition, as a clause of *conditional limitation*, so as not to require, as in the case of a gift on a condition, that the very event, on which the gift is made contingent, must be fulfilled with strict exactness, but paying regard, in the construction, to the substantial effect of the contingency specified, and so to the real intent of the testator. Thus, where

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(z) *Tulk v. Houlditch*, 1 Ves. & Beam. 248. *Burgess v. Robinson*, 1 Madd. 172. *Tollner v. Marriott*, 4 Sim. 19. *Re Hartley*, 34 C. D. 742. As to what is a performance of such a condition, see *Tanner v. Tebbutt*, 2 Y. & Coll. Ch. C. 225. *Re Hodges' Legacy*, L. R. 16 Eq. 92. The performance of the condition is not affected by the ignorance of the legatee, the principle being that a person who

takes by gift under a Will cannot plead want of knowledge of the contents of the Will as an excuse for not complying with its provisions. *Astley v. the Earl of Essex*, L. R. 18 Eq. 290. *Powell v. Rawle*, L. R. 18 Eq. 243.

(a) 9 Sim. 355.

(b) *Simpson v. Vickers*, 14 Ves. 341. *Ledward v. Hassell*, 2 Kay & J. 370.

a testator devised to the child of which his wife was pregnant, *and if any such child died under twenty-one*, then over; the devise over was held good, though the wife proved not to have been *enceinte* (c). So where there was a devise, on condition that the devisee should give a release within three months after the testator's decease, *and if he should neglect to give such release*, then over; and the devisee died in the testator's lifetime; it was held, that this was a conditional limitation, and not a case of condition, and that the devise over took effect (d). Again, where the gift was to the testator's children surviving him, *and if they all died under twenty-one*, then over; and the testator died without leaving, or ever having had, any children, the bequest over was held good (e). Again, a bequest, "*in case I shall have but one child living at the time of my decease*, or all but one die under twenty-one and unmarried," was established in the event of the testator's death, never having had any child (f). So, where there was a bequest of stock, in trust for three legatees in equal shares to be transferred to them when they should attain twenty-one, but if any of them "*shall die*" under that age unmarried then his share to go to the survivors; and one of the three legatees was already dead at the date of the Will: it was held that the survivors were entitled to his share: For that in the case of a conditional limitation such as this, the Will is to be construed according to the sense and intention of the testator, that intention being, that if, in any event, the

(c) *Jones v. Westcombe*, 1 Eq. Cas. Abr. 245. See also *Statham v. Bell*, Cowp. 40. *Gulliver v. Wickett*, 1 Wils. 105 (where the question arose on the same Will as in *Jones v. Westcombe*). *Foster v. Cook*, 3 Bro. C. C. 247. *Re Green's Estate*, 1 Drew. & Sim. 68. *Warren v. Rudall*, 4 Kay & J. 603. *Wing v. Angrave*, 8 H. L. C. 183, 200. *Hall v. Warren*, 9 H. L. C. 420. *Tennant v. Heathfield*, 21 Beav.

255. *Re Betty Smith's Trusts*, L. R. 1 Eq. 79.

(d) *Avelyn v. Ward*, 1 Ves. Sen. 420. See also *Doe v. Scott*, 3 M. & S. 300.

(e) *Meadows v. Parry*, 1 V. & B. 124. See also *Accord. Lanphier v. Buck*, 2 Dr. & Sm. 434.

(f) *Murray v. Jones*, 2 V. & B. 313. See also *Quicke v. Leach*, 13 M. & W. 218. *Brock v. Bradley*, 33 Beav. 670.

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first limitation cannot take place, the subsequent one shall (g).

Accordingly, in *Mackinnon v. Sewell* (h), a testatrix bequeathed the residue of her estate, in trust for her daughter Caroline for life, and after her death, for her daughter Caroline's daughter, if she should survive her mother and attain twenty-one, but in case she should not survive her mother and attain twenty-one, then in trust for such other child or children of the testatrix's said daughter, as should be living at their mother's death, to be paid to them after her death as they attained twenty-one; and if all such other children of the testatrix's said daughter should die before attaining twenty-one, then in trust for Louisa Mackinnon: The grand-daughter attained twenty-one, but did not survive her mother: Another child of the testatrix's daughter attained twenty-one, but did not survive his mother: Afterwards the daughter died: And Sir L. Shadwell, V.-C., and subsequently Lord Brougham, on appeal, held that the bequest over to Louisa Mackinnon took effect; for that it was but equivalent to a bequest over in the event of there being no child who should survive the mother and attain twenty-one: His Lordship, in giving his elaborate judgment, stated, that in order to support the decree, the Court must be satisfied, and had satisfied itself, First, that the words, "all such other children" of the testatrix's daughter, described one class of her children, viz. those who survived her: Secondly, that a clause so construed might be taken upon the authorities, as only apparently a condition, but really a limitation: The learned judge further stated, in the course of his judgment, that all or almost all the cases, upon which this doctrine is founded, are referable to one consideration, which it was very material to keep in view, viz., the construction which they authorize is never inconsistent with, far less contrary to, the plain intention of the clause itself, but only aids or furthers

(g) *Re Sheppard's Trust*, 1 Kay & J. 269.

(h) 5 Sim. 78. 2 M. & K. 220.

that intention, by supplying a manifest omission : in other words, no real difference is made in the result ; for the event contemplated has not happened, but something equivalent has taken place : His Lordship added, that almost all the cases are those of double contingencies, the second being of a negative nature, so that the first not happening amounts to the same thing as if both had happened : Thus a bequest over to A., *in case the first takers, the unborn children of B., die before they reach twenty-one*, read as a condition is a bequest to A., if B. has children and they do not live to twenty-one ; and the first or affirmative contingency not happening, it follows of necessity, that the second or negative must : If it is read as to its substance and import, and not resolved into its parts, the bequest is, *in case no child of B. reaches majority* : and of course none can, if he have none (i). But wherever the words plainly import a condition as in the testator's contemplation, and where that condition cannot be understood to have been substantially complied with by the event which has actually happened, the gift over fails (k).

Again, it must not be understood with regard to cases such as these, that if from any cause whatever, the prior gift cannot take effect, the second or alternative gift is for this reason to become operative ; for it would be making, not construing the testator's Will, if this were to be allowed in any event not expressly or impliedly indicated by the language used by him. Accordingly in *Underwood v. Wing* (l), where there was a bequest to the testator's wife absolutely, and in case she should die in his lifetime, then over ; and he and she were drowned at sea, under circumstances which made it impossible to prove that she died before him ; it was held by Romilly, M. R., and

(i) This case was acted on, and applied to the case of a pecuniary legacy, by Lord Langdale, in *Wilson v. Mount*, 2 Beav. 397. See also *Aiton v. Brooks*, 7 Sim. 204.

(k) See *Doe v. Shipphard*, 1 Dougl. 75. *Doo v. Brabant*, 4 T.

R. 706, and the other cases collected, *ante*, pp. 1083, 1084. *Toldervy v. Colt*, 1 M. & W. 250. *Dicken v. Clarke*, 2 Younge & Coll. 572. *Lenox v. Lenox*, 10 Sim. 400.

(l) 4 De Gex, M. & G. 633.

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by Lord Cranworth, C., on appeal, that the gift over failed ; inasmuch as it was made dependent on an event which had not been proved to have happened, *viz.* the testator surviving his wife : and that it did not become operative from the mere fact of the gift to the wife failing to have practical operation ; for the testator had indicated no such intention, either expressly or impliedly.

With respect to the performance of conditions subsequent, the general rule is, that they are to be construed with great strictness, as they go to divest estates already vested : Therefore the very event must happen, or the act with all its details must be done, in order to deprive the legatee of his legacy. Thus, if legacies be given to two persons, and *if either die during the life of A., then to the survivor living at the death of A.*, and both the legatees die before A., the personal representatives of both will be entitled : for the legatees took vested interests at the death of the testator, subject to be divested in favour of the survivor who might be living at the decease of A. ; but as there was no such survivor *at that period*, the divesting contingency never happened (*m*). So where there was a bequest to A. of the interests and dividends of personal property for life, and then to be divided equally amongst her three children, *or such of them as should be living at her death*, and the children *all* died in the lifetime of the tenant for life, it was held, that they took vested interests, transmissible to their representatives : for the vested interests first given by the Will were, by the form of the expression, only defeated in case there should be some or one, and not all, of the children living at the mother's death : but that event did not happen, for there was not one child then living (*n*).

Performance of conditions subsequent. All the events must happen.

(*m*) *Harrison v. Foreman*, 5 Ves. 207. See also *Page v. May*, 24 Beav. 325.

(*n*) *Sturges v. Pearson*, 4 Madd. 411. And this doctrine applies to contingent as well as vested interest : *Wagstaff v. Crosby*, 2 Coll.

746. *Re Sanders' Trusts*, L. R. 1 Eq. 375. For further instances, see *Gray v. Garman*, *ante*, p. 1124. *Smither v. Willock*, 9 Ves. 233. *Wall v. Tomlinson*, 16 Ves. 413. *Hervey v. McLaughlin*, 1 Price, 264. *Skey v. Barnes*, 3 Meriv.

Condition subsequent of death of legatee before his legacy becomes "payable."

And here it may be mentioned, that if a legacy is given to A. for life, and after his death, to his children at majority or marriage, with a gift over in the event of any one of them dying before his or her share becomes "payable," the Court will lean strongly (particularly in the case of a Will making a provision for children) in favour of construing the word payable to refer to the majority or marriage of the legatees and not to the period of distribution; so that if any one of the children should happen to die, after having attained majority or married, in the lifetime of the tenant for life, the legacy shall not go over, but shall be considered as having vested absolutely at the majority or marriage (o).

Condition not to dispute the Will.

A condition that the legatee shall not dispute the Will, is valid in law (p), though it has been, in general, considered as *in terrorem* merely (q), and will not operate as a forfeiture by

335. *Ante*, p. 1110. *Laffer v. Edwards*, 3 Madd. 210. *Browne v. Lord Kenyon*, 3 Madd. 410. *Whittell v. Dudin*, 2 Jac. & Walk. 279. *Jones v. Bromley*, 6 Madd. 137. *Schnell v. Tyrrell*, 7 Sim. 86. *Meyer v. Townsend*, 3 Beav. 443. *Belk v. Slack*, 1 Keen, 238. *Locker v. Bradley*, 5 Beav. 593. *Campbell v. Brownrigg*, 1 Phill. Ch. C. 301. *Templeman v. Warrington*, 13 Sim. 267. *Kimberley v. Tew*, 4 Dr. & W. 139. *Cohen v. Waley*, 15 Sim. 318. *Re Clark's Trusts*, L. R. 9 Eq. 378.

(o) *Hallifax v. Wilson*, 16 Ves. 168. *Jones v. Jones*, 13 Sim. 561. *Butterworth v. Harvey*, 9 Beav. 130. *Hayward v. James*, 28 Beav. 523, *i.e.*, the word "payable" is construed as "vested." *Haydon v. Rose*, L. R. 10 Eq. 224. *Partridge v. Baylis*, 17 C. D. 835. But see *Bright v. Rowe*, 3 M. & K. 316. *Creswick v. Gaskell*, 16 Beav. 577. A similar construction has prevailed as to marriage settle-

ments. *Ante*, p. 1113, *et seq.*

(p) *Cook v. Turner*, 15 M. & W. 727. *Secus*, where the condition is so worded, that it would prevent the legatee from taking any legal proceedings necessary for the protection of his rights: *Rhodes v. Muswell Hill Company*, 29 Beav. 560.

(q) There is no absolute rule of law that a condition subsequent shall operate merely *in terrorem*, unless the legacy is given over to another on breach of the condition: Therefore, where there was a condition subsequent in a Will, revoking a bequest to the testator's daughter in case she became a nun, Lord Cranworth held that the condition was a lawful one, and that her interest ceased upon a breach of it, though there was no gift over: *Re Dickson's Trust*, 1 Sim., N. S. 37. His Lordship, in his judgment in this case, explains the grounds on which such a rule has been introduced

Ch. II.

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with respect dispute in restraint however, strictly, a clause the condition clause does contingency opened, the in the case 26 C. D. given in full if the de name of "go over to remainder because t persons. Catt's Trust laid down kind, the defeat or subject matter construed more free from that both and the in with or gift, however qualified failure to use testator divided the

reason of the legatee's having disputed the validity (r) or effect (s) of the Will.

But where the legacy is given over to another person, in case of a breach of such condition, then if the legatee controvert the Will, his interest will cease and vest in the other legatee (t). If indeed the legacy, instead of being given to a stranger, is limited over to the executors in the event of the condition being broken, such condition is still merely regarded as *in terrorem*, and not obligatory (u). Yet if the

with respect to conditions not to dispute the Will, and conditions in restraint of marriage. The law, however, construes forfeiture clauses strictly, and will not enforce such a clause unless the defeasance fits the condition. If the forfeiture clause does not provide for the contingency which has actually happened, the clause will be void. Thus in the case of *Musgrave v. Brooke*, 26 C. D. 792, where an estate was given in fee, a clause providing that if the devisee did not take the name of "Jones" the estate should go over to those entitled in remainder was held absolutely void because there could be no such persons. This case followed *Re Catt's Trust*, 2 H. & M. 46, which laid down that a clause of this kind, the intention of which is to defeat one estate and give the subject matter over, must be construed most strictly, and must be free from ambiguity, and further that both limitations, the cesser and the limitation over, must fit in with one another. An absolute gift, however, of personalty can be qualified by a divesting clause on failure to assume or discontinue to use testator's name and arms, provided the rule against perpetuities

is not infringed, and provided there is a gift over which fits the condition: *Re Cornwallis*, 32 C. D. 392. But in a case in which a gift over of personalty was to the person who, if the limitation in the will had been undisturbed by any disentailing (*i.e.*, not disturbed, as the limitations in fact were), would have been next in succession to take the real estates, the gift over was held good, and the forfeiture clause enforceable. See also *Re Potts*, 1 H. L. C. 671. *Hogg v. Jones*, 32 Beav. 45. The forfeiture clause will be void if the gift over violates the rule against perpetuities, *Hodgson v. Halford*, 11 C. D. 959; in which case a clause whereby a legatee forfeited his share in a fund if he forsook the Jewish and adopted the Christian or any other religion has been held not to be void as against public policy.

(r) *Powell v. Morgan*, 2 Vern. 90. *Loyd v. Spillett*, 3 P. Wms. 344.

(s) *Morris v. Burroughs*, 1 Atk. 404.

(t) *Cleaver v. Spurling*, 2 P. Wms. 528. *Cooke v. Turner*, 15 M. & W. 727.

(u) *Cage v. Russel*, 2 Vent. 352.

testator direct the legacy to fall into *the residue* upon a breach of the condition, and dispose of that fund, the residuary legatee will be a particular legatee of the individual legacy: and, as such, will be entitled to it, if the condition is broken (*x*).

Conditions in
restraint of
marriage:

As conditions in restraint of marriage are of no infrequent occurrence and form a subject on which numerous decided cases may be found, it may be expedient to apply to them, separately, some of the rules of law already mentioned with respect to conditional legacies generally.

when valid:

First, with regard to the legality of such conditions. By the doctrine of the civil law, which seems at one time to have been adopted by the Ecclesiastical Courts of this kingdom, and in a great measure by the Courts of Equity, all conditions in restraint of marriage were regarded as illegal, and legacies were discharged of such conditions, whether precedent or subsequent (*y*). But the ancient rule has been greatly relaxed in modern times; and it is now settled, that conditions which do not directly or indirectly import an *absolute injunction to celibacy*, are valid (*z*). Thus conditions restraining marriage under twenty-one, or other reasonable age, without consent of executors, guardians, &c. (*a*), or requiring or prohibiting marriage with particular persons (*l*), and the like, are valid and legal conditions.

(*x*) See *Lloyd v. Branton*, 3 Squire, 17 Q. B. 932, 933. Meriv. 118.

(*y*) See the judgment of Lord Thurlow, in *Scott v. Tyler*, 2 Dick. 720, by Lord Thurlow. *Perrin v. Lyon*, 9 East, 170 (in which case the restraint was from marrying a Scotchman). *Randall v. Payne*, 1 Bro. C. C. 55. *Hodgson v. Halford*, 11 C. D. 959 (in which case the restraint was from marrying a Jew). *Jenner v. Turner*, 16 C. D. 188 (in which the restraint was from marrying a domestic servant or person who had been a domestic servant). *Duggan v. Kelly*, 10 Ir. Eq. 295 (in which the restraint was from marrying a Papist).

(*z*) *Scott v. Tyler*, 2 Dick, 721, by Lord Thurlow.
(*a*) *Hemmings v. Munckley*, 1 Bro. C. C. 303. *Scott v. Tyler*, 2 Bro. C. C. 431. *Stackpole v. Beaumont*, 3 Ves. 80. *Clifford v. Beaumont*, 4 Russ. Chanc. Cas. 325; which must be considered as overruling *Underwood v. Morris*, 2 Atk. 184. See the judgment of Lord Campbell in *Beaumont v.*

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Still the law will not allow *conditions* in absolute restraint of marriage: And accordingly it has been held, in the instance of a condition subsequent, that it was altogether void, and that the legatee should retain the interest given to him, discharged of the condition (c), notwithstanding a gift over.

It is not, however, to be understood, that where property is limited to a person until that person marries, and when such marriage happens, then over, such *limitation* may not be valid (d). In *Morley v. Rennoldson* (e), Wigram, V.-C., said, that he was satisfied, from an examination of the authorities, that a gift until marriage, and when the party marries, then over, is a valid limitation (f). And his Honor added, that in the case of a widow there was no question of the validity of such a limitation (g).

It may be here observed that a gift to an "unmarried" person cannot be construed to mean a gift to that person so long as he shall remain unmarried: And therefore if a testator bequeaths a fund to his "unmarried children," if once a child is entitled to participate by filling the character of

(c) *Morley v. Rennoldson*, 2 Hare, 570. *Lloyd v. Lloyd*, 2 Sim., N. S. 255. *Bellairs v. Bellairs*, L. R. 18 Eq. 510. But it was held by Wood, V.-C., in *Newton v. Marsden*, 2 Johns. & H. 356 (in which case the authorities as to the validity of a condition in restraint of marriage are fully reviewed), that a condition that the trusts for the benefit of a widow should cease if she married, was valid. A condition that a widow shall not marry is valid: *Lloyd v. Lloyd*, 2 Sim., N. S. 255.

(d) King Edward VI. granted to his sister, the Lady Mary, the manor of D., so long as she should continue unmarried: This was admitted to be a good limitation, but no condition: *Fulbecke's Parallele*, 47, edit. 1618.

(e) 2 Hare, 580.

(f) See also *Webb v. Grace*, 2 Phill. 701. *Godfrey v. Hughes*, 1 Robert. 593. *Heath v. Lewis*, 3 De Gex, M. & G. 954. *Evans v. Rosser*, 2 Hemm. & M. 190. *Jones v. Jones*, 1 Q. B. D. 279.

(g) Such a limitation is also valid in the case of a widower. *Allen v. Jackson*, 1 C. D. 399. See further as to limitations *durante viduitate*, *Rishton v. Cobb*, 9 Sim. 615. 5 M. & Cr. 145. *Lloyd v. Lloyd*, 2 Sim., N. S. 255. *Bullock v. Bennett*, 1 Kay & J. 315. But in *Marples v. Bainbridge*, 1 Madd. 500, Sir T. Plumer rejected the distinction between a condition and limitation: See *Rishton v. Cobb*, 5 M. & Cr. 152. In *Jones v. Jones*, 1 Q. B. D. 279, it was pointed out that the above distinction does not apply to a case of realty.

an unmarried child, he or she will not lose that right by his or her subsequent marriage (*h*).

But where a testator left a legacy to his wife "so long as she should continue his widow and unmarried," it was held that the wife having been divorced was not entitled, since widowhood was part of the condition, and she did not at the testator's death fill that position (*i*).

With respect, moreover to *conditions* in restraint of marriage *without consent*, not under the age of twenty-one, or other reasonable age, but *generally*, such conditions, like those just mentioned in restraint of litigating the Will, are regarded as a declaration of the testator *in terrorem* merely, if there is no disposition over (*k*), and whether precedent (*l*) or subsequent (*m*), are inoperative for the vesting or divesting of the legacy. But if there be a direction that the legacy, in the event of a breach or non-performance of such a condition, shall go over to another legatee, the condition is obligatory: for the Court is bound to protect the interest of the party in whose favour the ulterior limitation is made (*m*). A mere gift of the residue to a particular person will not be considered such a limitation (*n*), unless the testator also directs the legacy to fall into the residue in case of breach of the condition (*o*).

(*h*) *Jubber v. Jubber*, 9 Sim. 503. See *Hall v. Robertson*, 4 De Gex, M. & G. 781. As to the meaning given to the word "unmarried" in modern decisions, see *ante*, p. 952 (*t*).

(*i*) *Re Boddington*, 25 C. D. 685.

(*k*) See, however, *ante*, p. 1138, note (*g*).

(*l*) *Harvey v. Aston*, Com. Rep. 728, by Comyns, C. B. *Reynish v. Martin*, 3 Atk. 331, by Lord Hardwicke, *Malcolm v. O'Callaghan*, 2 Madd. 353, by Sir T. Plumer. But it has been doubted whether a condition *precedent* requiring the

consent of the executors, &c., to the marriage of the legatee, generally, be not operative, whether the legacy be limited over or not: See the observations of Lord Eldon in *Clarke v. Parker*, 19 Ves. 15; and those of Sir Wm. Grant, in *Lloyd v. Branton*, 3 Meriv. 116.

(*m*) *Stratton v. Grimes*, 2 Vern. 357. *Wheeler v. Bingham*, 3 Atk. 367, by Lord Hardwicke. *Malcolm v. O'Callaghan*, 2 Madd. 353, by Sir T. Plumer.

(*n*) *Wheeler v. Bingham*, 3 Atk. 364.

(*o*) 3 Atk. 368. *Lloyd v. Branton*, 3 Meriv. 118. *Ante*, p. 1140 (*z*).

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(s) *Reynish v. Martin*, 3 Atk. 331. *Clarke v. Parker*, 19 Ves. 15.

(t) *Clarke v. Parker*, 19 Ves. 15. *Altham v. Bingham*, 3 Atk. 367.

(u) *Wheeler v. Bingham*, 3 Atk. 364.

(v) *Wheeler v. Bingham*, 3 Atk. 364.

(w) *Wheeler v. Bingham*, 3 Atk. 364.

(x) *Wheeler v. Bingham*, 3 Atk. 364.

(y) *Wheeler v. Bingham*, 3 Atk. 364.

(z) *Wheeler v. Bingham*, 3 Atk. 364.

Provisions of this kind may be sometimes entirely rejected as being inapplicable. Thus in *Crommelin v. Crommelin* (p), provisions in a father's Will respecting his daughter's marriage were held not to apply to a daughter who, having married in her father's lifetime, after his death married a second time. Again, in *Bird v. Hunsdon* (q), a direction to pay interest to a legatee so long as she remained single, with a gift over on her death, was held to give to the legatee the interest for life, notwithstanding her marriage (r).

when rejected
as inapplicable.

Next, concerning the performance of conditions in restraint of marriage. In the instances of conditions requiring marriage with consent of executors or trustees, it has been decided that such consent must be obtained before or at the marriage; for a subsequent approbation by the executors, &c., will not be a performance of the condition (s). Again, the consent of all the executors or trustees must be obtained (t); though where one of them is dead, if the condition is precedent, it should seem that the consent of all the survivors is sufficient (u): But if the condition is subsequent, and conse-

Performance
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marriage:

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(p) 3 Ves. 227. See also *Clarke v. Berkeley*, 2 Vern. 720. *Parnell v. Lyon*, 1 Ves. & B. 479. *Post*, p. 1145, note (e). *Rishton v. Cobb*, 5 M. & Cr. 145.

(q) 2 Swanst. 342.

(r) See *Bullock v. Bennett*, 1 Kay & J. 315, reversed 7 De Gex, M. & G. 283.

(s) *Reynish v. Martin*, 3 Atk. 331. *Clarke v. Parker*, 19 Ves. 21. *Long v. Rickatts*, 2 Sim. & Stu. 179. Although the word "approbation" be also used, it should seem that the same rule must prevail: *Malcolm v. O'Callaghan*, 2 Madd. 353. *Clarke v. Parker*, 19 Ves. 21. But see *Burleton v. Humfrey*, Amb. 256, *contra*, where "approbation" was held to include subsequent approval.

(t) *Clarke v. Parker*, 19 Ves. 17. The marriage may be presumed to have been by consent after a lapse of time: *Re Birch*, 17 Beav. 358. Where a marriage is required to be with the consent of trustees generally it is sufficient if the marriage be had with the consent of such of the persons named trustees as accept the office: *Worthington v. Evans*, 1 Sim. & Stu. 165.

(u) *Dewson v. Oliver-Massey*, 2 C. D. 755, in which case it was suggested by James, L. J., that where the consent had to be that of parents if both were dead the legacy was discharged of the condition. But in *Re Brown's Will*, 18 C. D. 61 (where the same learned judge seems to throw doubt on his own dictum, which, at all events,

quently marriage without the consent of several persons is to divest the legacy, the death of all (*x*) or one of them will discharge the condition altogether (*y*).

what consent
sufficient :

The next consideration is, what will be a sufficient consent : It has been decided, that a general consent, given to the legatee after attaining majority, will be sufficient (*z*); and further, that an unconditional consent, once given, cannot be retracted (*a*); unless for good reasons, moral or

can only apply to parents), a testator appointed his wife sole guardian of his infant children, and bequeathed a legacy to each of his daughters on her attaining twenty-one years or marrying with the consent of her "guardian or guardians," which should first happen. He gave the residue to his wife for life, and after her death gave a further legacy to each daughter who should attain twenty-one or marry with the consent of her guardian or guardians. After the death of the wife, a daughter married under twenty-one without the consent of any guardian or guardians, there being none. It was held that the condition was not complied with, it not being made inoperative by there being no guardians, since guardians could have been appointed by the Court; and the testator on the language of his Will must be taken to have contemplated such an appointment. See also *Green v. Green*, 2 J. & Lat. 529.

The question may arise whether in a case where the consent of the executors is necessary the power to give this consent vests upon the death of all the executors in the representative of the survivor (together with the general duties and powers of an executor),

or whether it is confined to the executors and survivor of them personally, and so terminates with the death of the last of those to whom it was originally given. On this point Lord Eldon, in the case of *Grant v. Dyer*, 2 Dow. 84, is reported to have said that "the general course of decisions go to confine the power of giving or withholding consent to those who are personally named and not to extend it to the representatives."

(*x*) *Graydon v. Hicks*, 2 Atk. 18. *Aislabie v. Rice*, 3 Madd. 256. *Grant v. Dyer*, 2 Dow. Parl. C. 73.

(*y*) *Peyton v. Bury*, 2 P. Wms. 626. See *Accord. Collett v. Collett*, 12 Jur., N. S. 180, *coram* Lord Romilly. In that case the legacy was given, payable on the legatee's attaining twenty-one or marrying with her mother's consent : The mother died, and then the legatee, being still an infant, married : and it was held that this was a condition subsequent, which was discharged by the mother's death.

(*z*) *Mercer v. Hall*, 4 Bro. C. C. 328. *Pollock v. Croft*, 1 Meriv. 181.

(*a*) *Strange v. Smith*, Amb. 263. *Merry v. Ryves*, 1 Eden. 1. *Dashwood v. Bulkeley*, 10 Ves. 242. *Le Jeune v. Budd*, 6 Sim. 441.

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pecuniary, afterwards discovered (b). But the consent may be conditional: and then it will be sufficient or not, according as its condition is or is not performed (c). Again, it has been held that consent may be implied, as from the circumstance that the executor or trustee witnesses the reception of addresses of marriage, and intimates no disapprobation; for then the maxim *qui tacet, satis loquitur*, applies (d). Lastly, if the legatee married in the lifetime of the testator with his consent, or subsequent approbation, that is equivalent to a marriage after his death with the consent of his executors, &c. (e).

A first marriage with consent is a sufficient performance of the condition: and therefore a second marriage without consent, though in the lifetime of the executor or other individual whose assent is required in the condition, will incur no forfeiture (f).

If a bequest is made to a legatee at twenty-one, or upon marriage with consent, with a clause of forfeiture upon marriage without consent, if the legatee attains twenty-one, the condition is extinct, and a subsequent marriage without consent is no forfeiture (g). Again, where a bequest was made in trust for A. *when and so soon as he attained twenty-one, or married before that age with consent of guardians*; but if he should not attain twenty-one, or marry before that

second marriage without consent after a first with consent:

legacy at twenty-one or on marriage with consent:

marriage without con-

(b) *Dashwood v. Bulkeley*, 10 Ves. 230, 242, 243.

(c) *Dashwood v. Bulkeley*, 10 Ves. 230. *D'Aguilar v. Drinkwater*, 2 Ves. & Beam. 225.

(d) *Campbell v. Lord Netterville*, cited in 2 Ves. Sen. 530, and in 10 Ves. 243.

(e) *Clarke v. Berkeley*, 2 Vern. 720. *Parnell v. Lyon*, 1 Ves. & Beam. 472. *Wheeler v. Warner*, 1 Sim. & Stu. 304. *Smith v. Cowdery*, 2 Sim. & Stu. 358.

(f) *Huicheson v. Hammond*, 3 Bro. C. C. 128. *Crommelin v.*

Crommelin, 3 Ves. 227.

(g) *Desbody v. Boyville*, 2 P. Wms. 547. *Knapp v. Noyes*, Ambl. 662. On the same principle, where the testator gave his daughter 400*l.* to be paid in twelve months after his death, but if she married John Osborne, then he revoked the legacy and gave her a shilling in lieu; and she married fourteen months after his death; Lord Rosslyn ordered her to be paid the legacy of 400*l.* with interest: *Osborn v. Brown*, 5 Ves. 527.

sent before
attaining
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age without such consent, then over ; Sir William Grant held, that on attaining twenty-one, A. was absolutely entitled, although he had *previously* married without consent (*h*). Where the bequest was to A. *to be paid at twenty-one or marriage*, but if A. died under twenty-one, or married without the consent of B., then over, Lord Hardwicke held that marriage during minority, without consent, was a forfeiture (*i*). The distinction between these two cases may, perhaps, be discovered by considering, that in the former case the legacy is given on a condition *precedent*, upon the happening of one of two events, *viz.*, marriage with consent or the attainment of twenty-one, and the legacy vests, if either contingency happens ; whereas in the latter, the condition is *subsequent* and the vested interest to be determined, if either of two events happens, *viz.*, his death before twenty-one, or marriage without consent (*k*).

unreasonable
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executor, &c.,
controlled by
the Court.

Before leaving this subject, it must be observed, that if an executor or trustee, whose consent is required by the Will to the marriage of a legatee, refuse to execute his power by consenting, the Court will direct an inquiry into the proposed marriage, and as to its propriety ; and further, if the marriage should be found suitable, will receive proposals for a settlement on the legatee and issue of the marriage (*l*).

Legacies to
executors :

In conclusion of the subject of conditional legacies, it will be proper to advert to the rules established with respect to legacies given to executors.

given in that
character are

Where legacies are given to persons, in the character of

(*h*) *Austen v. Halsey*, 13 Ves. 125. See also *Knight v. Cameron*, 14 Ves. 389. *Collett v. Collett*, 12 Jur., N.S. 180, by Lord Romilly, M. R.

(*i*) *Chauncey v. Graydon*, 2 Atk. 616.

(*k*) If a legacy should be given payable upon marriage with consent of trustees under twenty-one ; and the legatee marry without consent under twenty-one, and then

marry a second time, having attained majority ; it may be questioned, whether on such second marriage, the legatee would become entitled to the legacy : *Clifford v. Beaumont*, 4 Russ. Chan. Cas. 325. But see *Beaumont v. Squire*, 17 Q. B. 905.

(*l*) *Clarke v. Parker*, 19 Ves. 18, 19. *Goldsmid v. Goldsmid*, 19 Ves. 368.

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executors, and not as marks of personal regard only, such bequests are considered to be given upon an implied condition, *viz.*: that the parties clothe themselves with the character in respect of which the benefits were intended for them (*m*). "Nothing is so clear," said Lord Alvanley, in *Harrison v. Rowley* (*n*), "as that if a legacy is given to a man, as executor, whether expressed to be for care and pains or not, he must, in order to entitle himself to the legacy, clothe himself with the character of executor" (*o*).

on condition
of accepting
the office :

It has, however, been held on two occasions (*p*), by Shadwell, V.-C., that this rule does not extend to the case of a residue : and his Honor said there was no case which decided that an executor should be deprived of his right to a residue, or a share of a residue, given to him, because he did not prove the Will.

In order to make a proper application of this rule, two inquiries are necessary : First, When shall a legacy be regarded as given to a man *in the character of executor* : Secondly, What shall be a sufficient assumption of the character of executor to entitle the legatee, when a legacy is so given.

First, when a legacy shall be regarded as given to a legatee in the character of executor : The presumption is that a legacy to a person appointed executor is given to him in that character, and it is on him to show something in the nature of the legacy, or other circumstances arising on the Will, to repel that presumption (*q*). Thus, in *Reed v.*

where a legacy
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given to an
executor
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character :

(*m*) *Abbot v. Massie*, 3 Ves. 148.
Freeman v. Fairlie, 3 Meriv. 31.

(*n*) 4 Ves. 216.

(*o*) It will make no difference that the executor is aged and incapable by bodily and mental infirmities of proving the Will : *Hanbury v. Spooner*, 5 Beav. 630. *Re Hawkins' Trust*, 33 Beav. 570. But he may prove it at any time, even after the hearing : *Reed v.*

Devaynes, 2 Cox, 285. *Post*, p. 1151, note (*h*).

(*p*) *Griffiths v. Pruett*, 11 Sim. 202. *Christian v. Devereux*, 12 Sim. 264. See also *Compton v. Bloxham*, 2 Coll. 201.

(*q*) *Stackpoole v. Howell*, 13 Ves. 417. *Re Appleton*, 29 C. D. 893. Parol evidence is admissible to rebut this, as well as every other, presumption. *Re Appleton*, *ib.* :

Devaynes (r), the testator gave legacies to certain persons by the description of "my very good friends," and in the further part of the Will, desired them to act as executors: One of those persons, who had not proved the Will, or acted as executor, claimed his legacy: But Lord Alvanley said, that an executor so appointed, could not claim his legacy without acting, or at least proving the Will. So in *Stackpoole v. Howell* (s), the testator devised his real and personal estates to the plaintiff, and the defendants Howell and Maberly, upon various trusts, and appointed them executors: He afterwards made two codicils by which he gave to those three persons legacies, not expressly as trustees or executors, but by their names and descriptions: and the legacies by the first codicil were classed together, and of equal amounts, as were those in the second: The plaintiff renounced probate, and he nevertheless claimed the legacies: But Sir Wm. Grant held, that he was not entitled. Again, in *Piggott v. Green* (t), a testatrix gives legacies of 100*l.* each to A., B., and C., and in a subsequent part of her Will, she appointed them her executors: In the preceding clauses, she made devises and bequests "to her executors thereafter named," and "to her executors and trustees:" A. neither proved nor acted: and Sir L. Shadwell, V.-C., held, that he was not entitled to the legacy (u).

but presumption capable of being rebutted:

But this presumption will be rebutted, if it should appear, either from the language of the bequest, or from the fair construction of the whole Will (x), that the bequest to a person, who is named executor, is given to him independently of that character; and then the legatee will be entitled to

per Cotton, L. J., 895. Fry, L. J., *dubitante*. The former learned Judge, as will be seen, doubts the qualification contained in the words of the text "arising on the Will."

(r) 3 Bro. C. C. 95. See *post*, p. 1150, note (f).

(s) 13 Ves. 417.

(t) 6 Sim. 72.

(u) See also *Barber v. Barber*, 3 Mylne & Cr. 688. *Post*, pp. 1334, 1335.

(x) But see *ante*, p. 1147, note (g), as to the suggested admissibility of parol evidence.

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receive the legacy, whether he accepts the office or not (y). Thus, in *Humberston v. Humberston* (z), the testator, as an encouragement to his executors (who were four) to accept the trust and executorship, gave to each of them 100*l.* and 12*l.* for mourning, and to each a ring, and 10*l.* a-year for their trouble: And Lord Chancellor Cowper held, that notwithstanding the condition of the acceptance might seem to run to all the legacies, yet the executors, though they did not act, should have their rings and mourning, these being intended for them immediately, and not to wait their time of acceptance; but that they should not have their 100*l.* and the annuity of 10*l.* each. So in *Dix v. Reed* (a), the testator bequeathed thus: "I give to William Reed and John Baugley 50*l.* each, whom I nominate and appoint executors in trust to this my Will: the said bequests to be upon condition of their taking upon them the trusts hereinafter mentioned:" In a subsequent part of the Will, the testator added, "I give unto my cousin, Thomas King, the sum of 50*l.*, whom I appoint as joint executor in trust in this my Will:" Reed and Baugley proved the Will; but King declined proving it, and did not interfere in the trusts: It was insisted that he was not entitled to the legacy of 50*l.*: The Master reported the legacy to be due, but an exception was taken to the report: And Sir John Leach, V.-C., overruled the exception, observing, that he considered the gift

(y) The fact of a legacy being payable to a legatee (who is named as one of the executors) after the death of a tenant for life rebuts the presumption that the legacy was given to him in his character of executor. *Re Reeve's Trusts*, 4 C. D. 841. The mere fact, however, that the gift of the legacy precedes the appointment of the legatee as executor or that the legacies to several persons appointed executors differ either in their amount or subject matter is

not enough by itself to rebut the presumption. *Re Appleton*, 29 C. D. 893. In this last decision the Court of Appeal questioned the case of *Jewis v. Lawrence*, L. R. 8 Eq. 345, in which it was held that the inequality in the subject matter of the bequests made to two legatees, each of whom was named executor, was sufficient to rebut the above presumption.

(z) 1 P. Wms. 333.

(a) 1 Sim. & Stu. 237.

rather intended in respect of the legatee's relationship than of his office. So in *Bubb v. Yelverton* (b), where a testator appointed his "friend" P. his executor, and gave him a legacy "as a remembrance," and P. did not act as executor, it was held by Lord Romilly, M. R., that he was entitled to the legacy without proving the Will.

So in *Burgess v. Burgess* (c), a legacy given to the testator's trustees and executors, as a mark of his respect for them, was held by Knight Bruce, V.-C., not to be revoked by a codicil appointing other trustees and executors in their room, and giving a legacy of equal amount to the newly-appointed trustees and executors, in similar language (d).

Again, in *Cockerell v. Barber* (e), a testator, after giving a legacy to his friend and partner, Mr. Palmer, appointed him one of his executors, and made other devises and bequests in his favour, so that Mr. Palmer was entitled under the Will to much greater benefits than any of the other executors: By a codicil, in which Mr. Palmer was described as one of the executors, a further legacy was bequeathed to him: And Lord Eldon, C., held that these legacies were not given to him in his character of executor: But his Lordship took occasion to lament the infringement of the old simple rule, that if a man was named executor, and had a legacy given to him, he should not have the legacy, if he did not take the office (f). So in *Wildes v. Davies* (g), where a testator by a

(b) L. R. 13 Eq. 131.

(c) 1 Coll. 367.

(d) See also *Compton v. Bloxham*, 2 Coll. 201, 202, where the same Judge said that the Courts had struggled against the effect of a general rule, the propriety of which had been doubted. See also *Re Denby*, 3 De Gex, F. & J. 350.

(e) 2 Russ. Chanc. Cas. 585.

(f) Lord Alvanley, in *Reed v. Devaynes*, 2 Cox, 285, said that he

thought a child, who had a portion left him by a Will, in which he was appointed executor, could not take the portion unless he acted as executor: But this may be considered inconsistent with the more recent authorities: And the same remark, perhaps, applies to the principal decision of the same learned Judge in *Reed v. Devaynes* (stated *ante*, p. 1147), inasmuch as it appears from the report in Cox, that the legacy was

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codicil gave to M. 200*l.*, and named him joint executor with the executors in the Will; and in case the testator's son should die lunatic, then he gave 200*l.* to the said M.; it was held, by Stuart, V.-C., that the latter gift was not annexed to the office.

Secondly, What shall be a sufficient assumption of the character of executor, to entitle the legatee, when a legacy is given to him in that character? If the legatee prove the Will with an intention to act under it, that will be a sufficient performance of the condition: or if he unequivocally manifest an intention to act in the executorship, as by giving directions about the funeral of the testator, and be prevented by death from further entering upon his office, that will also be a performance of the condition (*h*). Thus in *Harrison v. Rowley* (*i*), the testatrix bequeathed to her executors 100*l.* each for their care and loss of time: One of the executors survived the testatrix so short a time, that he was prevented from joining with his co-executors in proving her Will, but he concurred with them in giving directions respecting her funeral, and in paying certain sums for burial fees, making the coffin, and opening the vault, in consequence of whose directions: And Lord Alvanley decided that his executors were entitled to the legacy. In this case his Lordship

what is a sufficient assumption of the office to satisfy the condition.

given to the executors, "as a mark of my gratitude for the friendship they have shown me:" which words, it would seem, would rebut the presumption that the bequest was given to them in their character of executors.

(*g*) 1 Sm. & G. 475; 22 L. J. Ch. 497. See *Re Appleton*, 29 C. D. 893, in which this case is explained.

(*h*) If an executor proves, and *bond fide* acts as such, any time before the real business of administering the estate is concluded, he is entitled to his legacy: *Angermann v. Ford*, 29 Beav. 349. *Ante*,

p. 1147, note (*o*). So where an executor, to whom a legacy was left for his trouble, being in Australia at the death of the testator, sent home a power of attorney, under which another person administered the estate, and under which the rents of the real estate were received, and the executor died, without proving the Will, it was held by Malins, V.-C., that the executor had sufficiently shown an intention to act under the trusts of the Will, to entitle his representative to the legacy. *Lewis v. Matthews*, L. R. 8 Eq. 277.

(*i*) 4 Ves. 212.

declined determining whether, if the executor had died without knowing that he was appointed executor, or manifesting any intention to take upon him the trust (as if he had died at a distance, before the information reached him), he would have been entitled (*k*).

In *Hollingsworth v. Grasett* (*l*), a testator bequeathed his residuary estate to A., the executor and trustee of his Will; with a gift over in case of the death of A., so that he might not be enabled to perform the duties thereby required of him: A. proved the Will, but died before he had fully performed the trusts of it: And it was held by Sir L. Shadwell, V.-C., that A., by merely proving the Will, entitled himself to the residue absolutely.

But the conduct of an executor, after proving the Will may be such as to demonstrate, that instead of a *bonâ fide* intention to execute the trusts, he procured probate as a means of enabling him to violate, in the grossest manner, the confidence reposed in him by the testator: In such a case, the mere act of proving the Will cannot entitle him to the legacy meant for him. Thus in *Harford v. Browning* (*m*), Mr. Morris (one of four executors) had a legacy of 1,500*l.* and an annuity of 100*l.* given to him by the testator, upon proving the Will, and taking upon himself the execution of it: Morris concurred in the probate, and shortly afterwards eloped with, and married abroad, the infant daughter of the testator, who was beneficially interested under the Will: With the exception of probate, Morris never acted as executor, and in consequence of his misconduct, he was restrained by the Court of Chancery from interfering in the trust of the Will: And Lord Thurlow determined, that Morris's concurrence in the probate, under these circum-

(*k*) 4 Ves. 215. In *Brydges v. Wotton*, 1 Ves. & Beam. 134, a trustee dying nineteen months after the testatrix, without having acted, was held entitled to the legacy given as a token of regard,

and a recompense for his trouble; no refusal or neglect to act, where necessary, appearing.

(*l*) 15 Sim. 52.

(*m*) 1 Cox, 302.

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stances did not entitle him either to the legacy or the annuity.

In *Baker v. Martin* (n), a testator directed that 100*l.* should be annually paid to one of his executors, for his trouble in superintending his concerns, until a final settlement of his affairs should take place: The executor proved and acted: Some time after the testator's death, a suit was instituted for the administration of his estate, but no receiver was appointed, and some of the assets were still outstanding: Sir L. Shadwell, V.-C., held that the annuity did not cease on account of the institution of the suit.

Where an annuity given to an executor, "for his trouble" shall cease.

A request by a testator that a handsome gratuity should be given to each of his executors, is void for uncertainty (o).

Bequest of a "handsome gratuity" to executors.

In conclusion, it may be mentioned, that where personal property is bequeathed to executors as trustees, the probate of the Will is an acceptance of the trusts (p).

Liability of executor legatee accepting the office.

In the case of *Messenger v. Andrews* (q), a testator gave a specific bequest to A., and directed that, in consideration of the bequest, A. should pay his debts; and made A. his residuary legatee and executor: And Lord Lyndhurst, C., held, that the payment of the debts was a condition annexed to the specific bequest, and that if A. accepted the bequest, he was bound to pay the debts, though they should far exceed the amount of the property bequeathed to him.

In *Henvell v. Whitaker* (r), the testator directed his just debts and funeral expenses to be fully paid and satisfied by his executor thereafter named: And Sir John Leach, M. R., held, that this was a condition imposed upon the executor, to satisfy the testator's debts and funeral expenses as far as all the property, which he derived under the testamentary disposition, would extend, whether real or personal.

(n) 8 Sim. 25.

(q) 4 Russ. Chanc. Cas. 478.

(o) *Jubler v. Jubber*, 9 Sim. 503.

(r) 3 Russ. Chanc. Cas. 343. See also *Dover v. Gregory*, 10 Sim. 393, 399.

(p) *Mucklow v. Fuller*, Jacob. 198.

Legacies directed to be enjoyed in a particular mode, or applied in a particular way :

rule as to absolute gifts, with a revocation or qualification of them for purposes which fail.

In conjunction with the subject of conditional legacies, it may be proper to mention, that where there is a bequest of money to, or in trust for, legatees absolutely, but with a direction for the enjoyment or application of the money in a particular mode, for their benefit, as where it is given to purchase an annuity for the legatee (*s*), or to place him out apprentice (*t*), or to enable him to take holy orders (*u*), or "towards purchasing a country residence" (*x*), the legatees will be entitled to receive the capital money immediately, regardless of the particular modes directed for the enjoyment or application (*y*).

Cases also occur where the testator gives a present interest in money to a legatee, though the application of it is to be regulated by the discretion of some one else (*z*). As to such cases, the rule is, that where a legacy is given, but the application of it is prescribed by the testator himself, or left by him to the discretion of some other person if that discretion is not exercised, or an accident happens which prevents the employment of it in the way which is contemplated, the gift prevails : The mode of application may fail, but that will not interfere with the substance of the gift (*a*).

But here it may be advisable to refer to an important distinction with respect to Wills in which there is first a gift absolute in form, and then a revocation or qualification of it for purposes which fail. As to such bequests, the rule is, that if the testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee—

(*s*) *Ante*, p. 1061 : but the legatee is not entitled to receive the capital money where a condition subsequent is attached to the annuity, *Hatton v. May*, 3 C. D. 148.

(*t*) *Barlow v. Grant*, 1 Vern. 255. *Nevill v. Nevill*, 2 Vern. 431. *Barton v. Cooke*, 5 Ves. 461.

(*u*) *Barton v. Cooke*, 5 Ves. 463, by Lord Alvanley.

(*x*) *Knox v. Hotham*, 15 Sim. 82.

(*y*) See also *Lewes v. Lewes*, 16 Sim. 266. *Noel v. Jones*, 16 Sim. 309. *Re Skinner's Trusts*, 1 Johns. & H. 102.

(*z*) *Gough v. Bult*, 16 Sim. 45.

(*a*) *Gough v. Bult*, 16 Sim. 54, by Lord Cottenham. *Lord Lonsdale v. Berchtoldt*, 3 Kay & J. 185. *Presant v. Goodwin*, 1 Sw. & Tr. 544.

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upon failure of such objects, the absolute gift prevails (*b*): But if there is no absolute gift, as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having, in such event, been given away from it (*c*).

SECTION VII.

Of Cumulative Legacies.

Legacies are said to be cumulative, as contradistinguished from such as are merely repeated. Where the testator has twice bequeathed a legacy to the same person, it becomes a question, whether the legatee be entitled to both, or one only: *i.e.* whether the second legacy shall be regarded as merely a repetition of the prior bequest; or whether it shall be construed as an additional bounty, and *cumulative* to the former benefit. On this point, the intention of the testator is the rule of construction (*d*).

The cases in which this question arises, may be classed under two heads: 1st, Where there is no evidence of the testator's intention apparent on the face of Will; 2nd, Where there is such internal evidence.

(*b*) Campbell v. Brownrigg, 1 Phill. 301.

(*c*) Lassence v. Tierney, 1 Mac. & G. 551, 561, 562, by Lord Cottingham, in his judgment, in which the previous authorities are examined. See also Gompertz v. Gompertz, 2 Phill. 107. Bell v. Jackson, 1 Sim. N. S. 547. Cooper v. Mantell, 22 Beav. 231. Thus sometimes a gift for maintenance and education has been held to determine with minority, as in Badham v. Mee, 1 Russ. & M. 631. See also Gardner v. Barker, 18

Jur. N. S. 508. But it seems from the case of Soames v. Martin, 10 Sim. 287, followed in Wilkins v. Jodrell, 13 C. D. 564, in preference to Gardner v. Barker, that there is no general rule that maintenance in such a gift will be limited to minority and not extended to life. See also Knapp v. Noyes, Ambl. 661.

(*d*) Ridges v. Morrison, 1 Bro. C. C. 389. Coote v. Boyd, 2 Bro. C. C. 527. Toller, 334. Lobley v. Stocks, 19 Beav. 393.

1st. Where there is no internal evidence of intention.

1st. Where there is no internal evidence of intention, the following positions of law appear established :

I. If the *same specific thing* is bequeathed *twice* to the same legatee in the same Will, or in the Will, and again in a codicil, in that case he can claim the benefit only of one legacy, because it could be given no more than once (*e*).

II. Where two legacies of quantity of *equal amount* are bequeathed to the same legatee in one and the *same instrument*, there also the second bequest is considered a mere repetition, and he shall be entitled to one legacy only (*f*).

III. Where two legacies of quantity of *unequal amount* are given to the same person in the *same instrument*, the one is not merged in the other, but the latter shall be regarded as cumulative, and the legatee is entitled to both (*g*).

IV. Lastly, where two legacies are given *simpliciter* to the same legatee by *different instruments*, in that case, also, the presumption is, that the latter is cumulative, whether its amount be equal (*h*) or unequal (*i*) to the former (*k*).

(*e*) Toller, 335. Suisse v. Lowther, 2 Hare, 424, 432.

(*f*) Swinb. Pt. 7, s. 21, pl. 13. Godolph. Pt. 3, c. 26, s. 46. Greenwood v. Greenwood, 1 Bro. C. C. 30, *in notis*. Garth v. Meyrick, 1 Bro. C. C. 30. Holford v. Wood, 4 Ves. 75. Manning v. Thesiger, 3 M. & K. 29.

(*g*) Swinb. Pt. 7, s. 21, pl. 13. Curry v. Pile, 2 Bro. C. C. 225. Windham v. Windham, Finch, H., 267. Yockney v. Hansard, 3 Hare, 620, 622.

(*h*) Swinb. Pt. 7, s. 21, pl. 13. Godolph. Pt. 3, c. 26, s. 46. Wallop v. Hewett, 2 Chanc. Rep. 70. Newport v. Kynaston, Finch, R., 204. Baillie v. Butterfield, 1 Cox, 392. James v. Semmens, 2 H. Blackst. 219. Benyon v. Benyon, 17 Ves. 34. Forbes v. Lawrence,

1 Coll. 495. Les v. Pain, 4 Hare, 210. But not apparently where the instruments are executed at the same time : Whyte v. Whyte, L. R. 17 Eq. 50.

(*i*) Pitt v. Pidgeon, 1 Chanc. Cas. 301. Masters v. Masters, 1 P. Wms. 423. Hooley v. Hatton, 2 Dick. 461. Hodges v. Peacock, 3 Ves. 735. Wray v. Field, 6 Madd. 300. Mackenzie v. Mackenzie, 2 Russ. Chanc. Cas. 272, 273. Watson v. Reed, 5 Sim. 431. Guy v. Sharp, 1 M. & K. 589. Gordon v. Hoffman, 7 Sim. 29 : In the last case, the testator, by his Will, gave to his son a legacy of *three thousand pounds*, and, by a codicil, a legacy of 4000*l.* in addition to the legacy of *two thousand pounds given by his Will* : And Sir L. Shadwell, V.-C., held,

It has been said that the intrinsic value of the testamentary gift is not to be taken into consideration in determining the amount of the legacy.

that the legacy is not to be taken into consideration in determining the amount of the legacy. Mann v. Mann, 138. Robley v. Tweed, 453. 107. 449. (k) Hurst v. Russell, 183. 6 Eq. 7 Ch. may be found in the gift of the legacy. v. Dick, (l) I

It may be observed here, that if the Court of Probate has granted probate, *as of a Will and codicil*, this is conclusive of the fact of their being distinct instruments, though written on the same paper (*l*). So if two instruments have been admitted to probate in the Court of Probate as one testament, a Court of Construction is bound to consider them as such (*m*).

2nd. Where there is internal evidence of the intention of the testator. In many cases, the Will or codicil affords intrinsic evidence that the second gift was intended by the testator as a mere substitution for the first; and consequently that one legacy alone was intended (*o*): For example, where a later codicil appears to be a mere copy of the former, with the addition of a single legacy (*p*), or when it is manifest that the latter instrument was made for the purpose of ex-

2ndly. Where there is internal evidence of intention.

that the son was entitled to the legacy of 3000*l.* in addition to the legacy of 4000*l.* See also *Accord.* Mann *v.* Fuller, Kay, 624. See further *Att.-Gen. v. George*, 8 Sim. 138. *Spire v. Smith*, 1 Beav. 419. *Robley v. Robley*, 2 Beav. 95. *Tweedale v. Tweedale*, 10 Sim. 453. *Hertford v. Lowther*, 7 Beav. 107. *Lyon v. Colville*, 1 Coll. 449.

(*k*) By Sir J. Leach, V.-C., in *Hurst v. Beach*, 5 Madd. 358. *Russell v. Dickson*, 4 H. L. C. 293. *Johnstone v. Lord Harrowby*, Johns. 425. 1 De Gex, F. & J. 183. *Cresswell v. Cresswell*, L. R. 6 Eq. 69. *Wilson v. O'Leary*, L. R. 7 Ch. 448. But the presumption may be rebutted if the Court can find in the context of the instruments an intention that the latter gift shall be substitutional: *Russell v. Dickson*, 4 H. of L. 293.

(*l*) *Baillie v. Butterfield*, 1 Cox,

392. See also *Campbell v. Radnor*, 1 Bro. C. C. 272, by Lord Loughborough. *Martin v. Drinkwater*, 2 Beav. 215. *Russell v. Dickson*, 2 Dr. & Warr. 133, 137.

(*m*) *Heming v. Clutterbuck*, 1 Bligh, N. S. 491, 492. *Brine v. Ferrier*, 7 Sim. 549. But see also *Walsh v. Gladstone*, 1 Phill. Ch. C. 294. *Ante*, p. 474.

(*o*) See *Martin v. Drinkwater*, 2 Beav. 215. *Yockney v. Hansard*, 3 Hare, 620. *Russell v. Dickson*, 2 Dr. & Warr. 133. 4 H. L. C. 293. Where a testator, having given a general legacy, by a subsequent instrument makes it specific, the ademption of the specific legacy, without more, will not set up the general legacy: *Hertford v. Lowther*, 7 Beav. 107.

(*p*) *Coote v. Boyd*, 2 Bro. C. C. 521. *Moggridge v. Thackwell*, 1 Ves. 472.

plaining or better ascertaining the legacies bequeathed by the former (*q*).

So if in two instruments the legacies are not given *simpliciter*, but the motive of the gift is expressed, and in both the instruments the *same* motive is expressed, and the *same* sum is given, the Court considers the two coincidences as raising a presumption that the testator did not, by the second instrument, mean a second gift, but meant only a repetition of the former gift (*r*). But the Court raises this presumption only where the double coincidence occurs of the same motive and the same sum in both instruments (*s*). It will not raise it if the same motive be expressed in both instruments, and the sums be different: Consequently, the legatee is in such case entitled to both sums (*t*).

On the other hand, the ordinary inference that legacies are cumulative, arising from the fact of their being of unequal amount, or of their being given by different instruments, may

(*q*) See upon this subject, *Mayor of London v. Russell, Finch, R., 230. Duke of St. Albans v. Beauchamp, 2 Atk. 636. Jackson v. Jackson, 2 Cox, 35. Allen v. Callow, 3 Ves. 289. Barclay v. Wainwright, 3 Ves. 462. Osborne v. Duke of Leeds, 5 Ves. 369. Currie v. Pye, 17 Ves. 462. Atty-Gen. v. Harley, 4 Madd. 263. Gillespie v. Alexander, 2 Sim. & Stu. 145. Hemming v. Gurrey, 1 Sim. & Stu. 311. Fraser v. Byng, 1 Russ. & M. 90. Strong v. Ingram, 6 Sim. 197. Adnam v. Cole, 6 Beav. 353. Saurey v. Rumney, 5 De G. & Sm. 698. Tuckey v. Henderson, 33 Beav. 174. If a testator expressly declares one gift to be in addition to another, and in another instance makes a gift without any such declaration, this is a *circumstance* to show that the latter was intended*

not to be additional but in substitution: *Russell v. Dickson, 2 Dr. & Warr. 139, per Sugden, C. of Ireland. See the remarks of Wigram, V.-C., on this point, in Lee v. Pain, 4 Hare, 219—221, 233.*

(*r*) *Benyon v. Benyon, 17 Ves. 34. Hurst v. Beach, 5 Madd. 358, by Sir John Leach, V.-C.* Where a testatrix, by her Will, gave an annuity "to my servant E. H.," and, by a codicil, an annuity of the same amount "to my servant E. H.," the bequests were held to be cumulative, the word "servant" not expressing *the motive*, but being descriptive only: *Roch v. Callen, 6 Hare, 531.*

(*s*) *Mackinnon v. Peach, 2 Keen, 555.*

(*t*) *Hurst v. Beach, 5 Madd. 359. Lord v. Sutcliffe, 2 Sim. 273.*

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be strengthened by internal evidence : as, where one is given generally, and the other for an express purpose : or where one reason is assigned for the former, and another for the latter (*u*) ; or where the legacies are not *ejusdem generis*, as where an annuity and a sum of money are given (*x*), or two annuities of the same amount by different instruments, the one payable quarterly, the other half-yearly (*y*) ; or where one legacy is vested and another contingent (*z*).

Before leaving this subject it is necessary to take some notice of the question as to the admissibility of parol evidence, to show that the testator did or did not intend a double benefit. In the case of *Hurst v. Beach* (*a*), Sir John Leach, V.-C., had occasion to consider the point : One of the questions before his Honor in that case was, whether parol evidence was admissible to prove that the testatrix meant a legacy of 500*l.*, given by a codicil, as a substitution merely for a legacy of 300*l.* given by her Will : Upon which his Honor gave the following judgment (*b*) : " Upon the question whether evidence is admissible to prove that the testatrix did not mean that the defendants should take both sums, there are no decisions in Courts of Equity : There are *obiter dicta* for the admission of such testimony (*c*) ; but in *Osborne v. Duke of Leeds*, the point was fully argued, and Lord Alvanley appears to have inclined against receiving it. It did not, however, become necessary there to decide the question. It is to be collected from the Digest, that it was admitted by the civil law. This

Parol evidence
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intention.

(*u*) *Ridges v. Morrison*, 1 Bro. C. C. 388.

(*z*) *Masters v. Masters* 1 P. Wms. 423, 424. See also *Att.-Gen. v. George*, 8 Sim. 138.

(*y*) *Currie v. Pye*, 17 Ves. 462.

(*z*) *Hodges v. Peacock*, 3 Ves. 735 : or where one is payable immediately on the testator's death, and the other at a future period : *Wray v. Field*, 2 Russ. Chanc. Cas. 261, 262. See also *Wright v. Ca-*

dogan, 2 Eden, 239. *Guy v. Sharp*, 1 M. & K. 589. *Suisse v. Lowther*, 2 Hare, 424. *Lee v. Pain*, 4 Hare, 223.

(*a*) 5 Madd. 351.

(*b*) *Ibid.*, 359.

(*c*) See *Coote v. Boyd*, 2 Bro. C. C. 528, by Lord Thurlow ; and see also *Hooley v. Hatton*, 1 Bro. C. C. 390, note. *James v. Semmens*, 2 H. Black. 210.

Court has no original jurisdiction in testamentary matters ; it acts with respect to them only upon the ground of administering a trust ; and is bound to adopt, in questions of legacy, the principles and rules of the Ecclesiastical Court. I found it necessary, therefore, to direct inquiry to be made in that Court upon this point, and the answer that I have received is that no decision has taken place there upon this question, and that no settled opinion is formed upon it (d) : It remains, then, to be considered upon the principles of evidence which are received in our own law. Our primary principle is, that evidence is not admissible to contradict a written instrument. *In some cases, Courts of Equity raise a presumption against the apparent intention of a testamentary instrument, and there they will receive evidence to repel that presumption ; for the effect of such testimony is not to show that the testator did not mean what he has said, but, on the contrary, to prove that he did mean what he has expressed. Thus, where the Court raises the presumption against the intention of a double gift, by reason that the sums and the motive are the same in both instruments, it will receive evidence that the testator actually intended the double gift he has expressed. In like manner, evidence is received to repel the presumption raised against an executor's title to the residue, from the circumstance of a legacy given to him ; and to repel the presumption that a portion is satisfied by a legacy. In all these cases, the evidence is received in support of the*

(d) But although no decisions may be found as to the admissibility of evidence with respect to the construction of a Will and codicil giving legacies to the same legatee, yet there are several authorities for the admissibility, in the Ecclesiastical Court, of parol evidence, with respect to the *factum* of the instrument, to investigate *quo animo* the act was done by the testator ; as whether a subsequent codicil was intended as a substitute

for, and consequently, revocatory of a former one, or not : See *ante*, p. 145 : See also the observations of Lord Loughborough in *Campbell v. Radnor*, 1 Bro. C. C. 272 ; and of Sir H. Jenner Fust, in *Thorne v. Rooke*, 2 Curt. 825—827. *Hubbard v. Alexander*, 3 C. D. 738, where evidence by one of the attesting witnesses to one of two duplicate codicils was admitted to show that they were not two distinct instruments.

Ch. III.

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apparent effect of the instrument, and not against it. Here the evidence tendered is not in support of the apparent effect of the instrument, but directly against it. This codicil leaves unrevoked the former legacy of 300*l.* to the defendant, and makes to him a further substantive gift of 500*l.* The evidence tendered is, that the testatrix did not mean this as a further gift of 500*l.*, but meant to substitute the 500*l.* in the place of the former 300*l.* I am of opinion, therefore, that such evidence cannot be received without breaking in upon the primary rule, that parol evidence is not admissible against the expressed effect of a written instrument" (e).

In *Guy v. Sharp* (f), Lord Brougham decided, that evidence of a testator's declarations of his meaning and intention were inadmissible, upon the question whether a legacy was cumulative or substitutional: His Lordship, however, admitted depositions relating to the amount of the testator's property, and the circumstances of his family, to be read *de bene esse*. It became unnecessary to decide the point as to their admissibility, the learned Judge being of opinion, that even if admitted, the evidence would not alter the conclusion to be arrived at upon a due regard to the construction of the instruments themselves. But his Lordship adverted to the manifest difference between the declarations, whether verbal or written, of a testator, and the proof of facts and circumstances, by the knowledge of which, the Court, when called upon to construe, may be placed in the same situation with the party who made the instrument, and may thereby be the better able to understand his meaning (g).

(e) See *Accord*. *Hall v. Hill*, 1 Dr. & Warr. 94, 116. *Lee v. Pain*, 4 Hare, 216. See *post*, p. 1169. But see *Weall v. Rice*, 2 Russ. A. M. 263. *Booker v. Allen*, *ibid.* 270.

(f) 1 M. & K. 589.

(g) See *Accord*. *Martin v. Drinkwater*, 2 Beav. 115. See also *Boys v. Williams*, *ante*, p. 1029. Thus in *Wilson v. O'Leary*, L. R., 7 Ch. 448, evidence that the testator had

in his possession an earlier codicil, at the time he made the later, was admitted so far as it went to prove the position of the testator, but was rejected so far as it suggested any motive for his making the second codicil. In this case also a letter written to the testator by his solicitor advising him to recopy his first codicil was held inadmissible.

Substituted or added legacies subject to the incidents of the original gift.

It may be here mentioned, as a general rule, that where one legacy is given as a mere *substitution* for another, the substituted gift is subject to the incidents of the original one, although it is not so expressed in the testamentary instrument (*h*). So *added* legacies shall, generally speaking, be subject to the same conditions and incidents as those to which they are added (*i*). But this is not a universal rule (*k*), and it is only where the subject of the first gift is given absolutely, or made defeasible, that the second gift has been held to be given on similar terms: For the doctrine has never been extended so far as to alter an absolute second gift into an estate for life only, and then to the party who was named in the first gift to take after that legatee's death (*l*).

SECTION VIII.

Of the Satisfaction of Debts and Portions by Legacies.

Of the satisfaction of debts by legacies.

It is a rule established in the Courts of Equity, that where a debtor bequeaths to his creditor a legacy equal to, or exceeding the amount of, his debt, it shall be presumed, in the absence of any intimation of a contrary intention, that the legacy was meant by the testator as a satisfaction of the debt (*m*).

(*h*) *Leacroft v. Maynard*, 1 Ves. 279. *Cooper v. Day*, 3 Meriv. 154. *Shaftesbury v. Marlborough*, 7 Sim. 237. *Day v. Croft*, 4 Beav. 561. *Bristow v. Bristow*, 5 Beav. 289. *Post*, p. 1505 *et seq.* (where the cases as to legacy duty are collected). See also *Duncan v. Duncan*, 27 Beav. 392. *Johnstons v. Lord Harrowby*, 1 De Gex, F. & J. 183, *coram* Lord Campbell, C. *Re Corrie's Will*, 32 Beav. 426. *Fisher v. Brierley*, 30 Beav. 267. *Secus*, where the latter legacy is a distinct substantive bequest: *Chatteris v. Young*,

2 Russ. Ch. C. 183. *Alexander v. Alexander*, 5 Beav. 518. *Haley v. Bannister*, 23 Beav. 336.

(*i*) *Cooper v. Day*, 6 Madd. 31. *Shaftesbury v. Marlborough*, 7 Sim. 137.

(*k*) *Overend v. Gurney*, 7 Sim. 128. *Re More's Trust*, 10 Hare, 171. And it cannot be applied unless it is consistent with the terms of the gift and the scope of the rest of the Will: *King v. Tootel*, 25 Beav. 23.

(*l*) *Mann v. Fuller*, Kay, 624.

(*m*) *Brown v. Dawson*, Prec. Chanc. 240. *Talbot v. Shrewa-*

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This rule, however, though it has long prevailed, has met with the censure of several eminent Judges; and the Courts have inclined to lay hold of any minute circumstances whereupon to ground an exception to it (*n*).

Thus the presumption of satisfaction shall not be made, where the debt was not contracted till after the making of the Will: for the testator could not have intended by the legacy to have satisfied a debt which did not then exist (*o*): Nor where the debt is due upon a current account; for the state of the account, and on whose side the balance lay, might be unknown to the testator (*p*): Nor where the debt was upon a bill of exchange, or other negotiable security; for the debt might have been transferred to a stranger by the legatee passing away the instrument (*q*).

Again, where a legacy is at all contingent or uncertain, it shall not be deemed a satisfaction of a debt (*r*). As where the legacy is given upon the contingency of the legatee surviving a particular person or period (*s*); or where the legacy is of the whole or part of a residue; for it may

Presumption of satisfaction rebuttable.

Where legacy contingent or uncertain;

bury, *ibid.* 394. *Fowler v. Fowler*, 3 P. Wms. 353. *Richardson v. Greese*, 3 Atk. 65. *Gaynon v. Wood*, 1 Dick. 331. *Hammond v. Smith*, 33 Beav. 452. *Atkinson v. Littlewood*, L. R. 18 Eq. 595. *Re Fletcher*, 38 C. D. 373. So a legacy may operate as a satisfaction of a covenant: *Wathen v. Smith*, 4 Madd. 325. But see *Cole v. Willard*, 25 Beav. 568. *Charlton v. West*, 30 Beav. 124. But where the legacy is of less amount than the debt, it shall not be deemed a part payment or satisfaction: *Cranmer's case*, 2 Salk. 508. *Graham v. Graham*, 1 Ves. Sen. 263. *Thynne v. Glengall*, 2 H. L. C. 153, 154.

(*n*) See the remarks of Sir T. Clarke, M. R., in *Mathews v. Ma-*

thews, 2 Ves. Sen. 636, and of Lord Alvanley in *Hinchcliffe v. Hinchcliffe*, 3 Ves. 529, and of Lord Cottenham in *Thynne v. Glengall*, 2 H. L. C. 153. See also *Hales v. Darell*, 3 Beav. 324, 332. *Smith v. Lyne*, 2 Y. & Coll. Ch. C. 345. *Hassell v. Dawkins*, 4 Drew. 468.

(*o*) *Cranmer's case*, 2 Salk. 508. *Jeffs v. Wood*, 2 P. Wms. 132. *Thomas v. Bennet*, 2 P. Wms. 343.

(*p*) *Rawlins v. Powell*, 1 P. Wms. 299.

(*q*) *Carr v. Eastabrooke*, 3 Ves. 561.

(*r*) *Nicholls v. Judson*, 2 Atk. 300.

(*s*) *Compton v. Sale*, 2 P. Wms. 553.

possibly turn out, after all the claims on the testator's estate are satisfied, that such legacy is not of equal amount with the debt (*t*). So a provision by Will that the legatee shall have the interest of a particular fund, or other proceeds, *for life*, shall not be deemed a satisfaction of a sum of money which the legatee is entitled to claim *absolutely* from the testator (*u*).

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Another exception to the rule exists in cases where the legacy is not payable immediately after the death of the testator : for the debt is due at the death of the testator, and therefore the legacy must be so too (*x*). Thus, in *Mathews v. Mathews* (*y*), Sir Thomas Clarke, M. R., said, that he remembered a case before the Lord Chancellor (Lord Hardwicke) where an old lady, indebted to a servant for wages, by Will gave ten times as much as she owed, or was likely to owe : yet because the legacy was made payable in a month after her own death, the Court laid hold of that circumstance to take it out of the general rule (*z*).

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A further exception may be found in cases where the legacy and debt are of a different nature (*a*) ; as where the testator is indebted by bond, and bequeaths an interest in land to his creditor (*b*). So in *Bartlett v. Gillard* (*c*), a leasehold estate of the testator's was subject to an annuity of 12*l.* to Mrs.

(*t*) *Devese v. Poutet*, 1 Cox, 188 ;
Thynne v. Glengall, 2 H. L. C.
154.

(*u*) *Alley v. Alley*, 2 Ves.
Sen. 37. *Forsight v. Grant*, 1
Ves. 298.

(*x*) By Lord Hardwicke, in *Clark
v. Sewell*, 3 Atk. 96. See also *At-
kinson v. Webb*, Prec. Chanc. 236.
Nicholls v. Judson, 2 Atk. 300.
Mathews v. Mathews, 2 Ves. Sen.
635. *Haynes v. Mico*, 1 Bro. C. C.
129. *Jeacock v. Falkener*, 1 Bro.
C. C. 295. *Adams v. Lavender*,
1 McClel. & Y. 41.

(*y*) 2 Ves. Sen. 636.

(*z*) In *Richardson v. Greese*, 3

Atk. 69, Lord Hardwicke said,
that legacies to servants had never
been held to be in satisfaction of
debts. But this case mentioned by
Sir T. Clarke, and also Chancey's
case, 1 P. Wms. 408, seem to de-
cide that they are to be so con-
sidered, unless there are circum-
stances to take the case out of the
general rule.

(*a*) See the observations of Lord
Hardwicke in *Bellasis v. Uthwatt*,
1 Atk. 428.

(*b*) *Eastwood v. Vinke*, 2 P.
Wms. 614. *Richardson v. Elphin-
stone*, 2 Ves. 463.

(*c*) 3 Russ. Chanc. Cas. 149.

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Bartlett for her sole use, to be paid to her half-yearly, on the 27th of January, and the 27th of July: He devised all his lands, in which the leasehold was included, to Richard Gillard, paying to Mrs. Bartlett 12*l.* per annum, by half-yearly payments, to be made on the 27th of January and the 27th of July: The Lord Chancellor held, that although the amounts of the two annuities and the days of payment were precisely the same, yet as the second was charged upon the freehold as well as the leasehold property, and was payable to Mrs. Bartlett generally and not to her separate use, this was sufficient to repel the presumption that the second annuity was intended as a satisfaction of the first, and that consequently both were payable. In *Fourdrin v. Gowdey* (*d*), a testator, under his wife's appointment, was entitled to her residuary estate, charged with her pecuniary legacies, including one of 100*l.* to Anna Jewitt, and another of 100*l.* to Mary Ann Myers, who was a married woman, to her separate use, independent of her husband; and it was left to his discretion either to pay the charges in his lifetime, or to direct them to be paid by his executors: He did not pay them in his lifetime; but, amongst other legacies, which by his Will he directed his executors to pay, was a sum of 500*l.* to Anna Jewitt, and a sum of 100*l.* to Mary Ann Myers, not limited to her separate use: Sir J. Leach, M. R., held that the sum of 100*l.* given to Anna Jewitt by the appointment of the wife, was satisfied by the 500*l.* bequeathed by the testator; and that the sum of 100*l.* bequeathed to Mary Ann Myers was in addition to, and not a satisfaction of, the 100*l.* given to her separate use by the wife.

(*d*) 3 M. & K. 409. And in *Fairer v. Park*, 3 C. D. 309, Vice-Chancellor Hall in his judgment says: "This case seems to me to be within the principle stated by the M. R. in *Fourdrin v. Gowdey*, where he says it is 'a question not of satisfaction but performance,' and also within the

case of *Rowe v. Rowe* (2 De G. & Sm. 294, 298), in which Sir J. Knight Bruce referred to Lord Lyndhurst's observation in *Bartlett v. Gillard*, *ubi sup.* that the circumstance of the gift of one annuity being for separate use, and another not, is a material fact."

Legacy of specific chattel not generally a satisfaction of debt.

Again, a legacy of a specific chattel, however great its value, will not be a satisfaction of a debt; unless the testator bequeaths it with such condition expressed, and the legatee accepts it by way of satisfaction (*e*).

It must also be observed, that the presumption of satisfaction may be counteracted by other parts of the Will: As where the legacy appears to be given *diverso intuitu*, some particular purpose being expressed as the ground of the bequest (*f*): or where there is an express direction in the Will for the payment of *all debts and legacies* (*g*).

A legacy given by a parent to a child is regarded, with respect to the rule in question, in the same light as a legacy to a stranger (*h*): Nor is a legacy given by a husband to his wife considered upon any different footing (*i*).

It is said that a legacy shall in all cases be construed as a satisfaction, in case there be a deficiency of assets (*k*).

Of the satisfaction of portions by legacies.

With respect to the satisfaction of portions by legacies, the rule has been established, with much fewer exceptions

(*e*) *Byde v. Byde*, 1 Cox, 49.

(*f*) *Mathews v. Mathews*, 2 Ves. Sen. 635. *Post*, p. 1167, note (*g*).

(*g*) *Chancey's case*, 1 P. Wms. 410, 411. *Richardson v. Greese*, 3 Atk. 68. *Field v. Mostin*, 2 Dick. 543. *Hales v. Darell*, 3 Beav. 324. *Lethbridge v. Thurlow*, 15 Beav. 334. *Jaffries v. Mitchell*, 20 Beav. 15. *Wathen v. Smith*, 4 Madd. 331. *Charlton v. West*, 30 Beav. 124. *Edmunds v. Low*, 3 Kay & J. 318, in which last case Wood, V.-C. held that a direction to pay *debts* (without more) is insufficient to rebut the presumption. See, however, *contra*, *Cole v. Willard*, 25 Beav. 568. *Glover v. Hartcup*, 34 Beav. 74, and compare *Atkinson v. Littlewood*, L. R. 18 Eq. 595. In the late case of *Re Huish*, 43 C. D. 260,

the decision in *Edmunds v. Low*, *ubi sup.*, was disapproved by Kay, J., who held that a direction by a testator that his "debts" are to be paid is sufficient, without the further direction to pay "legacies," to exclude the presumption that a legacy to a creditor, equal to, or exceeding the debt, is a satisfaction of the debt. A liability on a covenant made on marriage is a debt within the meaning of a direction "to pay debts:" *Cole v. Willard*, 25 Beav. 572, 573, dissenting from Sir J. Leach's opinion in *Wathen v. Smith*, *ubi supra*.

(*h*) *Telson v. Collins*, 4 Ves. 483, *post*, p. 1168.

(*i*) *Fowler v. Fowler*, 3 P. Wms. 353. *Re Fletcher*, 38 C. D. 373.

(*k*) *Toller*, 337.

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than that with regard to the satisfaction of debts, that where a parent is under obligation, by articles or settlement, to provide portions for his children, and he afterwards makes a provision by Will for them, such testamentary provision shall, *primâ facie*, be presumed to be a satisfaction or performance of the obligation (*l*). The strong inclination of the Courts against double portions has caused this rule to be applied without much relaxation (*m*).

If, therefore, the bequests be less in amount than the portions, or payable at different periods, such legacies will, notwithstanding, be considered satisfactions, either in full or in part according to circumstances (*n*). So though a gift of a whole or part of a residue cannot be considered as a satisfaction of a debt (*o*), yet it may be a satisfaction of a portion altogether, or *pro tanto* according to the amount (*p*).

But this presumption may be repelled or fortified by intrinsic evidence derived from the nature of the two provisions. Where the two provisions are of the same nature, or there are but slight differences (*q*), the two instruments

Presumption of satisfaction repelled or fortified by intrinsic evidence.

(*l*) *Bruen v. Bruen*, 2 Vern. 439. *Copley v. Copley*, 1 P. Wms. 147. *Moulson v. Moulson*, 1 Bro. C. C. 82. *Ackworth v. Ackworth*, 1 Bro. C. C. 307, note. *Weall v. Rice*, 2 Russ. & M. 251. *Papillon v. Papillon*, 11 Sim. 642. *Thynne v. Glengall*, 2 H. L. C. 131.

(*m*) See also *infra*, Pt. III. Bk. III. Ch. III. § II., as to the ademption of legacies given as portions.

(*n*) *Jesson v. Jesson*, 2 Vern. 255. *Byde v. Byde*, 1 Cox, 44. *Warren v. Warren*, 1 Bro. C. C. 305. *Finch v. Finch*, 1 Ves. 534. *Thynne v. Glengall*, 2 H. L. C. 153, 154. See *Fazakerley v. Gillibrand*, 6 Sim. 591.

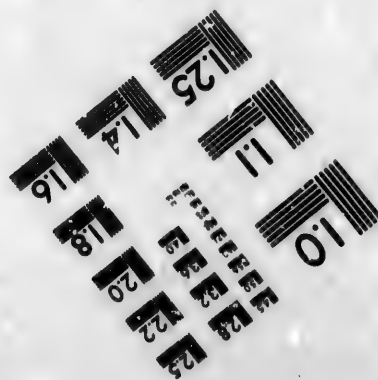
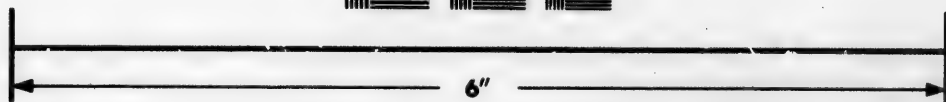
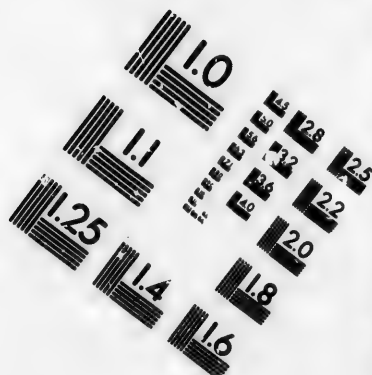
(*o*) *Ante*, p. 1163.

(*p*) *Thynne v. Glengall*, 2 H. L.

C. 131, 154. *Dawson v. Dawson*, L. R. 4 Eq. 504. *Nevin v. Drysdale*, L. R. 4 Eq. 517.

(*q*) *Per* Turner, L. J., in *Coventry v. Chichester*, 2 Hemm. & M. 149. *Chichester v. Coventry*, L. R. 2 H. L. 71. *Campbell v. Campbell*, L. R. 1 Eq. 383. *Russell v. St. Aubyn*, 2 C. D. 398. It is not possible to define what are to be considered as slight differences between two provisions: Slight differences are such as, in the opinion of the judge, leave the two provisions substantially of the same nature; and every judge must decide that question for himself; By Sir J. Leach, M. R., in *Weall v. Rice*, 2 Russ. & M. 268. *McCarogher v. Whieldon*, L. R. 3 Eq. 236. Where the legacy is





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afford intrinsic evidence against a double provision: Where the two provisions are of a different nature, the two instruments afford intrinsic evidence in favour of a double provision (r).

It must be further observed, that a legacy by a father to a child is not a satisfaction of a debt due to the child, or of moneys owing to the child in the nature of a debt, in any other way than a debt due from a stranger would be satisfied by such legacy: and therefore circumstances of difference, such as there has already been occasion to point out (s), will be laid hold of by the Court to prevent the application of

contingent, it shall not be considered a satisfaction of the portion: *Bellasis v. Uthwatt*, 1 Atk. 426, 428. *Hanbury v. Hanbury*, 2 Bro. C. C. 352; So where the legacy is given *diverso intuitu*: See *Foster v. Evans*, 8 Sim. 15. *Glover v. Hartcup*, 34 Beav. 74.

(r) *Chichester v. Coventry*, L. R. 2 H. L. 71. *Weall v. Rice*, 2 Russ. & M. 267. *Paget v. Grenfell*, L. R. 6 Eq. 7. *Re Tussaud's Estate*, 9 C. D. 363. The question whether a gift in a Will is a satisfaction of a portion given in a settlement, or a portion in a settlement is an ademption of a gift in a Will, is one of intention. The rule that there is a presumption against double portions is founded on the assumption that the maker of the second instrument supposed himself to be substantially satisfying the obligations of the first. This rule is much easier of application where the Will precedes the settlement than where the settlement precedes the Will. In the latter case, the intention to satisfy a covenant must be distinctly expressed or clearly indicated. Great

differences in the sums given, and in the limitations of the trusts on which they are given, will be taken as indications that the gift in the Will was not meant in satisfaction of the covenant. Where, too, the gift by the Will is not to the child, but to trustees to pay debts and legacies, and then to pay the residue to the child, the form of the gift will be taken as an indication that the debt due under the settlement must be satisfied before the residue is declared: *Chichester v. Coventry*, L. R. 2 H. L. 71. There is a marked distinction between "ademption" and "satisfaction." In the former, the benefit is given by a revocable instrument, and in any future gift the giver may declare his pleasure as to the second gift being taken in substitution for the first. In the case of the gift by settlement, followed by a Will, the persons to be benefited have the right to elect which of the gifts they will take, a right which does not arise in the other case; *ib. per Lord Romilly*.

(s) *Ante*, p. 1163 *et seq.*

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the rule of satisfaction (t). And in *Hall v. Hill* (u), where a father upon the marriage of his daughter, executed to the intended husband his bond (with a warrant of attorney for confessing judgment thereon), conditioned for the money of 800*l.* by instalments, part thereof to be paid during his life, and the residue upon his decease, and the intended husband gave a bond in the same amount to the trustees of the marriage settlement, which was settled upon the intended wife and issue; and then the father bequeathed to his daughter a legacy of 800*l.*; it was held by Sugden, C., of Ireland, that this legacy could not be considered as a satisfaction of the debt due to the husband, notwithstanding such debt was, in substance, a portion.

With respect to rebutting the presumption of satisfaction of a debt by parol evidence, it was holden by Lord Talbot, in *Fowler v. Fowler* (x), that such evidence was not admissible: But Lord Eldon, in *Wallace v. Pomfret* (y), upon the authority of the cases as to satisfaction of portions (z), held, that parol declarations by the testator are admissible in evidence, to repel the presumption of a satisfaction of a debt by a bequest of a greater amount, even where such declarations were not contemporaneous with, but subsequent to the making of the Will; and although the expressions in the Will may afford an inference in favour of the presumption. And it was laid down by Sir J. Leach, in *Weall v. Rice* (a), that whether the two instruments afford intrinsic evidence in favour of or against a double provision, extrinsic evidence is admissible of the real intention of the testator. And this proposition seems to have been approved of by Lord Langdale in *Lord Glengall v. Barnard* (b). And it is now settled

Admissibility
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(t) *Tolson v. Collins*, 4 Ves. 483.
Stocken v. Stocken, 4 Sim. 152.
See *Plume v. Plume*, 7 Ves. 258.

(u) 1 Dr. & Warr. 94.

(z) 3 P. Wins. 354.

(y) 11 Ves. 547, 548. But this case was disapproved by Lord

St. Leonards in *Hall v. Hill*, 1 Dr. & Warr. 94, 112. Compare *Ferris v. Goodburn*, 27 L. J. Ch. 574, 576.

(a) See *post*, p. 1197 *et seq.*

(a) 2 Russ. & M. 267, 268.

(b) 1 Keen, 769, 793, 794.

that where a presumption has arisen to imply an intention in the Will the rule is that parol evidence is admissible to rebut such presumption, and there is no difference in this respect between a deed and a Will (c).

SECTION IX.

Of the Release of Debts by Legacies : and herewith of the effect of appointing a Debtor or a Creditor to be Executor.

1. *Of a Legacy by a Creditor to his Debtor.*

Where a creditor bequeaths a legacy to his debtor, and either does not notice the debt, or mentions it in such a manner as to leave his intention doubtful, and after his death the securities for the debt, if any exist, are found uncanceled among the testator's property, the Courts of Equity do not consider the legacy to the debtor as necessarily, or even *prima facie*, a release or extinguishment of the debt, but require evidence clearly expressive of the intention to release (d) : And if such intention does not appear clearly expressed or implied on the face of the Will, evidence from other sources will be admitted (e). *Prima facie* a bequest to a debtor of the debts due from him means

(c) *Re Tussaud's Estate*, 9 C. D. 365. "You look at the Will for some expression of intention whether one or both are to be paid. If you find no expression, then you are driven to a presumption of law, which only arises in the absence of an expressed intention to give a double portion. That is entirely independent of the construction of the Will. When you come to a presumption to imply an intention in the Will, then the rule always is that you may admit parol evidence to rebut such presumption. I know no distinction in this respect between a deed and a Will. The whole

fallacy lies in supposing that it is for the purpose of determining the construction of the instrument. You first construe the Will, and if in any way a presumption arises, you admit evidence to rebut that presumption," by Cotton, L.J., at p. 374.

(d) *Wilnot v. Woodhouse*, 4 Bro. C. C. 226. *Jeffs v. Wood*, 2 P. Wms. 132. See also *Hyde v. Neate*, 15 Sim. 554, for an example of a Will where the language is sufficient to show that the testator intended to remit the debts of the legatees, as well as to give them their legacies.

(e) *Eden v. Smyth*, 5 Ves. 341.

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the debts due from him severally, and does not include debts due from a firm of which he is a member (*f*).

Where a testator recites that a legatee is indebted in a certain sum, that recital binds the legatee, except in case of a clear mistake of figures (*g*).

It must be observed, that if the testator expressly bequeaths the debt to his debtor, this being no more than a release by Will, operates only as a legacy; and the debt is assets, therefore, subject to the payment of the testator's debts (*h*).

Where a legatee is indebted to the testator, the executor may retain the legacy, either in part or full satisfaction of the debt, by way of set-off (*i*). And it has been held, that in a suit by a legatee to obtain payment of the legacy out of the assets of the testator, in a due course of administration, the executor may retain so much of the legacy as is sufficient to satisfy a debt due from the legatee to the testator, although the remedy for such debt was, at the time of the death of the testator, barred by the Statute of Limitations (*k*).

Retainer and set-off of a legacy, in respect of a debt due from the legatee, or party claiming through the legatee:

It is dangerous to extend the doctrine of this case: *Chester v. Urwick*, 23 Beav. 404.

(*f*) *Ex parte Kirk, Re Bennett*, 5 C. D. 800.

(*g*) *Robinson v. Bransby*, 6 Madd. 348. See also *Re Aird's Estate*, 12 C. D. 291. This case is stated in the head note to *Re Taylor's Estate*, 22 C. D. 495, not to have been followed, but it seems from the judgment of the C. A. that *Re Taylor's Estate* turned on a question of construction unaffected by *Re Aird's Estate*.

(*h*) *Rider v. Wager*, 2 P. Wms. 331, 332. *Ante*, pp. 1029, 1030.

(*i*) *Jeffs v. Wood*, 2 P. Wms. 130. *Smith v. Smith*, 3 Giff. 263. So where the legatee is a bankrupt member of a firm indebted to

the testator: *ibid.* So a retainer will be allowed to one executor, out of a legacy to his co-executor, in respect of a *devastavit* by the latter: *Sims v. Doughty*, 5 Ves. 243.

(*k*) *Courtenay v. Williams*, 3 Hare, 589. *Rose v. Gould*, 15 Beav. 189. *Coates v. Coates*, 33 Beav. 249. *Campbell v. Graham*, 1 Russ. & M. 453. See the remark of Knight Bruce, V.-C., in *Harvey v. Palmer*, 4 De G. & Sm. 427. So an administrator is entitled to set off against the share of one of the next of kin the whole of a debt of which part has become barred by the Statute of Limitations. *Re Cordwell's estate*, L. R. 20 Eq. 644. Legatees who were also next of kin of the testator, brought an

It may be observed, that the term "set-off" is somewhat inaccurately used in cases of this kind. The proper use of that expression seems applicable only to the mutual demand of debtor and creditor. A right of this nature is rather a right to pay out of the fund in hand, than a right to set-off. And such right of payment can only arise where there is a right to receive the debt so to be paid; and the legacy or fund so to be applied in payment of the debt must be payable by the person entitled to receive the debt (l). Accordingly, in *Cherry v. Boulton* (m), Thomas Boulton was indebted to Catherine Boulton, his sister, in the sum of 1,878*l.*: He became bankrupt, and shortly after his bankruptcy, Catherine made her Will, whereby she gave legacies of 500*l.* and 2,000*l.* to her executors, in trust to pay the interest thereof, (as to the 500*l.* after the decease of her mother,) to Thomas Boulton for his life, without power of anticipation, and free from his debts; and after

action against the executor seeking a revocation of the probate, but failed, and were ordered to pay the executor's costs of the action. While the action was pending some of the plaintiffs assigned and others mortgaged their shares whether under the Will or on an intestacy. Afterwards the legatees commenced an action against the executor in the Chancery Division for the administration of the estate. It was held that the executor was entitled to set off the costs in the probate suit against the legacies, notwithstanding the assignments and incumbrances. *Re Knapman*, 18 C. D. 300.

(l) *Cherry v. Boulton*, 4 M. & Cr. 442, 447, *per* Lord Cottenham, and see *Re Briant*, 39 C. D. 471, 479. *Re Akerman*, [1891] 3 Ch. 212, 219. In the case of *Re Akerman* (*ubi sup.*), Kekewich, J., says:

"The principle to be found laid down in *Cherry v. Boulton* (*ubi sup.*), and also in *Courtenay v. Williams* (3 Hare, 589), and, no doubt, if search were made, in many other cases, is that a person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass, without first making the contribution which completes it. Nothing is in truth retained by the representative of the estate: nothing is in strict language set-off; but the contributor is paid by holding in his hand a part of the mass, which, if the mass were completed, he would receive back," p. 219.

(m) 2 Keen, 319; affirmed on appeal, 4 M. & Cr. 442.

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his decease to pay the principal to such persons as he should appoint, and in default of appointment to his executors and administrators, for his and their own use and benefit: The testatrix did not prove her debt under her brother's commission: He died without having obtained his certificate, and without having attempted to make any appointment: Lord Langdale, M. R., held (overruling the case of *Ex parte Mann* (n), before Sir J. Leach), that the executors of the testatrix had no right to set-off the debt due from Thomas Boulton to the testatrix against the legacies, but that the assignee of Thomas Boulton was entitled to so much of the legacies as the assets were sufficient to pay: And this decision was confirmed by Lord Cottenham on appeal: And his Lordship observed, that the bankruptcy of the debtor having taken place in the lifetime of the testatrix, her executors never were entitled to receive from the assignees more than the dividends of the debt; and as the bankrupt never obtained his certificate, he was never entitled to receive the legacy: consequently there never was a time at which the same person was entitled to receive the legacy and liable to pay the entire debt; and therefore the right of retaining a sufficient sum out of the legacy to pay the debt could never have vested in any one; though the assignees would have been bound to allow the amount of any dividend on the debt, if it had been proved (o).—

(n) *Mont. & M'Arth.* 210.

(o) *Cherry v. Boulton*, 4 M. & Cr. 442, 448. These observations were regarded by Shadwell, V.-C., in *Bell v. Bell*, 17 Sim. 127, as decisive of a case where one of the creditors of an insolvent died intestate, leaving the insolvent one of his next of kin: The debtor had, in the lifetime of the intestate, taken the benefit of the Act, and been discharged, having entered the debt in question in his schedule: and the V.-C. held,

that the administrators of the creditor were not entitled to retain the debt out of the insolvent's distributive share of the creditor's estate. *Cherry v. Boulton* has been twice followed by Hall, V.-C., in *Re Hodgson*, 9 C. D. 673, and *Re Orpen*, 16 C. D. 202. As regards the retainer of anything in respect of a dividend under a bankruptcy, the Court will not necessarily in every case of a bankrupt legatee direct in making its order that some sum shall be de-

It will be seen that in this case the claim for the legacy arose *after the bankruptcy*, at a time when the claim of the testatrix, in respect of the debt due from the bankrupt, was merely a right of proof against his estate in the hands of the assignees: And the decision, therefore, does not apply to a case where the right to receive and the liability to pay both existed at the time of the bankruptcy (*p*). Where, in truth, the cross demands are essentially in different rights, it is a general rule, of equity as well as law, that one of such demands cannot be applied in satisfaction of the other (unless the right to do so be conferred by agreement, express or implied, which the Court has thought itself justified in presuming from slight circumstances (*q*): Accordingly, in *Freeman v. Lomas* (*r*), where an executor and trustee of a legacy, who was also residuary legatee, had become a creditor of the husband and administrator of the deceased legatee in respect of debts incurred since he had become her administrator: it was held by Turner, V.-C., that as there were no circumstances from which an agreement to set-off the one demand against the other could be presumed, the debt could not be set off against the legacy (though assets were admitted): because the claims existed in different rights.

in a case of a legacy to a *feme covert* whose husband is indebted to the testator's estate.

It does not seem necessary here to consider in detail, how far the right of set-off by the executor extends, in case of a legacy to a married woman, with respect to debts due from her husband to the testator, because the result of the Married Women's Property Act, 1882, is that a woman married after the commencement of that Act (*s*) will be entitled to hold as her separate property all real and personal property belonging

ducted by the executor on account of a dividend. It will only do so when it has been ascertained who are the creditors claiming, what is the amount of the assets, what the costs of the bankruptcy, and what the amount of the dividend, so that the amount to be deducted or allowed can also be ascertained.

Re Hodgson, 9 C. D. 673, 676.

(*p*) *Lee v. Egremont*, 5 De G. & Sm. 348, 368. See *Bousfield v. Lawford*, 1 De Gex, J. & S. 459.

(*q*) *Freeman v. Lomas*, 9 Hare, 109, 114.

(*r*) 9 Hare, 109.

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to her at the time of marriage, or acquired by or devolving upon her after marriage (*t*), and therefore her husband will have no interest in legacies left to her. Moreover, a woman married before the commencement of the Act will be entitled to all real and personal property as her separate property, her title to which accrues after the commencement of the Act (*u*), though not to property whether vested or contingent and whether in reversion or remainder, her title to which was acquired *before*, though it falls into possession *after*, the commencement of the Act (*x*).

Generally, it may be stated that the result of the authorities appears to be, that before the Married Women's Property Act, 1882, where a debt to the estate of a testator might be set-off by the executors against a legacy bequeathed by the testator to his debtor, such debt might also be set-off against a legacy bequeathed by the testator to the wife of the debtor, subject to her equity (if any) in the legacy (*y*).

In *Harvey v. Palmer* (*z*), leaseholds had been bequeathed for the legatee's personal support and maintenance, and to be entirely free from any claim, charge or demand of his creditors: And Knight Bruce, V.-C., held that the leaseholds could not be withheld from the legatee until he paid a debt due from him to the testator; for that the testator had expressed that which was equivalent to a declaration of intention that they should not be so withheld: And his Honor seemed to doubt whether, in any case, where a *specific* legatee is indebted to the testator, the legacy can be withheld till the debt is paid.

2. *The effect of appointing a Debtor to be Executor.*

It will be convenient to consider this subject, first, as to

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| (<i>t</i>) 45 & 46 Vict. c. 75, s. 2. | lieu, 5 Ves. 737. Carr v. Taylor, |
| (<i>u</i>) <i>Ibid.</i> s. 1. | 10 Ves. 574. <i>Ex parte</i> O'Ferrall, |
| (<i>x</i>) Reid v. Reid, 31 C. D. 402, | 1 Glyn & Jam. 347. Ranking v. |
| and <i>ante</i> , p. 662. | Barnard, 5 Madd. 32. <i>Re</i> Briant, |
| (<i>y</i>) McMahon v. Burchell, 5 | 39 C. D. 471. |
| Hare, 325. McCormick v. Garnett, | (<i>z</i>) 4 De G. & Sm. 425. |
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At Common
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the effect at Common Law, of the testator's appointing his debtor to be his executor; and then as to the effect in Equity.

Inasmuch as the rules of Equity, where before the Judicature Acts there was any conflict between them and the rules of Common Law, prevail (*a*), the effect at Common Law of the appointment by a testator of his debtor to be his executor does not require to be stated at length. Generally it may be stated that an appointment by the testator of his debtor, whether he was a sole debtor or one of several joint debtors, or even one of joint and several debtors, his executor, operated as a release or extinguishment of the debt: The principle being that a debt is merely a right to recover the amount by way of action, and as an executor could not maintain an action against himself, his appointment by the creditor to that office suspended the action for the debt: And where a personal action is once suspended by the voluntary act of the party entitled to it, it is for ever gone and discharged. Thus if the obligee of a bond makes the obligor his executor, this amounts at law to a release of the debt (*b*).

Nor is the case varied by the executor dying without having either proved the will or administered (*bb*), for in such a case also the debt is extinguished and the administrator *cum testamento annexo* can bring no action for it. There seems to be some doubt whether the debt of a sole executor who does not administer and refuses probate was at Common Law released (*c*): but the debt of one of several executors who refused was released if the others administered (*cc*), for he must have been made a co-plaintiff in all actions by the other executors. Since the passing of 20 & 21 Vict. c. 77, s. 79, which enacts that the rights of an executor renouncing

(*a*) Judic. Act, 1873, s. 25, subs. 11. See *per* Lord Cairns in *Pugh v. Heath*, 7 App. Cas. 237.

(*b*) *Needham's case*, 8 Co. 136, *a*.

(*bb*) *Wankford v. Wankford*, 1 Salk. 299. *Wentw. Off. Ex. c. 2* (14th Edit.). *Com. Dig. Admon. (B. 5.)*

(*c*) *Wankford v. Wankford*, 1 Salk. 307. See *contra*, *Abram v. Cunningham*, 2 Vent. 303, and *Butler's notes to Co. Lit.* 264, *b*.

(*cc*) 1 Salk. 308. *Bac. Abr. Tit. Exors. (A.) 10*, note to *Cabell v. Vaughan*, 1 Saund. 291.

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probate are to cease as if he had not been named an executor in the will, it would seem as if the debt of a renouncing executor is not released. The mere fact of an executor not proving does not seem to prevent the debt being released. At all events an opportunity would be given him to come in and prove (*d*).

It must, however, be observed, that, as between the debtor executor and the creditors of the testator, this doctrine was applicable only in cases where there were assets sufficient to satisfy the testator's debts (*dd*): For it would be unfair to defraud the creditors of their just debts by a release which is absolutely voluntary (*e*); And therefore the debt due from the executor was considered, on their behalf, as assets in his hands (*ee*): Accordingly it was said by Lord Holt (*f*), that when the obligee makes the obligor his executor, the debt is assets, and the making him executor does not amount to a legacy, but to payment and release: And that if H. be bound to J. S. in a bond of 100*l.*, and then J. S. makes H. his executor, H. has actually received so much money, and is answerable for it; and if he does not administer so much, it is a *devastavit*.

It must further be remarked, that, where the debtor is appointed executor, the suspension of the remedy is the *voluntary act of the creditor*, and therefore the action was for ever gone: But the effect was different, where the remedy is suspended *by the act of law* (*g*): Thus, if administration of the effects of a creditor were committed to the debtor, this

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(*d*) *Re Applebee*, [1801] 3 Ch. 422.

(*dd*) *Bac. Abr. Exors. (A.)* 10.

(*e*) 2 *Black. Com.* 512: If the testator, says Lord Talbot, in *Brown v. Selwyn*, *Cas. temp. Talb.* 241, 242, had expressly given it away, even that could not have screened it from debts.

(*ee*) *Holliday v. Boas*, 1 *Roll. Abr.* 920, 921. *Exors. (G.)* pl. 13. *Woodward v. Lord Darcy, Plowd.*

186. *Dorchester v. Webb*, *Cro. Car.* 373. *Touchst.* 497, 498. *Wankford v. Wankford*, 1 *Salk.* 305, by Holt, C. J. The author of "The Office of an Executor," seems to be of opinion that the debt will be assets in equity only: *ch. 2, pp. 73, 74, 14th edit.*

(*f*) 1 *Salk.* 306.

(*g*) *Wankford v. Wankford*, 1 *Salk.* 303, by Powell, J.

being by act of law, was held to be only a temporary privation of the remedy (*h*): Therefore, if the obligor of a bond took out administration to the obligee, and died, the administrator *de bonis non* of the obligee might maintain an action for such debt against the executor of the obligor (*i*). Again, if the executrix of the obligee married the obligor, such marriage was no release of the debt; for the testator had done no act to discharge it (*k*): Consequently, the remedy was merely suspended by the legal effect of the coverture; and, on her death, the administrator *de bonis non* was equally entitled to that debt, as to any others outstanding (*l*): But if the obligee made the wife of the obligor his executrix, this operated as a release (*m*).

It was decided in *Caweth v. Phillips* (*n*), that making a debtor executor *durante minore etate* of another person does not discharge the debt; on the ground that the debtor is only executor in trust for the other during his minority.

It may also be proper in this place to mention the case of *Stapleton v. Truelock* (*o*): There the testator made B. and C. his executors, and added, "I Will that C. shall pay to my other executor all such debts as he oweth me, before he shall meddle with anything of this my Will, or take any advantage of this my Will for the discharge of the same debts, for that I have made him one of my executors:" And it was held that C. could not administer, or be executor, before he paid the debts.

In Equity.

The effect in equity (*p*) of the appointment of a debtor to the office of executor, is, as there has already been occasion to state, that the debt due from the debtor executor is considered

(*h*) Wentw. Off. Ex. Ch. 2, p. 76, 14th edit. Needham's case, 8 Co. 136, *a*. Wankford *v.* Wankford, 1 Salk. 306, by Holt, C. J.

(*i*) Lockier *v.* Smith, 1 Sid. 79. Hudson *v.* Hudson, 1 Atk. 461.

(*k*) Needham's case, 8 Co. 136, *a*. Co. Lit. 264, *b*. Wankford *v.* Wankford, 1 Salk. 306, by Holt, C. J.

(*l*) Crozman's case, 1 Leon. 320. Wankford *v.* Wankford, 1 Salk. 306, by Holt, C. J. Toller, 349.

(*m*) Fryer *v.* Gildridge, Hob. 10. *Re* Price, 11 C. D. 163.

(*n*) 1 Lord Raym. 605.

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to have been paid to him by himself; and upon this supposition it is an established rule in Equity that the executor shall be accountable for the amount of his debt as assets (*q*): And it should seem to be now clearly settled, that the debt is general assets, not only for the payment of the testator's debts, but also of his legacies (*r*). And if the debt were a specialty debt, it would have remained so, and would have retained its priority as against the estate of the executor, in the event of his death, as though a stranger had been appointed executor (*s*).

There are, indeed, some authorities for considering the appointment in the light of a specific legacy to the debtor for the purpose of discharging the debt, and that, therefore, although, like all other legacies, it shall not be paid or retained till the debts are satisfied, yet the executor has a right to it exclusive of the other legatees (*t*): And Lord Talbot, in *Brown v. Selwyn* (*u*), speaks of the question as being at that time unsettled, whether such a debt was assets to pay legacies in general, though he inclines to be of opinion in the affirmative. However, Lord Thurlow, in *Carey v. Goodinge* (*x*),

(*q*) See the judgment of Lord Tenderden, in *Freakley v. Fox*, 9 B. & C. 134. In *Ingle v. Richards*, 28 Beav. 366, a testator died in 1842, having appointed T. R. and others his executors: T. R., who owed the testator 300*l*. on his promissory note, did not prove the Will till 185*v*: And it was held by Romilly, M. R., that he could not then set up the Statute of Limitations in respect of the debt; —that the act of proving had relation to the testator's death; and that he must be considered as having the 300*l*. in his hands as assets and be charged therewith, with interest, from 1855.

(*r*) *Flud v. Rumcey*, Yelv. 160. *Phillips v. Phillips*, 2 Freem. 11. *Errington v. Evans*, 2 Dick. 456. *Carey v. Goodinge*, 3 Bro. C. C.

111. *Berry v. Usher*, 11 Ves. 90. *Simmons v. Gutteridge*, 13 Ves. 264. Bac. Abr. Exors. (A.) 10. *Re Price*, 11 C. D. 163. See also, In the goods of Boddington, 6 Notes of Cas. 18. *Tomlin v Tomlin*, 1 Hare, 247.

(*s*) *Turner v. Cox*, 8 Moo. P. C. 288, 315.

(*t*) Co. Litt. 264, *b*. note (1), by Butler. 2 Black. Com. 512. Toller, 349: But Lord Holt, in *Wankford v. Wankford*, 1 Salk. 306, denies that the making a debtor executor amounts to a legacy: And even if it did, it should seem that he would have no right of retainer against other specific legatees: See *post*, p. 1211.

(*u*) Cas. temp. Talb. 242.

(*x*) 3 Bro. C. C. 111.

and Sir William Grant, in *Berry v. Usher* (y), treat the point as perfectly settled, that the appointment of a debtor to be executor is no more than a parting with the action, and that a trust is accordingly raised in equity, not only for a residuary legatee (z), but even for a next of kin (a).

The appointment of a debtor as executor will operate even in equity as a release of the debt if the rights of creditors are not interfered with, and there is evidence to show the intention of the testator to release the debt by the appointment, because, there being a legal act which released the obligation, there is in such case no equity against the debtor to deprive him of the benefit (b).

3. Of the effect of appointing a Creditor to be Executor.

There has already been occasion to consider the privilege enjoyed by a creditor, who is appointed to the office of executor, of retaining for his own debt out of the assets, in priority to all other creditors of equal degree (c): But it remains further to investigate how far that appointment and the consequent privilege operate as an extinguishment of the claim of the executor.

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If a debtor makes his creditor, or the executor of his creditor, his executor, this alone is no extinguishment of the debts though there be the same hand to receive and pay: Yet if the executor has assets of the debtor, it is an extinguishment; because then it is within the rule that the person

(y) 11 Ves. 90.

(z) *Brown v. Selwyn*, Cas. temp. Talb. 240.

(a) *Carey v. Goodinge*, 3 Bro. C. C. 110.

(b) *Strong v. Bird*, L. R. 18 Eq. 315. See also the case of *Re Applebee*, [1891] 3 Ch. 422, in which *Strong v. Bird* was followed, and in which *Stirling, J.*, discusses the admissibility of evidence to prove (a) the intention of the testator to release the executor by means of his appointment: (b) the

intention in testator's lifetime to forgive the debt: (c) the circumstances rendering it inequitable for the residuary legatee to refuse to give effect to the intention of the testator as proved. The evidence would seem admissible on the ground that it is not to alter or add to the will, but merely to negative an equity in favour of the residuary legatee arising on a presumption.

(c) See *ante*, p. 883 *et seq.*

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who is to receive the money, is the person who ought to pay it: But if he has no assets, then he is not the person who ought to pay, though he is the person that is to receive it (*d*): The debt, in other words, is not extinct, unless upon a supposition that the executor has assets, which he may retain to pay himself (*e*).

Therefore, if the obligor makes the obligee his executor, and he has no assets, he may sue the heir, if the heir be bound (*f*): But it is said, that if he pay himself any part of his debt by retaining out of the assets, he cannot sue the heir for the residue; for he cannot apportion his debt, but, he ought to retain goods for the whole, or have an action for the whole against the heir (*g*).

The law is the same, if one of several joint and several debtors makes their common creditor his executor: Therefore if such an executor has assets, the debt is extinct, and he cannot sue the other debtor; for the having assets amounts to payment (*h*). Thus, in the case of *Locke v. Crosse* (*i*), the

where one of several debtors makes the creditor executor:

(*d*) *Woodward v. Lord Darcy*, Plowd. 185. *Fryer v. Gildridge*, Hob. 10. *Cock v. Cross*, 2 Lev. 73. *Wankford v. Wankford*, 1 Salk. 305, by Holt, C. J.

(*e*) By Powell, J., in *Wankford v. Wankford*, 1 Salk. 304. Accordingly, where a promissory note was, at maturity, in the hands of the payee, who was one of the two executors of the drawer, and it was afterwards endorsed by the payee to the plaintiff, who, as indorsee, sued the payee and his co-executor as the executors of the drawer; and they pleaded the facts above stated, alleging also that the payee had assets of the testator before the endorsement; it was held, that the allegation as to the payee having assets were material, for otherwise the debt was not gone, and the instrument was still negotiable: It was further held that the alle-

gation must be taken to mean legal assets presently available; and, therefore, it was not sustained by proof that the testator had devised to the payee a house charged with a sum of money, payable within twelve months after his death, to be applied in payment of debts and legacies: *Lowe v. Peskett*, 16 C. B. 500. *Richards v. Moloney*, 2 Ir. Ch. 1.

(*f*) 1 Roll. Abr. 940, (M.) pl. 5. *Pidgeon v. Pitts*, 2 Show. 401, pl. 273. *Wankford v. Wankford*, 1 Salk. 304, by Powell, J. Co. Lit. 264, b. note by Butler.

(*g*) *Woodward v. Lord Darcy*, Plowd. 185, 186. Wentw. Off. Ex. 78, 14th edit.

(*h*) *Wankford v. Wankford*, 1 Salk. 305, by Holt, C. J.

(*i*) Cited by Holt, C. J., 1 Salk. 305.

obligee was made executor to one of two joint and several obligors, and in an action by him against the other, where the matter was pleaded, the plea was held to be bad, because it did not show to what value the assets were that the plaintiff administered: but if the defendant had shown that the plaintiff had administered goods to the value of the debt in demand, it had been a good plea.

where a
creditor is
one of several
executors.

Again, the same doctrine prevails where the debtor appoints his creditor to be one of several executors, *if the creditor administers (k)*: But if the creditor neither proves the Will, nor acts as executor, he may bring an action against the other executor (*l*); nor is it necessary, to enable him so to do, that he should renounce in the Court of Probate (*m*). So if the debtor makes the creditor and another his executors, and the creditor does not administer, but dies, his executor shall have an action against the surviving executor (*n*).

Action by
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It may be proper, in this place, to mention the case of *Ashley v. Childers (o)*: There a man died intestate, and a stranger possessed himself of the intestate's goods: Afterwards letters of administration were granted to a creditor of the intestate, who brought an action for the debt due to him by the intestate, against the stranger, as executor of his own wrong: The question was, whether the creditor, by taking the letters of administration, had not suspended his action for the time he continued to be administrator: And Twisden, J., held that he had: But the rest of the Court held, that, as there was an averment by the plaintiff that he had 100 assets to satisfy his debt, the action was not suspended, but was sustainable; for the reason why the creditor's taking out administration is said to suspend or extinguish the action, is on supposition of assets.

(k) *Woodward v. Lord Darcy*, 557.
Plowd. 184. *Dorchester v. Webb*,

10. Car. 372.

(l) *Dorchester v. Webb*, W.
Jones, 345.

(m) *Rawlinson v. Shaw*, 3 T. R.

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(n) *Woodward v. Lord Darcy*,
Plowd. 184.

(o) 1 Roll. Abr. 940, *Extinguishment*, (M.) pl. 5.

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CHAPTER THE THIRD.

OF THE ADEMPMENT OF LEGACIES.

IF a gift to one legatee in the earlier part of a Will be inconsistent with a subsequent gift to another legatee in the Will, or in a codicil, this inconsistency operates as an ademption or revocation of the earlier gift (a).

Ademption by
inconsistent
legacy.

SECTION I.

Of the Ademption of Specific Legacies.

The general rule is, that in order to complete the title of a specific legatee to his legacy, the thing bequeathed must, at the testator's death, remain *in specie* as described in the Will: otherwise the legacy is considered as revoked by ademption. For instance, if the legacy be of a specified chattel in possession, as of a gold chain, or a bale of wool, or a piece of cloth, the legacy is adeemed, not only by the testator's selling or otherwise disposing of the subject in his lifetime, but also if he should change its form so as to alter the specification of it; as if he should convert the gold chain into a cup, or the wool into cloth, or make the piece of cloth into a garment, the legacy shall be adeemed (b).

It must be here observed that the rule of ademption does not apply to *demonstrative legacies*: i. e. to legacies of so

Demonstrative
legacies :

(a) See *Kermode v. McDonald*, L. R. 1 Eq. 459, 460. L. R. 3 Ch. 584.

(b) *Ashburner v. M'Guire*, 2 Bro. C. C. 110. So where the testator took the goods bequeathed with him on a voyage, and the ship was lost at sea, and the goods perished, and he was

drowned; it was held, that as it could not be shown that the testator died before the goods perished, the legatee had no interest in them, and no claim on the money for which they had been insured: *Durrant v. Friend*, 5 De G. & Sm. 343. See *ante*, p. 1072.

much money with reference to a particular fund for payment: as for instance, legacies given out of a particular stock (c), or debt (d), or term (e): for although the particular fund be not in existence at the testator's death, the legatees will be entitled to satisfaction out of the general estate (f).

It is now proposed further to consider the rule above laid down, and certain qualifications of it, by applying it to some of the examples of specific legacies heretofore adduced (g).

Ademption of
specific legacy
of a debt;

As to the ademption of specific legacies of debts and securities for money: If a debt specifically bequeathed be received by the testator, the legacy is adeemed: because the subject is extinguished, and nothing remains to which the words of the Will can apply (h). Thus, in *Rider v. Wager* (i), the testator specifically bequeathed to A. part of a debt due to him from B., and the remainder to C.: The testator called in the money: And Lord King determined that the legacy was extinguished; and further held in the same case, the testator having bequeathed to D. a debt which D. owed him, that this legacy was adeemed by payment of the money in his lifetime (j). So in *Barker v. Rayner* (k), the testator effected two policies of insurance on the life of his wife, the one for 600*l.* and the other for 1,500*l.*, payable to himself, his executors, &c., within six months of his wife's death: By his Will, he gave all his right, title, and interest in the policies, the policies themselves, and all the benefit and advantage thereof, to his executors and trustees, to pay the yearly premiums during his wife's life; and after her death, he directed certain payments to be made out of the money to be received, and the remainder to be placed out upon securities at interest, and disposed of the principal and interest by the Will: He survived his wife, and himself received the amount of the policies, and, after applying part of the money to particular

(c) *Ante*, p. 1027.

(d) *A. t. e.*, p. 1030.

(e) *Ante*, p. 1032.

(f) *Ante*, p. 1021.

(g) *Ante*, p. 1022 *et seq.*

(h) *Badrick v. Stevens*, 3 Bro. C. C. 431.

(i) 2 P. Wms. 329, 330.

(j) 2 P. Wms. 331.

(k) 5 Madd. 208.

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purposes, placed the remainder out at interest upon securities, which were left in the hands of the executors: Sir John Leach held, that the specific testamentary disposition of the policies were adeemed: And this decision was confirmed on appeal by Lord Eldon (l). Again, in *Gardner v. Hatton* (m), a testator bequeathed the interest of 7,000*l.* secured on mortgage of an estate at Worstead, in the county of Norfolk, belonging to Mr. Robert Tuck; The 7,000*l.* and interest were received after the date of the Will by the testator's agent, on his account, and immediately afterwards, 6,000*l.*, part of it, was invested on another mortgage, and the remainder was paid into a bank in which the testator had no other monies, but was afterwards drawn out by a person to whom the testator had given a check for the amount: And Sir L. Shadwell, V.-C., held that the legacy was specific, and notwithstanding the 6,000*l.* remained due on the second mortgage at the testator's death, that the legacy was wholly adeemed.

So a partial receipt by the testator of the debt specifically bequeathed will operate as an ademption *pro tanto*. Thus, in *Ashburner v. M'Guire* (n), where a bond debt was bequeathed, the obligor became bankrupt, and the testator received a dividend under the commission in respect of the debt: Lord Thurlow held, that this receipt was an ademption *pro tanto*. So in *Fryer v. Morris* (o), where the specific legacy was of money due on a note for 400*l.*, and the testatrix received 385*l.* 18*s.* of the debt, Sir William Grant determined that the receipt of that sum was an ademption, on the ground of all the preceding decisions, *viz.* that the thing given and described no longer existed.

Such being the principle by which the ademption of specific legacies is governed, the fallacy is obvious of a distinction formerly taken with respect to a specific legacy of a

(l) 2 Russ. Chanc. Cas. 122. See (m) 6 Sim. 93.
for further examples, *Birch v. Baker*. (n) 2 Bro. C. C. 108.
Mosely, 375. *Stanley v. Potter*, 2 (o) 9 Ves. 360.
Cox, 180.

debt, viz. between a compulsory and a voluntary payment of it to the testator; but it was finally established, according to the words of Lord Thurlow, in *Humphries v. Humphries* (oo), that "the only rule to be adhered to is to see whether the subject of the specific bequest remained in *specie* at the time of the testator's death; for if it did not, then there must be an end of the bequest; and the idea of discussing what were the particular motives and intention of the testator in each case, in destroying the subject of the bequest, would be productive of endless uncertainty and confusion" (p).

A distinction was made by Sir John Stuart, V.-C., in the case of *Clark v. Browne* (q), between the gift of a debt *quâ* debt and the gift of the sum of money produced when the debt shall have been recovered and ceased to exist as a debt; as for example, where there is a gift of "whatever sum may be received from my claim on A. B.": In such a case it may be inferred that the testator contemplated the recovery of the debt in his own lifetime, and that the subject of the gift is not the debt itself, but the amount recovered in respect of it; and the receipt of such amount by the testator will be no ademption: at all events if he sets it apart, and does not mix it with the general mass of his property. But from this decision, as well as from that of Sir W. Grant in the earlier case of *Le Grice v. Finch* (r), Sir G. Jessel, M. R., dissented (s), holding these cases always to be cases of construction; that is, to turn on the question whether the gift was of the money as invested, or of the proceeds of the fund however invested (t).

(oo) 2 Cox, 185.

(p) *Jones v. Southall*, 32 Beav. 31. For an instance of a receipt which does not amount to an ademption, see *Graves v. Hughes*, 4 Madd. 381.

(q) 2 Sm. & G. 524.

(r) 3 Mer. 50.

(s) *Harrison v. Jackson*, 7 C. D. 339. See also *Manton v. Tabois*,

30 C. D. 92, per Bacon, 7.-C.

(t) In *Moore v. Moore*, 29 Beav. 496, and *Morgan v. Thomas*, 6 C. D. 176, it was held, on the construction of the Wills in question, that the gift was of the proceeds of the fund and that the money could be traced. See *Accord. In Johnstone's Settlement*, 14 C. D. 162, which was a case of a Will

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When stock is specifically bequeathed, and it does not wholly, or does only in part exist at the testator's death, the legacy will either be totally or partially adeemed, as the case may be. Thus, in *Ashburner v. M'Guire* (u), the testator made the following bequest: "To A., now at school, &c., my capital stock of 1,000*l.* in the India Company's stock, with the dividends, &c.:" The fund was afterwards sold by the testator: And Lord Thurlow decided, that the legacy was adeemed (x).

ademption of a specific legacy of stock.

And it is said, that the legacy is irretrievably adeemed by the sale of the stock; and will not be revived by a new purchase of similar stock by the testator (y). In *Pattison v. Pattison* (z), a testator gave to Margaret Forbes, whom he afterwards married, among other bequests the sum of 50*l.* Long Annuities, which he described as purchased with 1,000*l.* left him by the Will of James Tillard: After his marriage he made a codicil, by which he confirmed to his

made in exercise of a power of appointment, and the legacies were held not to be adeemed by a subsequent change of investment.

(u) 2 Bro. C. C. 108.

(x) Where there was a bequest of "1,000*l.* D. Stock in the London and North Western Railway Company now standing in the names of the trustees of my settlement," which was subsequently to the Will paid off by the company and re-invested by the testator's desire in the purchase of other securities, it was held that the legacy was adeemed: *Harrison v. Jackson*, 7 C. D. 339. And where a testator having certain debentures at the date of his Will thereby gave "all my debentures" upon certain trusts, and after the date of the Will the testator exercised an option given to him by the company who had issued the debentures and con-

verted them into debenture stock of the same company; it was held that the debenture stock did not pass: *Re Lane*, 14 C. D. 856. A gift of "all my interest in the Coventry Street Estate" was held to be adeemed by the sale of the estate subsequently to the Will, although the purchase-money stood on deposit at the testator's bankers at the time of his death: *Manton v. Tabois*, 30 C. D. 92. It often happens that a gift held not to be specific, but general, fails through the non-existence of a standard of value: *Re Gray*, 36 C. D. 205.

(y) But see the *dicta* of Lord Talbot in *Partridge v. Partridge*, Cas. temp. Talb. 227; of Lord Hardwicke in *Avelyn v. Ward*, 1 Ves. Sen. 426; and of Sir Thomas Clarke, in *Drinkwater v. Falconer*, 2 Ves. Sen. 625.

(z) 1 M. & K. 12.

wife the benefits given to her by his Will, in addition to the provision made for her by her marriage settlement: He afterwards sold his Long Annuities, and with the produce purchased new Annuities, which differed only from the Long Annuities by being terminable a quarter of a year sooner: Subsequently to this transaction, he made another codicil, by which he confirmed his Will and former codicil: And Sir John Leach, M. R., held, that the legacy of 50*l.* Long Annuities was adeemed: his Honour observing that the law settled, that a legacy is adeemed if the specific thing do not exist at the testator's death.

Cases where
specific legacy
of stock is
not adeemed.

But no ademption will take place when the stock specifically bequeathed is exchanged by act of law; as when a fund is converted into one of a different description by Act of Parliament (*a*); nor where the stock has been transferred into another fund by a trustee without the knowledge or authority of the testator (*b*); nor where the stock is merely transferred with the testator's consent, from the name of his trustee into his own (*c*); or, as it should seem, from the names of old to those of new trustees, or from the specified fund to a fresh security, under a power so to do: Nor, perhaps, will the legacy be adeemed, when the testator lends the stock specifically bequeathed, on condition of its being replaced (*d*).

In *Basan v. Brandon* (*e*), a testator, resident in Jamaica, bequeathed to A. B. 2,000*l.*, part of a sum of 7,000*l.* in the

(*a*) *Partridge v. Partridge*, Cas. temp. Talb. 226. *Bronsdon v. Winter*, Ambl. 59. See also *Oakes v. Oakes*, 9 Hare, 666.

(*b*) *Shaftesbury v. Shaftesbury*, 2 Vern. 747. So, where the subject of a specific legacy was sold during the testator's lunacy, by his son, it was held by Stuart, V.-C., that there was no ademption: *Jenkins v. Jones*, 1. R. 2 Eq. 323. But where after the Will a testator

was found a lunatic and by an order in the lunacy certain shares specifically bequeathed were directed to be sold and the proceeds invested in other securities, the bequest of such shares was held to be adeemed: *Jones v. Green*, 1. R. 5 Eq. 555. *Re Freer*, 22 C. D. 622.

(*c*) *Dingwall v. Aakew*, 1 Cox, 427.

(*d*) 1 Rep. Leg. 3rd. edit. 292.

(*e*) 8 Sim. 171.

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hands of his agents in England and received by them from the Transport Board on his account: The testator afterwards went to Philadelphia, where he died: Seven days before his death, he wrote to his agent in Jamaica, desiring him to order his agents in England to invest all his moneys in their hands received from the Transport Board, in any stock most beneficial to his estate: The agent wrote accordingly; but, some time before his letter arrived in England, the agents there, had, of their own accord, invested the whole of the testator's moneys in their hands in the four per cents.: And Sir L. Shadwell, V.-C., held, that the legacy was not adeemed: his Honor being of opinion that the unauthorized act of the agents could not alter the Will: and that a mere unexecuted intention to change the state of a fund, which the testator might have revoked, and which, in fact, was never carried into execution, cannot, in any sense, be considered as an ademption.

If a partner, under articles providing for the renewal of the partnership, specifically bequeaths his share of the profits (naming the amount), and upon the expiration of the old, new articles are entered into, by which his share of the profits is altered, the legacy will not be revoked by ademption (*f*).

Ademption of specific legacy of partnership share:

As to ademption of specific legacies of goods, it must be observed, that where the disposition of the subject is not absolute, the legacy will not be adeemed: As where a testator pawns or pledges an article specifically bequeathed, a right of redemption is left in him, and passes to the legatee at his death; so as to enable him to call on the executor to redeem and deliver it to him (*g*).

Ademption of specific legacy of goods:

not by pawning:

The ademption of a specific legacy of goods will sometimes be effected by the mere removal of them: Thus where

when by removal.

(*f*) *Blackwell v. Child*, Ambl. 260.

(*g*) *Ashburner v. M'Guire*, 2 Bro. C. C. 113, by Lord Thurlow.

the testator bequeathed all his books at his chambers in the Temple; and afterwards removed his books into the country, this was held to extinguish the legacy (*h*). So where the bequest was of all the testator's household goods, plate, linen, china, &c., &c., which should be in or about his dwelling-house at B. at the time of his death; and he afterwards took another house, into which he removed the greater part of the furniture from the house at B.; this removal was held an ademption (*i*). Again, where the testator bequeathed to his wife the lease of his house in Baker Street, and the household furniture, plate, pictures and certain other articles therein, and the lease having expired in his lifetime, part of the furniture was sold, and the remainder, together with the plate, pictures, and other articles, was removed to a house which the testator took in Edward Street, it was held, that the legacy was adeemed; because it was clear that the testator made the bequest of the furniture, &c., with reference to giving the lease, and that he had in contemplation an enjoyment of the house with the furniture, &c., and, consequently, that the bequest had totally failed by the change of circumstances (*k*).

Cases where
no ademption
by removal.

But no ademption by removal, it should seem, will take place, where the goods are removed for their preservation, as to save them from fire (*l*); or where they are removed by fraud, or without the testator's knowledge or authority (*m*); or where, by the nature of the place described, it is clear that their locality was not referred to, as essential to the bequest as in the case of a specific legacy of goods in a ship (*n*); or where the testator has two houses, in which he lives alter-

(*h*) *Green v. Symonds*, 1 Bro. C. C. 129, in note. But see *Cunningham v. Ross*, *post*, p. 1191. *Norris v. Norris*, *post*, p. 1191.

(*i*) *Heseltine v. Heseltine*, 3 Madd. 276. See also *Spencer v. Spencer*, 21 Beav. 548.

(*k*) *Colleton v. Garth*, 6 Sim. 19.

(*l*) *Chapman v. Hart*, 1 Ves. Sen. 273. *Re Johnston*, 26 C. D. 538, 553.

(*m*) *Shaftesbury v. Shaftesbury*, 2 Vern. 747.

(*n*) *Chapman v. Hart*, 1 Ves. Sen. 273.

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nately, and being possessed of one set of furniture only, which he removes with himself to each house, bequeaths, while residing in one of them, all his furniture in that house (o).

In *Cunningham v. Ross* (p), a testator bequeathed all his bills, bonds, &c., belonging to him, lying in the lodgings he possessed in the house belonging to Mr. Smith: At his death the testator had no effects in the house of Mr. Smith: It was contended that the legacy failed, on the authority of the case of *Shaftesbury v. Shaftesbury* (q), in which case the testator devised to his wife all his goods that should be in his house, and before his death, he removed all the goods from the said house, and the devise was held void: But Sir George Lee was of opinion that the present case differed from that; for there the testator devised all his goods *that should be in his house*, which implied, that should be there at his death; but in the present case the words were only descriptive of what the testator meant to bequeath; and therefore it was immaterial whether they remained at Smith's house at the time of his death or not.

Again, in *Norris v. Norris* (r), a testator bequeathed to his wife as follows:—"All my interest in my house at Lavender Hill, the furniture, books, pictures, wines, &c., &c.: After the date of his Will, the testator removed from Lavender Hill to Spencer Lodge, taking with him furniture, books, pictures, wines, and plate: He afterwards purchased more of these articles, and died at Spencer Lodge. And it was held by Knight Bruce, V.-C., that the testator's wife was entitled to the furniture, books, pictures, wines, and plate, which he had at the time of his death.

As to the ademption of specific legacies of terms for years; generally speaking, when the testator expresses himself in the present tense, and all the words directly refer to a lease

Ademption of legacies of terms for years:

(o) *Land v. Devaynes*, 4 Bro. C. C. 537. *Rawlinson v. Rawlinson*, 3 C. D. 302.

(p) 2 Cas. temp. Lee, 272.

(q) 2 Vern. 747.

(r) 2 Coll. 719.

of which he was *then* possessed, a specific legacy of such lease will be adeemed by a surrender; and a new term, acquired by the testator upon a renewal of the surrendered lease, will not pass to the specific legatee (a): but such an ademption will, it appears, be effected only when the testator has the *legal* estate in the term specifically bequeathed: for where the testator is merely a *cestui que trust*, and the equitable interest only is bequeathed, the Court will not permit a mere surrender of the old lease by the testator and his trustee to defeat the specific legacy, but will consider the intention of the testator appearing upon the Will (t).

And even before section 24 of the Wills Act, no such ademption would have taken place when the expressions of the bequest had a prospective or future operation, as where they were of "all the estate which *I have or shall have to come* in the land held by me under a lease from A." (u); or where the old lease containing a covenant on the part of the lessor to renew, the lessee bequeathed "all my right and interest under or *by virtue* of the lease" (x). Lastly, a surrender of a lease will not operate as an ademption, where the bequest is not specific; as where the testator devises "all and singular my leasehold estate, goods, chattels, and personal estate whatsoever" (y).

And now, by stat. 1 Vict. c. 26, s. 28, it is enacted, "that no conveyance or other act made or done subsequently to the execution of a Will of or relating to any real or personal estate therein comprised, except an act by which such Will shall be

1 Vict. c. 26,
s. 28:

bequest not to
be rendered
inoperative by
any subsequent
conveyance or
act.

(a) *Abney v. Miller*, 2 Atk. 593, 597. See also *Rudstone v. Anderson*, 2 Ves. Sen. 418. *Hone v. Medcraft*, 1 Bro. C. C. 261. *Porter v. Smith*, 16 Sim. 251. *Cooper v. Mantell*, 22 Beav. 223. But it must be remembered that by sect. 24 of the Wills Act every Will with reference to real and personal estate speaks from the death of the testator, unless a contrary intention appears.

(t) *Carte v. Carte*, 3 Atk. 174. *Slatter v. Noton*, 16 Ves. 201.

(u) *James v. Dean*, 11 Ves. 383, 389. *Abney v. Miller*, 2 Atk. 599. *Slatter v. Noton*, 16 Ves. 199. *Colegrave v. Manby*, 6 Madd. 84.

(x) 1 Rep. Leg. 311, 312, 3rd edit.

(y) *Stirling v. Lydiard*, 3 Atk. 199. *Digby v. Legard*, 2 Dick. 500. See *ante*, p. 1034: but see *James v. Dean*, 11 Ves. 390.

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revoked as aforesaid, shall prevent the operation of the Will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by Will at the time of his death" (z). And by section 24, "every Will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will" (a).

Sect. 24.

Will shall be construed to speak from the death of the testator.

The consequence of the 23rd section above stated is, that all those cases in which it was formerly held that a Will was revoked by an alteration of the estate of the testator are put an end to, and a Will can only be revoked by marriage, by express declaration in writing, or by burning, &c. Accordingly, where a testator devised real estates, and by a subsequent void deed, attested by two witnesses, conveyed them on other trusts, it was held that the deed was not a writing declaring an intention to revoke within the 20th section; and, therefore, that the Will operated on such estate and interest as the testator possessed in the property at his death (b).

(z) Thus in *Saxton v. Saxton*, 13 C. D. 359, a testator bequeathed to his wife all his term and interest in a leasehold house in which he then resided, and after the date of the Will purchased the freehold, and it was held that the wife took the freehold. Notwithstanding this enactment, however, if a testator devises real estate and afterwards sells it, and the purchase is not completed till after his death, the purchase-money belongs to his personal representatives and not to

his devisee: *Farrer v. Winterton*, 5 Beav. 1. *Ante*, p. 582. *Moor v. Raisbeck*, 12 Sim. 123. See *Gale v. Gale*, 21 Beav. 349. *Blake v. Blake*, 15 C. D. 481. In the goods of *Lloyd*, 9 P. D. 65.

(a) The cases as to the construction of this section will be found collected, *ante*, pp. 175-179, in notes (t), (u), and *post*, pp. 1298-1302.

(b) *Ford v. De Pontes*, 30 Beav. 572.

SECTION II.

Of the Ademption of Legacies given as Portions.

Ademption of
legacy given
by father as
a portion.

As to the ademption of legacies given as portions to children by their father: On this subject an artificial doctrine prevails in Courts of Equity, the establishment of which has excited the regret and censure of more than one eminent modern Judge, though it has also met with approbation from other high authorities. The rule is, that where a father gives a legacy to a child, it must be understood *as a portion*, although not so described in the Will, because it is a provision by a parent for his child (*c*); and if the father afterwards advances a portion for that child, as upon marriage, it will be a complete ademption of the legacy, not only in cases where the advancements are larger than, or equal to, the testamentary portions (*d*), but also, it has been said, in cases where the sums advanced are *less* than the sums bequeathed (*dd*). But it was decided by Lord Cottenham, in *Pym v. Lockyer* (*e*),

(*c*) By Lord Eldon, in *Ex parte Pye*, 18 Ves. 153. See also the judgment of Wigram, V.-C., in *Suisse v. Lowther*, 2 Hare, 434 *et seq.* The doctrine of ademption of legacies founded on parental or *quasi*-parental relation applies also to cases where a moral obligation other than parental or *quasi*-parental is recognised in the Will though without reference to any special application of the money: *Re Pollock*, 28 C. D. 552.

(*d*) *Ward v. Lant*, Prec. Chanc. 182. *Jenkins v. Powell*, 2 Vern. 115. *Upton v. Prince*, Cas. temp. Talb. 71. *Scotton v. Scotton*, 1 Str. 236. *Watson v. Lord Lincoln*, Ambl. 325. *Grave v. Salisbury*, 1

Bro. C. C. 427. *Carver v. Bowles*, 2 Russ. & M. 301. *Montague v. Montague*, 15 Beav. 565. 22 Bear. 488. *Hopwood v. Hopwood*, 7 H. L. C. 728.

(*dd*) *Hartop v. Whitmore*, 1 P. Wms. 681. *Clarke v. Burgoine*, 1 Dick. 353. *Ex parte Pye*, 18 Ves. 153. Where a sum is secured by a settlement on the marriage of the child, it is not necessary that it should be paid in order to operate as an ademption of a previous legacy: *Hopwood v. Hopwood*, 7 H. L. C. 728.

(*e*) 5 M. & Cr. 29. *Re Pollock*, 28 C. D. 552, 556. See *Accord*. *Kirk v. Eddowes*, 3 Hare, 515. Where the advance is a gift of

after a careful investigation of all the authorities, that where the portion is less than the legacy, it shall operate only as an ademption *pro tanto*. The legacy will not be set up by a codicil, made after the settlement, ratifying and confirming the Will, and all the devises and bequests therein contained (*f*).

This presumption against double portions will not be repelled, although there may be a difference between the nature of the provision made by the Will and of the provision under the subsequent settlement (*g*). And therefore the application of the principle of ademption will not be prevented by the circumstance that the limitations of the portion under the Will are widely different from the limitations of the portion under the settlement. This doctrine was settled by the decision of the House of Lords in *Durham v. Wharton* (*h*). In this respect there is a distinction between the principle of the ademption of legacies given as portions, and that of the satisfaction of debts by legacies (*i*).

stock, its value must be ascertained as at the time of the gift: *Watson v. Watson*, 33 Beav. 576.

(*f*) *Booker v. Allen*, 2 Russ. & M. 270. *Powys v. Mansfield*, 3 Mylne & Cr. 359. *Montague v. Montague*, 15 Beav. 565. *Hopwood v. Hopwood*, 7 H. L. C. 728.

(*g*) *Trimmer v. Bayne*, 7 Ves. 508. *Ex parte Pye*, 18 Ves. 153. *Hartopp v. Hartopp*, 17 Ves. 184. *Sheffield v. Coventry*, 2 Russ. & M. 317. *Platt v. Platt*, 3 Sim. 503. *Phillips v. Phillips*, 34 Beav. 19. *Dawson v. Dawson*, L. R. 4 Eq. 504. Where the settlement is made after the Will the presumption against double portions will not be repelled even by great differences in the nature of the gift by Will, and the obligations entered into by the testator settlor under the settlement. The difference between such a case and

the class of cases of which *Chichester v. Coventry* is a leading example, is that in this last class of cases, where the settlement precedes the Will a debt has been created anterior to the gift by Will and the gift has been construed not as a satisfaction of the debt, but rather as an additional bounty, especially where the Will contains an express direction for payment of debts: *Dawson v. Dawson*, *ubi sup.* *Cooper v. Macdonald*, L. R. 16 Eq. 258. *Stevenson v. Masson*, L. R. 17 Eq. 78. The direction to pay debts seems immaterial where the Will precedes the settlement: *Cooper v. Macdonald*, *ubi sup.*

(*h*) 10 Bligh, 526. 3 Cl. & Fin. 146.

(*i*) *Monck v. Monck*, 1 Ball & Beat. 298. *Durham v. Wharton*, 10 Bligh, 545. Accordingly, if a parent, having made a Will be-

It was formerly considered that where the bequest to the child is of a residue or part of a residue, the subsequent advance cannot operate as an ademption: because such a gift cannot be considered as a legacy of a portion, which must mean a legacy of a definite sum (k). But a contrary doctrine is now fully established (l).

queatling a certain sum to a child, takes upon himself to make a settlement of it, the variance between the provisions of the Will and those of the settlement affords no argument against the portion being a satisfaction of the legacy: Where, therefore, a father makes an absolute gift by his Will to his child, and afterwards, on the marriage of that child, settles a like sum on the husband and wife and their children, the provision of the settlement is a satisfaction of the legacy: *Barry v. Harding*, 1 J. & Lat. 475. Again, where a legacy is given to M. with a contingent limitation over to N., in the event of M. dying without children, and the legacy to M. is adeemed by a subsequent gift to M. in the lifetime of the testatrix, to which no limitation in favour of N. is attached; the legacy is not merely adeemed as to M., but extinguished as to N.: *Twining v. Powell*, 2 Coll. 282. See *Garner v. Holmes*, Cas. temp. Napier, 132, 133. *Phillips v. Phillips*, 34 Beav. 19. *McCarogher v. Whieldon*, L. R. 3 Eq. 236. In *Chichester v. Coventry*, L. R. 2 H. L. 71, it was laid down that the question whether a gift in a Will is a satisfaction of a portion given in a settlement, or a portion in a settlement is an ademption of a gift in a Will, is one of intention, and

that the rule that there is a presumption against double portions is founded on the assumption that the maker of the second instrument supposed himself to be substantially satisfying the obligations of the first. This rule is much easier of application where the Will precedes the settlement than where the settlement precedes the Will. In the latter case, the intention to satisfy a covenant must be distinctly expressed or clearly indicated. Great differences in the sums given, and in the limitations of the trusts on which they are given, will be taken as indications that the gift in the Will was not meant in satisfaction of the covenant. Where, too, the gift by the Will is not to the child, but to trustees to pay debts and legacies, and then to pay the residue to the child, the form of the gift will be taken as an indication that the debt due under the settlement must be paid before the residue is declared. *Chichester v. Coventry*, *supra*. *Re Tussaud's Estate*, 9 C. D. 363. For a case where the obligation under the settlement was held not to be a debt payable before the declaration of the residue, see *Bennett v. Houldsworth*, 6 C. D. 671.

(k) See *Farnham v. Phillips*, 2 Atk. 215.

(l) *Montefiore v. Guedalla*, 1 De Gex, F. & J. 93. See also *Schofield*

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The presumption, however, will not prevail, where the testamentary portion and subsequent advancement are not *ejusdem generis* (m); or where the subsequent advancement depends upon a contingency, and the testamentary portion is certain (n): or where a legacy or advancement is not merely given as a portion, but is expressed to be made in lieu of, or compensation for, an interest to which the child was entitled (o): In such cases the presumptive ademption by advancement will not take place. It should seem also, that the principle does not extend to devises of real estate (p).

Likewise, this presumption may be rebutted or confirmed by the application of parol evidence of a different intention by the testator (q). And where evidence is admissible for that purpose, counter-evidence is also admissible: And it was held by Sir John Leach, M. R., in *Booker v. Allen* (r),

Admissibility
of parol
evidence.

v. Heap, 27 Beav. 93. *Beckton v. Barton*, 27 Beav. 99. But the rules as to double portions though to a certain extent applied to gifts of residue in *Montefiore v. Guedalla*, *ubi sup.*, will not be applied for the benefit of a widow or stranger who may have an interest in the residue whether an interest for life or in the capital of the residue, the object of the rule being to secure equality among the children: *Meinertzen v. Walters*, L. R. 7 Ch. 670.

(m) *Holmes v. Holmes*, 1 Bro. C. C. 555. *Davys v. Boucher*, 3 Y. & Coll. 411. A gift of a sum of money to the husband of a daughter, by her father, *simpliciter*, after marriage, is not an ademption of a legacy given by him to his daughter: *Ravenscroft v. Jones*, 32 Beav. 669. Nor is an advance to the daughter herself of a sum for her marriage outfit, *ibid.* Nor

occasional small gifts, nor an annual allowance of a small sum: *Watson v. Watson*, 33 Beav. 574. *Schofield v. Heap*, 27 Beav. 93.

(n) *Spinks v. Robins*, 2 Atk. 491. See further, *Crompton v. Sale*, 2 P. Wms. 553. But see also the observations of Lord Cottenham in *Powys v. Mansfield*, 3 Mylne & Cr. 374, 375.

(o) *Baugh v. Read*, 1 Ves. 237. But see the observations of Lord Lyndhurst, in *Durham v. Wharton*, 10 Bligh, 546.

(p) *Davys v. Boucher*, 3 Younge & C. 397.

(q) *Trimmer v. Bayne*, 7 Ves. 508. *Powys v. Mansfield*, 3 Mylne & Cr. 359. *Hopwood v. Hopwood*, 7 H. L. C. 728. *Phillips v. Phillips*, 34 Beav. 19, 21. *Re Tussaud's Estate*, 9 C. D. 363, see *ante*, p. 1170, note (c).

(r) 2 Russ. & M. 270.

that if it be proved by parol evidence that the testator intended the provision made by the settlement to be in lieu of the legacy left by the Will, the settlement will be held a satisfaction of the legacy, though the two provisions differ so much from each other, that they cannot be considered substantially the same (s). The true rule appears to be that parol evidence is only properly admissible in such cases for the purpose of showing what the testator meant *by the act subsequent to the Will* (t). The law on this subject was fully considered, on an examination of all the previous authorities, by Wigram, V.-C., in *Kirk v. Eddowes* (u). In that case a testator bequeathed the sum of 3,000*l.* to his daughter for her separate use, for life, with remainder to her children as she should appoint: and, in default of appointment, to her children equally, with provisions for survivorship, advancement, and for the substitution of their issue; and subject to an annuity, and to his debts, he devised and bequeathed all the residue of his real and personal estate (naming securities for money) unto his son absolutely: After the date of the Will, the testator gave to his daughter and her husband a promissory note for 500*l.* then due to the testator: In a suit by the children of the daughter against the son, claiming to have the legacy of 3,000*l.* invested and secured for their benefit, the defendant tendered parol evidence that, after the date of the Will, the testator was requested by his daughter to confer some benefit on her husband, and that, thereupon, the testator gave her the promissory note, declaring that it was to be in part satisfaction of the legacy of 3,000*l.*: and that the testator was advised by his solicitor, that it was not necessary to alter his Will to give it that effect: And the learned judge held, that this evidence was admissible, as constituting an essential part of a transaction subsequent to, and independent of, the Will, of which subsequent transaction

(s) See also *Lloyd v. Harvey*, 2 Russ. & M. 310. 116—119, 131, 132.

(u) 3 Hare, 509. Compare

(t) *Hall v. Hill*, 1 Dr. & W. 94, *Smith v. Conder*, 9 C. D. 170.

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there was no evidence in writing : and that the parol evidence was not receivable as evidence of revocation or alteration of any part of the Will, but as evidence of a transaction, whereby the legatee had received part of her legacy by anticipation (x) : and that the advance to the daughter and her husband was an ademption *pro tanto* of the legacy bequeathed by the Will for the benefit of the daughter and her children, which was in the nature of a portion : though it might have been otherwise, if the children had been all living at the date of the Will, and been named therein individually, and not merely described as a class.

Where the testator is *in loco parentis* to the legatee, the legacy will be considered as a portion, and will be adeemed by a subsequent advancement, in all cases where it would be so, if made by the actual parent (y). But where the testator stands neither in the natural nor assumed relation of parent to the legatee, the legacy will be considered as a bounty, and will not be adeemed by a subsequent advancement (z) ; unless the legacy is given for a *particular* purpose, and the testator advances money for the *same* purpose (a) ; or unless the

Testator *in loco parentis* to legatee.

(x) His Honor disclaimed holding that declarations of the testator made at any other time than contemporaneously with the advance would be admissible. See also *Accord. McClure v. Evans*, 29 Beav. 422.

(y) *Monck v. Monck*, 1 Ball & Beat. 298. *Trimmer v. Bayne*, 7 Ves. 515. *Borlaser v. Allen*, 2 Rus. & M. 270. *Powys v. Mansfield*, 3 Mylne & Cr. 359. *Twining v. Powell*, 2 Coll. 262.

(z) *Wetherby v. Dixon*, 19 Ves. 407.

(a) *Debeze v. Mann*, 2 Bro. C. C. 166. *Monck v. Monck*, 1 Ball & Beat. 303. *Re Pollock*, 28 C. D. 552, 556. *Re Fletcher*, 38 C. D. 373 (where the legacy was of the amount of a debt). A legacy may

be treated as intended as satisfaction of a debt, even though the debt may have ceased to exist at the death of the testator, and even though the special purpose of the legacy is not mentioned in the Will. See *Re Fletcher (ubi sup.)*, in which case North, J., says, that the case stands in precisely the same position where the existence of the purpose is founded on a presumption of law which there is no evidence to rebut, *e. g.*, the presumption that a legacy of exactly the same amount as an existing debt is given in satisfaction of the debt. See also the observations of Lord Cottenham, in *Powys v. Mansfield*, 3 Mylne & Cr. 377. In the following cases the legacy was held *not*

intention otherwise legally appear that the advancement was made with a view to ademption (b). The question, who is to be considered as standing *in loco parentis*, with reference to this rule, is one of considerable difficulty (c), which must in a great degree depend upon the individual circumstances of each particular case.

Definition of
person *in loco*
parentis.

Admissibility
of parol
evidence to
prove testator
in loco
parentis.

The proper definition of a person *in loco parentis* to a child is, a person who means to put himself in the situation of the lawful father of the child, with reference to the father's office and duty of making a provision for the child (d). And it necessarily flows from the rule of presumption that parol evidence is admissible to prove that the testator was in this predicament: For if the acts of a party standing *in loco parentis* raise, in equity, a presumption which could not arise from the same acts of another person not standing in that situation, evidence must be admissible to prove or disprove the facts upon which the presumption is to depend; viz., whether he had meant to put himself *in loco parentis*; and as the fact to be tried is the intention of the party, his declarations, as well as his acts, must be admissible for that purpose (e). Mothers (f), great uncles (g), uncles (h), grandfathers or grandmothers (i), or putative fathers (k),

to be deemed by reason of the non-correspondence of the purposes of the legacy and the advancement: *Roome v. Roome*, 3 Atk. 181. *Spinks v. Robins*, 2 Atk. 491.

(b) *Pankhurst v. Howell*, L. R. 6 Ch. 136. *Re Fletcher*, 38 C. D. 373, 377.

(c) See the remarks of Lord Eldon in *Ex parte Pye*, 19 Ves. 150. *Bennet v. Bennet*, 10 C. D. 474, 477. The relation must exist at the time of the Will: *Watson v. Watson*, 33 Beav. 574.

(d) *Powys v. Mansfield*, 3 Mylne & Cr. 359. See *Rogers v. Southern*, 2 Keen, 598. *Tucker v. Burrow*,

2 Hemm. & M. 519. *Campbell v. Campbell*, L. R. 1 Eq. 383.

(e) *Powys v. Mansfield*, 3 Mylne & Cr. 370.

(f) *Bennet v. Bennet*, 10 C. D. 474. *Re De Visme*, 2 D. J. & S. 17. *Sayre v. Hughes*, L. R. 5 Eq. 376.

(g) *Shudal v. Jekyll*, 2 Atk. 516, 518.

(h) See *Powel v. Cleaver*, 2 Bro. C. C. 517, 518.

(i) *Roome v. Roome*, 3 Atk. 183. *Perry v. Whitehead*, 6 Ves. 547. *Lyddon v. Ellison*, 19 Beav. 565.

(k) *Grave v. Salisbury*, 1 Bro. C. C. 425, cited 6 Ves. 547.

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are not to be considered *in loco parentum*, unless they have intended to assume the office and duty of a parent. But a person may stand *in loco parentis* to a child, though the child resides with, and is maintained by his father (l). And when the testator's assumption of the office of a parent is established, his legacy will be considered a portion, and accordingly *primâ facie* adeemed by a subsequent advancement, not only in cases where he is collaterally related to, or the putative father of, the legatee, but also where no relationship of any kind subsists between them (m).

(l) *Powys v. Mansfield*, 3 Mylne & Cr. 359, overruling the decision of the Vice-Chancellor, 6 Sim. 528.

(m) *Re Pollock*, 28 C. D. 552, 558. The reader is referred to 1 Roper on Legacies, 333, 3rd edit., for an able examination of the question, as to what circumstances are sufficient to invest the testator with the assumed relation of parent to the legatee, and whether parol evidence is admissible to show that the legacy by a testator, who is not actually a parent, was intended

for a portion. Where parol testimony is given in order to rebut the presumption of ademption, (in a case where the evidence establishes the fact that the testator did mean to place himself *in loco parentis*), it is plain that the presumption may be supported by evidence of the same kind: *Powys v. Mansfield*, 3 Mylne & Cr. 370: And the declarations of the party are admissible in evidence for this purpose: *Powys v. Mansfield*, 3 Mylne & Cr. 374.

CHAPTER THE FOURTH.

OF THE PAYMENT OF LEGACIES.

SECTION I.

All debts must be paid before any Legacies are satisfied.

IT is obvious, that as the whole personal estate is liable in the hands of the executor to the payment of the debts of the testator, the executor must take care to discharge them, before he satisfies any description of legacy.

There is no distinction, in this respect, in favour of specific legacies: Hence if an executor, although acting *bonâ fide*, and under a conviction that the assets are amply sufficient for the payment of the testator's debts, permits specific legatees to retain or possess themselves of the articles bequeathed to them, he will be answerable for the value of those articles, with interest at 4l. per cent., if there should ultimately be a deficiency of assets, although the deficiency should be occasioned by subsequent events, which he had no reason to anticipate: And the Court will direct an account to be taken of the value of the property so possessed by the legatees, and interest to be computed, unless it is certain that the assets will ultimately be sufficient to pay all the creditors (a).

(a) *Spode v. Smith*, 3 Russ. Chanc. Cas. 511. So property specifically bequeathed is not discharged from its liability to the testator's debts by the circumstances that there has come to the hands of the executor personal property of the testator not spe-

cifically bequeathed, more than sufficient to pay his debts, &c., and that the specifically bequeathed property has been made over by the executor to the specific legatee: *Davies v. Nicolson*, 2 De G. & J. 693.

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There has already been occasion to point out, that even *voluntary* bonds and other debts by specialty, must be paid in preference to legacies (b).

Voluntary
debts.

With respect to *contingent* debts and liabilities, a question of great importance formerly arose; namely, whether an executor can safely make payment of legacies, or deliver over a residue, where there is an outstanding covenant of his testator (or bond, with a condition, or the like) which has never yet been broken, and which may or may not be broken hereafter.

Contingent
debts and
liabilities :

This question was discussed in *Nector v. Gennet* (c), *Eeles v. Lambert* (d), *Hawkins v. Day* (e), *Pearson v. Archdeaken* (f), and the result seems to be that an executor, with notice of even a possible liability, cannot safely make payment of legacies or pay over the residue to a residuary legatee. If he does, he will have no answer to the claim of the creditor whose contingent claim has ripened into a certain claim. Thus in *Taylor v. Taylor* (g) it was held that, where executors of a shareholder in a Joint Stock Company which was a going concern at the time of the testator's death, paid a legacy under his Will without providing for any contingent liability in respect of the shares which they retained unsold, they were liable to pay the amount of the legacy in satisfaction of calls (h). As against the legatees, however, the executor may claim repayment of the legacies even though he had notice of the contingent liability at the time when he distributed the estate, but not if, at the time when the legacy was paid, the contingent liability had ripened into a debt of which the executor had notice (i).

Executor with
notice of even
a possible
liability cannot
safely pay
legacies or
residue :

(b) *Ante*, pp. 869, 870.

(c) *Cro. Eliz.* 466.

(d) *Style*, 37, 54, 73.

(e) *Ambl.* 160.

(f) 1 *Alcock & Nap.* 23.

(g) *L. R.* 10 *Eq.* 477.

(h) See also *Knatchbull v.*

Fearnhead, 3 *M. & C.* 122. *Newcastle Banking Co. v. Hymers*, 22 *Beav.* 367.

(i) See *Jervis v. Wolferstan*, *L. R.* 18 *Eq.* 18. *Whittaker v. Kershaw*, 45 *C. D.* 320

when a legatee must give security against contingent debts and liabilities.

Such being the law, it was held that, when such liabilities exist, an executor is not bound to part with the assets, either to a particular or residuary legatee, without a sufficient indemnity; and that a Court of Equity will not compel him to do so without such indemnity, or without impounding a sufficient part of the residuary estate for that purpose (*k*), for otherwise, if the contingent covenants, &c., should afterwards be broken, the executor would be liable to answer the damages *de bonis propriis*, without any fault in him (*l*).

(*k*) *Simmons v. Bolland*, 3 Mer. 547. *Vernon v. Egmont*, 1 Bligh. N. S. 554. *Cochrane v. Robinson*, 11 Sim. 378. *Fletcher v. Stevenson*, 3 Hare, 360, 370. *Dobson v. Carpenter*, 12 Beav. 370. *Hickling v. Boyer*, 3 Mac. & G. 635. *Dean v. Allen*, 20 Beav. 1.

(*l*) The occasions for an order other than an order under the above-mentioned statute will probably not often occur, but where an executor, giving the Court all the information he possesses, acts under the order of the Court, he will be protected from liability in all cases. *Dean v. Allen*, 20 Beav. 1. See *Accord.*: *Smith v. Smith*, 1 Dr. & Sm. 384. *Dodson v. Sammell*, *ib.* 575. *Waller v. Barrett*, 24 Beav. 413. *Bennett v. Lytton*, 2 J. & H. 155. *Addams v. Ferick*, 26 Beav. 384. *Williams v. Headland*, 4 Giff. 505. *England v. Tredegar*, L. R. 1 Eq. 344. Formerly orders were made for indemnifying executors of lessees such as that in *Brewer v. Pocock*, 23 Beav. 210, but such an indemnity is now held unnecessary, because since the passing of Lord St. Leonard's Act (22 & 23 Vict. c. 35, s. 27), no such protection

is needed. The effect of that section is that, if the executor has sold the leaseholds and assigned them to a purchaser, he may without the order of the Court and of his own authority distribute the assets without making provision for future breach of covenant in the lease and shall not be subject to any liability. *Dodson v. Sammell*, 1 Dr. & Sm. 575. By that section it is enacted that "where an executor or administrator liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease, as may have accrued due, and been claimed, up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and shall have as

But it has always been held that an executor, who has assented unconditionally to a specific bequest of the testator's leasehold estates, is not entitled to an indemnity out of the testator's general estate in respect of his covenants contained in the leases (*m*).

It may here be mentioned, that the old practice of the Court of Chancery was, that the legatee should in all cases give the executor security to refund, if debts should afterwards appear (*n*). Afterwards the Court ceased to require such security (*o*); and since then creditors have been allowed, in Courts of Equity, to follow assets in the hands of legatees, as well as of the executor (*p*).

Another question arises, of great importance, and closely connected with the preceding inquiry, *viz.*, whether, under any circumstances, an executor or administrator can be allowed payments made to legatees, or parties entitled in distribution, as against creditors of whose claims he had no notice.

Payment of legacies before debts of which an executor has no notice.

signed the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively without appropriating any part or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease: and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the lease or agreement for a lease: but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow

the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed." This section has been held to be retrospective. *Smith v. Smith*, 1 Dr. & Sm. 384. *Re Green*, 2 De G. F. & J. 121. By section 28 similar provisions are made as to the liability of an executor in respect of covenants in conveyances on chief rent or rent-charge.

(*n*) *Shadbolt v. Woodfall*, 2 Coll. 30. See *Hickling v. Boyer*, 3 Mac. & G. 635, 646.

(*n*) *Chamberlain v. Chamberlain*, 1 Chanc. Cas. 257. *March v. Russell*, 3 Mylne & Cr. 41, 42.

(*o*) *Anon.* 1 Atk. 491.

(*p*) By Lord Hardwicke in *Hawkins v. Day*, Harg. MSS. Ambl. 804, Blunt's edit. *March v. Russell*, 3 Mylne & Cr. 42. *Post*, p. 1313.

The question was discussed in the cases of *The Governors of the Chelsea Water Works v. Couper* (q), *Norman v. Baldry* (r), *Smith v. Day* (s), *Knatchbull v. Fearnhead* (t), and *Hill v. Gomme* (u), and these authorities appear to demonstrate, that the mere circumstance of want of notice of a debt or claim against the estate of the deceased will not excuse an executor or administrator from the payment or satisfaction of it, if the assets were originally sufficient for the purpose, notwithstanding that, in ignorance of the existence of the debt or claim, he has *bond fide* handed over the assets to legatees or parties entitled in distribution. But it seems to have been considered, in some cases, that lapse of time may operate as a waiver of the right of the creditor or claimant, by way of *laches* on his part, so as to preclude him from complaining of the insufficiency of the assets (x); and Tindal, C. J., in *Richards v. Brown* (y) says, that if, in the distribution of assets, a creditor does mislead an executor, either by *laches* or express authority, so as thereby to induce the executor to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets (z).

22 & 23 Vict.
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The hardship on the executor has been much mitigated since the stat. 22 & 23 Vict. c. 35, s. 29, "where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or admi-

(q) 1 Esp. N. P. C. 275.

(r) 6 Sim. 621.

(s) 2 Mees. & W. 684.

(t) 3 Mylne & Cr. 122.

(u) 1 Beav. 540.

(x) *Davis v. Blackwell*, 9 Bingh.

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(y) 2 Bingh. N. S. 493.

(z) See *Accord. Stroud v. Stroud*, 7 M. & Gr. 417, 421. But Tindal, C. J., does not, although he uses the term *laches*, mean that the mere doing nothing will deprive the creditor of his right to complain

of a *devastavit*. There must be such a course of conduct or express authority whereby the executors have been misled into parting with assets available for payment of the creditor's claim : *Re Birch*, 27 C. D. 622. *Jewsbury v. Mummery*, L. R. 8 C. P. 60. And there is no rule in equity any more than in law that mere non-suing for any period within the time limited by the Statute of Limitations deprives a creditor of the right of requiring payment : *Re Baker*, 20 C. D. 230.

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nistrator is sought to be charged would have been given by the Court of Chancery in an administration suit for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate (a), such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets, or any part thereof, so distributed to any person of whose claim such executor or administrator

to be liable for debts, after distribution of the assets, of which he had not then notice.

(a) An executor who has distributed the assets of his testator after issuing advertisements and taking the steps pointed out by the Act, will have the same protection as if he had administered the estate under a decree of the Court, and if he should have retained any legacies as trustee after appropriating them for the benefit of the *cestui que trusts* he will no longer be under any liability *quod* executor. See *Clegg v. Rowland*, L. R. 3 Eq. 368. *Hunter v. Young*, 4 Ex. Div. 256. But an executor with notice of a claim against his testator's estate is not discharged by the fact that the person entitled to make the claim has failed to send in particulars in answer to the statutory advertisements. *Re Land Credit Company of Ireland, Markwell's Case*, 21 W. R. 135.

The executors of a testator whose estate was liable to replace trust money in consequence of a breach of trust, having only issued notices for claims against the testator's estate to be sent in within three weeks, by advertisements in local newspapers in the neighbourhood

where the testator resided and not in the *London Gazette*, was held by Lord Romilly, M. R., not to be protected from liability under the above section: *Wood v. Weightman*, L. R. 13 Eq. 434. It has, however, been held by North, J., in *Re Bracken*, 43 C. D. 1, that there is no absolute rule that notices issued by executors under the Act to creditors and others should (as was contended in that case) be published in a London daily newspaper of large circulation, or that a month should be allowed for the bringing in of claims. In determining whether executors have given such notices as are sufficient to entitle them to the protection of the section the Court will have regard to the circumstances of the particular case, such as the place of residence of the testator and his position in life.

The provisions of Section 29 are not confined to claims of *creditors* of the testator or intestate, but apply also to persons having claims as *next of kin*: *Newton v. Sherry*, 1 C. P. D. 246.

shall not have had notice at the time of distribution of the said assets, or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, into the hands of the person or persons who may have received the same respectively."

How far a creditor's priority over legatees may be barred in a suit for the administration of assets.

In conclusion of this subject, it may be proper to consider how far the laches of the creditor may affect his priority over legatees, where there is a suit for the administration of testator's assets. Although the language of the judgment, where an account of debts is directed, is, that those who do not come in shall be excluded from the benefit of that judgment; yet the course is, to permit a creditor, he paying the costs of the proceedings, to prove his debt, as long as there happens to be a residuary fund in Court, or in the hands of the executor, and to pay him out of that residue (b): If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred from the benefit of that judgment: If he chooses to sue the legatees and bring back the fund he may do so (c): but he cannot affect the legatees, except by suit; and he cannot affect the executor at all (d).

A point of considerable difficulty arises, if a creditor does

(b) By Lord Eldon in *Gillespie v. Alexander*, 3 Russ. Chanc. Cas. 136. *March v. Russell*, 3 Mylne & Cr. 41. *Hartwell v. Colman*, 16 Beav. 140. See the observations of Lord Lyndhurst, in *Vernon v. Egmont*, 1 Bligh, N. S. 570. It should seem that, after report settled, though not signed, in a creditor's suit, a creditor cannot be let in to prove his debt without a special application to the Court; and he must submit to be visited with costs and pay the usual penalty for default: *Parker v. Morley*, 3 Younge & C. 720. But see *Lee v. Flood*, 2 Sm. & G. 250.

(c) See *post*, p. 1313. *David v. Frowd*, 1 M. & K. 209, 210. *Sawyer v. Birchmore*, 1 Keen, 401. 2 M. & Cr. 611. *March v. Russell*, 3 Mylne & Cr. 31. *Underwood v. Hatton*, 5 Beav. 36.

(d) *Gillespie v. Alexander*, 3 Russ. Chanc. Cas. 136, 137. *David v. Frowd*, 1 M. & K. 209, 210. *Seale v. Buller*, 2 Giff. 312. The creditor has, it should seem, under such circumstances, lost his legal title by the administration of the Court of Equity, and his only remedy is in that Court: *David v. Frowd*, 1 M. & K. 210.

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not come in until some individual legatees have received their legacies in full under the sanction of the Court, and there are left in Court certain funds which have been directed to be appropriated to other individual legatees, who have not been paid: The question then is, whether a creditor, so coming in, is to be paid his whole debt by the unpaid legatees; or whether the rule is not, that he should take from them such a proportion only of his debt as would have been borne by them if he had applied before the other legacies were paid, and that he should be left to recover the residue of it against the paid legatees: In the case of *Gillespie v. Alexander* (e), (which was a suit for the administration of a testator's assets,) after a decree on further directions had sanctioned payments made by the executor in discharge of legacies, and had directed the fund in Court to be apportioned among the other legatees, a creditor obtained permission to prove his debt: The Master subsequently reported a debt to be due to him; but in the meantime the fund had been apportioned, and part of it had been paid over, while the remainder had been carried to the account of particular legatees, who were infants: And Lord Eldon held, that the creditor was entitled to receive out of the funds of the legatees so remaining in Court, not the whole of the debt, but only part of it, bearing the same proportion to the whole as the legacies given to those legatees bore to the whole amount of the legacies given by the Will; and that he must seek the payment of the rest of his debt, in proper proportions, amongst those legatees who had been actually paid (f).

(e) 3 Russ. Chanc. Cas. 130.

(f) See *David v. Frowd*, 1 M. & K. 210, *Accord.* by Sir J. Leach, M. R. But the rule applied in *Gillespie v. Alexander*, is not applicable where the estate has not been administered by the Court: *Davies v. Nicolson*, 2 De G. & J. 603. Where a decree has been

made for the administration of the estate of a deceased person, and the assets in hand have been distributed among his creditors, who have come in and proved, and at a later period further funds come in, and some only of the creditors who had proved come forward in answer to advertisements, the creditors

Accordingly, in *Greig v. Somerville (g)*, in a suit instituted in 1814, to administer the personal estate of an intestate who died in 1807, the Master reported that no debts had been proved; and by the decree on further directions, in 1817, the whole of the residue was apportioned and distributed; but as the plaintiff was then an infant, his share, amounting to four-ninths of the fund, was retained, and carried to his separate account: In 1825, a foreign prince, claiming to be a creditor of the intestate, petitioned for leave to prove his debt against the sum remaining in Court; and the plaintiff coming of age soon after, applied to have that sum paid out: And Lord Lyndhurst held, that the creditor was not precluded by the previous proceedings, or the lapse of time, from tendering such proof before the Master; but that every defence should be allowed there, which would have been competent upon a new bill; that the debt, if established, must be restricted, as against the fund in Court, to that proportion which the plaintiff's share bore to the whole amount distributed; and therefore, that after reserving a sum equal to four-ninths of the claim, the residue of the fund ought to be paid out to the plaintiff (*h*).

who thus claim payment at the later period are not entitled to have the whole of the new fund applied so far as it will extend in payment of their claims, but only to receive rateable proportions of it according to the proportion which their debts bear to the total amount of the debts.

(*g*) 1 Russ. & M. 338.

(*h*) The general rule then being that mere delay does not prevent a creditor coming in to prove while there are assets in hand: *Brown v. Lake*, 1 De G. & Sm. 144. The question in each case seems to be whether there is anything to take it out of the general rule. Thus in *Cattell v. Simons*, 8 Beav. 243,

a bond creditor had proved his debt and also claimed to have an equitable mortgage for the amount. The matter having stood over for amendment by the creditor and he, through his neglect to amend, being reported as a bond creditor only, the estate was sold, the money paid into Court, and an apportionment directed. Nine years afterwards his personal representative presented a petition for liberty to go in and establish his mortgage, alleging that he had recently discovered that the amendment had not been made; it was dismissed with costs. On the other hand, in *Re Metcalfe*, 13 C. D. 236, a creditor who had obtained an

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SECTION II.

Of the Abatement of Legacies.

1. As to the abatement of general legacies. In case the assets be sufficient to answer the debts and specific legacies, but not the general legacies, the latter are subject to abatement.

In case of deficiency of assets, general legatees must abate before specific :

This abatement must take place among all the general legatees in equal proportions (*i*): And the executor has no power to give himself a preference in regard to his own legacy, as he has in the instance of his own debt (*k*).

Generally speaking, nothing shall, in such cases, be abated from the specific legacies (*l*). But if the testator bequeaths specific legacies, and also general pecuniary legacies, and directs by his Will that such pecuniary legacies shall come out of all his personal estate, or words tantamount; then, if there be no other personal estate than the specific legacies, they must be intended to be subject to those which are pecuniary; otherwise, the words of the bequest to the pecuniary legatees would be nugatory (*m*).

It must here be observed, that a *residuary* legatee has no right to call upon particular general legatees to abate: The

but a residuary legatee cannot call on them to abate.

order for raising the amount which he then claimed out of a testator's realty, was afterwards allowed, the assets being undistributed, to obtain an order by way of amendment, increasing the amount to be raised, although he had in his possession, at the time of obtaining the first order, a book, which, if he had known of the existence of a particular entry, would have supplied the information on which the claim to amend was based.

(*i*) Treat. Eq. Bk. 4, Pt. 1, ch. 2, s. 5. With regard to general lega-

cies of stock, the abatement will be regulated by the value of stock at the end of one year next after the testator's death: Blackshaw v. Rogers, cited *per curiam*, in Simons v. Vallance, 4 Bro. C. C. 349. Auther v. Auther, 13 Sim. 440, *per* Shadwell, V.-C.

(*k*) Toller, 347.

(*l*) Treat. Eq. Bk. 4, Pt. 1, ch. 2, s. 5. Clifton v. Burt, 1 P. Wms. 676. 2 Black. Com. 513. Toller, 339.

(*m*) Sayer v. Sayer, Prec. Chanc. 393. Treat. Eq. Bk. 4, Pt. 1, ch. 2, s. 5.

whole personal estate not specifically bequeathed must be exhausted, before those legatees can be obliged to contribute anything out of their bequests (*n*).

So if there is a simple bequest of an annuity, there is no doubt but that, however great or small the income of the testator's property may be, the annuity must be paid in full to the last farthing of the property (*o*). But the provisions of the Will as to the payment of the annuity may be such as to show an intention, on the part of the testator, that the annuity shall only come out of the income of the fund or estate, and not out of the *corpus* or capital. The general rule is, that if there be a clear gift of a life-interest and a reversion, and the estate proves insufficient, each party, the tenant for life and the reversioner, must bear the loss in proportion to his interest: But if there is a gift of an annuity, and a residuary gift, the annuity takes precedence, and the whole loss falls on the residuary legatee (*p*).

(*n*) *Purse v. Snaplin*, 1 Atk. 418. *Fonnereau v. Poyntz*, 1 Bro. C. C. 478. See *Harley v. Moon*, 1 Dr. & Sm. 623. *Baker v. Farmer*, L. R. 3 Ch. 537.

(*o*) *Croly v. Weld*, 3 De Gex, M. & G. 993, 996, by Knight Bruce, V.-C.

(*p*) *Ibid.* 995, by Lord Justice Turner. *Infra*, note (*r*). The following are cases in which annuities have been held payable out of the *corpus* or capital of the testator's estate: *Miller v. Huddleston*, 17 Sim. 71. *Haynes v. Haynes*, 3 D.M. & G. 590. *Croly v. Weld*, *ib.* 993. *Miner v. Baldwin*, 1 Sm. & G. 522. *Mills v. Drewett*, 20 Beav. 636. *Perkins v. Cooke*, 2 J. & H. 393. *Hickman v. Upsall*, 2 Giff. 124. *Howarth v. Rothwell*, 30 Beav. 516. *Bright v. Larcher*, 3 De G. & J. 48. *Upton v. Vanner*, 1 Dr. &

Sm. 594. *Phillips v. Gutteridge*, 32 L. J. Ch. 1. *Birch v. Sherratt*, L. R. 2 Ch. 644. *Pearson v. Helliwell*, L. R. 18 Eq. 411. *Re Hedges' Trust*, L. R. 18 Eq. 410. *Michell v. Wilton*, L. R. 20 Eq. 269. *Re Mason*, 8 C. D. 411. *Carmichael v. Gee*, 5 App. Cas. 588, *sub nom.* *Gee v. Mahood*, 11 C. D. 891, reversing S. C. 9 C. D. 151. The following are cases in which they were held payable out of *income*: *Tarbottom v. Earle*, 11 W. R. 680. *Bague v. Dumergue*, 10 Hare, 462. *Hindle v. Taylor*, 20 Beav. 109. *Baker v. Baker*, 6 H. L. C. 616 (reversing S. C. 20 Beav. 548). 7 De G. M. & G. 681. *Stelfox v. Sugden*, Johns. 234. *Booth v. Coulton*, L. R. 5 Ch. 684. *Taylor v. Taylor*, L. R. 17 Eq. 324. *Wormald v. Muzeen*, 17 C. D. 167. The question may generally be put in the terms used by Lord Gifford in *May*

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In *Farmer v. Mills* (q), a testator, by his Will, bequeathed certain annuities, and directed that sums set apart to secure them, should, as the annuitant died, sink into the residue of his personal estate: By a codicil to his Will, he stated, that in case his property would not provide an income equal to the annuities, they should be rateably reduced: His estate was deficient, and the annuities were rateably reduced: And it was held by Sir John Leach, M. R., that upon the death of any annuitant, the sum, set apart to secure the reduced annuity, would belong to the residuary legatees, and was not to be applied to increase the reduced annuities to the amount given by the Will: His Honor, however, observed,

v. Bennett, 1 Russ. 370, viz., whether the bequest is to be considered as a bequest of an annuity or as the bequest of the income (or part of the income) of a sum directed to be set apart. The case of *Wright v. Callender*, 2 De G. M. & G. 652, is an instance of the former class. *Baker v. Baker* (*ubi sup.*) is an instance of the latter. If the gift is of an annuity not so limited as to make it payable exclusively out of the income of a particular fund during the annuitant's lifetime, it will be a charge on the *corpus* to the loss of those interested in the residuary estate. If, on the other hand, what is bequeathed is the income of a particular fund, then, if the income does not come up to the expectation of the testator, the annuitant will have to bear the loss. *Carmichael v. Gee*, 5 App. Cas. 588, 597, in which case Lord Selborne says that *Millers v. Huddleston*, if rightly decided, depended on the special language of a very special Will. The mere fact that the gift of an annuity is followed by a direction to set apart a fund to secure it, will not cut down the

right of an annuitant to a right to receive only the income of fund. *Re Mason*, 8 C. D. 411. A provision that the fund out of which the annuity is directed to be paid shall fall into the residue after the death of the annuitant, is an indication that the testator meant to bequeath an annuity: *May v. Bennett* (*ubi sup.*). *Wright v. Callender* (*ubi sup.*). A provision for the destination of the surplus income during the life of the annuitant goes to show that the annuity is a charge on the income only: *Wormald v. Muzeen*, 17 C. D. 167, 169. *Stelfox v. Sugden*, Johns. 234, 240. Where a testator directs that out of the income of a fund invested or to be invested a life annuity is to be paid, and there is no direction that the annuity is to be paid out of income to accrue in the lifetime of the annuitant, the annuity is a charge on the income, even after the death of the annuitant, until the arrears of the annuity are satisfied: *Booth v. Coulton*, L. R. 5 Ch. 684.

(q) 4 Russ. 86.

that if the case had rested upon the Will, the residuary legatees could have taken no benefit, until the annuities were fully provided for (r).

In *Arnold v. Arnold* (s), a testator desired that A., B., and C. might each enjoy, during life, the interest of 800*l.* sterling, the principal to devolve eventually to his residuary legatees: He directed the residue of his property to be divided into three equal parts, one part to each of his brothers and his sister; and if his brothers and sister should not survive him, or have legal issue living at the testator's death, then their shares to devolve in equal proportions to the survivors, as

(r) In *Scott v. Salmond*, 1 M. & K. 363, a testator gave several life annuities charged upon a particular fund, the income of which he considered to be equal to them in value; and he gave the fund itself over to another person for life, upon the respective deaths of the annuitants: The fund having proved deficient, and the annuitants having suffered a proportional abatement, it was held, by Sir J. Leach, M. R., and afterwards by Lord Brougham, on appeal, that on the death of one of them, the income from the fund released by the falling in of her annuity went over to the tenant for life, and was not applicable to make good the deficiency of the continuing annuities. See also *Page v. Leapingwell*, 18 Ves. 463, *Miller v. Huddleston*, L. R. 6 Eq. 65. *Re Lyne's Estate*, L. R. 8 Eq. 482. *Re Tootal's Estate*, 2 C. D. 628. See also *Wright v. Weston*, 26 Beav. 429. But where a testator, having a power of appointment by Will over a sum of stock, bequeathed two sums of 5,000*l.* and 500*l.* sterling thereout to A. and B., and the residue to his

son; and the stock became in Equity liable to his debts, and by payment thereof, and of the costs of the suit, the fund became less than 5,500*l.* sterling, it was held by Romilly, M. R., that the pecuniary and residuary legatees were not liable to abate proportionally, but that the residuary gift failed altogether: *Petre v. Petre*, 14 Beav. 971. See also *Harley v. Moon*, 1 Dr. & Sm. 623. The question would seem to be, does the testator deal with a given sum which he assumes to be available, or does he not. If a man dealing with a sum of stock or a specific amount says, "I bequeath so much to A., so much to B., and the rest to C.," the fund must be divided in those exact proportions, and if the stock falls short the loss must be apportioned amongst all the legatees in the same proportion: but if the testator is not dealing with a specific amount, or does not assume to be so doing, the loss will fall on the residuary legatee. *Elwes v. Causton*, 30 Beav. 554. *De Lisle v. Hodges*, L. R. 17 Eq. 440.

(s) 2 M. & K. 374.

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well as the shares that might have been devised to their issue: The testator's estate was not sufficient to pay the legacies in full: And Sir C. Pepys, M. R., held, that upon the death of one of the tenants for life an apportionment of the legacy of 800*l.*, set apart to answer her life interest, fell into the residue, and was not given over to the residuary legatees in their individual character; and that the surviving tenants for life were entitled to have the deficiencies in their annuities satisfied out of the released fund: And his Honor observed, on *Farmer v. Mills* (t) being cited, that in that case the testator's codicil expressly provided that the annuities should be rateably reduced; and that, but for that codicil, the residuary legatees could have taken no benefit until the annuities were fully paid.

A point of considerable difficulty arises in cases where there are pecuniary legatees and a residuary legatee, and by reason of the *devastavit* of the executor the estate becomes insufficient to pay all the pecuniary legacies: The question then is, whether, there being at the testator's death a residue of a certain sum, the residuary legatee is not entitled to rank as a legatee of that sum.

In *Dyose v. Dyose* (u), Lord Cowper, in the instance of deficiency by a *devastavit*, held, that he was bound to consider the residuary legatee as entitled to something, if the state of the assets at the death of the testator left a residue; and that the wreck of the estate, which could be recovered after the *devastavit*, was divisible, not among the pecuniary legatees alone, but among all the legatees according to the proportion of their legacies, and allowing the residuary legatee to claim as a legatee of the amount of the residue as it stood at the death of the testator.

But this decision came under the consideration of Lord Thurlow, in the cases of *Fonereau v. Poyntz* (x), and *Humphreys v. Humphreys* (y); on both which occasions his

(t) *Ante*, p. 1213.

(u) 1 P. Wms. 305.

(x) 1 Bro. C. C. 478.

(y) 2 Cox, 186.

Lordship condemned the doctrine of it: And this condemnation was approved by Sir William Grant in *Page v. Leapingwell* (z).

On the other hand, in *Ex parte Chadwin* (a), Lord Eldon, after reviewing all the preceding authorities, seems to consider the question as unsettled: and his decree in that case may, perhaps, be considered as in some measure confirmatory of *Dyose v. Dyose*, though certainly on a totally different principle.

The case alluded to, *Ex parte Chadwin* (b), is an authority to show that a legatee, entitled to a priority, may have so dealt, in respect to his legacy, with an executor guilty of a *devastavit*, as to lose all priority, and to render it just, that the estate should be divided as if no *devastavit* had taken place: There the testator directed his trustees and executors, after sale of his estates, to stand possessed of the money arising from the sales, upon trust, in the first place, to invest 400*l.* in trust for his wife for life in bar of dower, and after her death for W. C., and upon further trust, out of the residue of the money, to invest 400*l.* in trust for J. R. for life, and after his death for his children; and upon further trust, to pay other sums to persons named; and he bequeathed the residue of his estate to W. C.: The only acting executor made no investment on the trust of the Will, but paid interest on the two sums of 400*l.* to the respective legatees, and applied the assets to his own use, and afterwards became bankrupt: Lord Eldon was of opinion, that, by so dealing with the executor, these two legatees had made him their debtor for their legacies respectively: And upon that ground his Lordship decreed, that the dividends payable upon the whole sum proved under the commission against the executor in respect of the testator's estate should be divided among the pecuniary and the residuary legatees, in the proportion of the amount of their legacies, and of the residue, as it was computed at the death of the intestate, with interest on each.

(z) 18 Ves. 466.

(a) 3 Swanst. 367.

(b) 3 Swanst. 380.

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In *Willmott v. Jenkins* (c), an executor, who was also trustee, divided the assets: He paid to the adult legatees their shares, and invested the shares of the infants in his own name, but he executed no declaration of trust thereof: He afterwards applied these sums to his own use: Further assets having unexpectedly fallen in, Lord Langdale, M. R., held that they ought, in the first place, to be applied in making good the infants' legacies: And the learned Judge said, that if an executor makes payments to a legatee in person, or to a trustee for a legatee, or makes such appropriation as is equivalent to payment, the other persons entitled under the Will are not to be called on to contribute for any loss which may afterwards happen to the fund so paid or appropriated (d); but that if there be no payment, and no appropriation equivalent to payment, his Lordship did not see why, if anything afterwards comes to the hands of the executors, it should not be applied in discharge of the legacies of the unpaid legatees (e).

The general rule is, that, among legacies in their nature general (according to the distinctions attempted to be pointed out in a previous chapter) there is no preference of payment: they shall all abate together, and proportionally, in case of a deficiency of assets to satisfy them all. But this must be understood only as among legatees, who are all volunteers; for if there be any valuable consideration for the testamentary gift, as where a general legacy is given in consideration of a debt owing to the legatee, or of the relinquishment of any right or interest, as of her dower by a widow (f), such

Priority,
among general
legatees, of
purchasers
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teers:

(c) 1 Beav. 401.

(d) See *Morris v. Livie*, 1 Y. & Coll. Ch. C. 380. *Post*, pp. 1260, 1261.

(e) Where there has been no consent of the legatees to the special appropriation of the fund out of which their legacies are payable, the ordinary rule that the residuary legatee can take

nothing till all the pecuniary legatees have been paid must prevail. *Baker v. Farmer*, L. R. 3 Ch. 537 (reversing *Malins v. C.*, L. R. 4 Eq. 382). *Harley v. Moon*, 1 Dr. & Sm. 623.

(f) *Burridge v. Bradyl*, 1 P. Wms. 127. *Heath v. Dendy*, 1 Russ. Ch. C. 543. *Norcott v. Gordon*, 14 Sim. 258. But such a

legacy will be entitled to a preference of payment over the other general legacies, which are mere bounties (*g*); and it should seem that the preference will be allowed, though the bequest should exceed the value of the right or interest relinquished by the legatee (*h*). But it is requisite that the right or interest should be subsisting at the testator's death (*i*).

In *Heath v. Dendy* (*k*), the testator, having by a post-nuptial settlement made certain provisions for his wife, which were expressed to be in bar of dower, bequeathed to her specific legacies, and also a general legacy, adding, that what he had so given her, together with the provision made for her by the settlement, should be in lieu of any dower which she might claim: The assets proved insufficient for the payment of the legacies in full: And Lord Gifford, M. R., held, that the wife was entitled to priority over the other legatees, and that the legacy given to her ought not to abate proportionally with the other legacies: His Lordship, in giving judgment, observed, that if, at the death of the testator, his widow had not been entitled to dower, then, according to the principle of the previous authorities, she could not have claimed any priority: But, at his death, her right to dower was in full force; and she was to release her dower, not merely for the provision which the settlement made, but for that provision taken in conjunction with the legacy: It was not material whether the sum bequeathed was or was not the whole of the consideration for the release of the dower: If it was only part of the consideration, she was nevertheless

legacy has no priority, where the testator leaves no real estate out of which the widow is dowable: *Acey v. Simpson*, 5 Beav. 35; or where the only real estate of the testator was conveyed to him with a declaration against dower: *Roper v. Roper*, 3 C. D. 714. The decision of Malins, V.-C., in this case has since been approved by Chitty, J., in *Re Greenwood* [1892], 2 Ch. 295, 299, although he dis-

sents from the dictum of the Vice-Chancellor that, if the dower had been barred by the will, the widow would have been entitled to priority.

(*g*) Treat. Eq. B. 4, Pt. 1, ch. 2, s. 5.

(*h*) Ambl. 244.

(*i*) *Blower v. Morret*, 2 Ves. Sen. 422.

(*k*) 1 Russ. Chanc. Cas. 543.

a purchaser of the sum, and was entitled to priority over the other legatees (l).

In *Davies v. Bush* (m), a testator had bequeathed a legacy to a person, between whom and himself accounts had subsisted for some time, on condition of his executing to the testator's executors a general release of all claims and demands which the legatee had on the testator: The legatee executed the release: The assets were insufficient for the payment of all the legacies; and the question was, whether this particular legatee was, by the execution of the release, a purchaser of his legacy, and entitled to be paid in preference to the other legatees; or whether he was bound to abate rateably with them: It did not appear whether the legatee had any legal claim or demand on the testator: Lord Lyndhurst, C. B., was of opinion, that if there was not a debt actually due to the legatee, he could not be considered as a purchaser of the legacy, so as to avoid an abatement with the other legatees: If no debt were due, and the release was required merely for the sake of peace, then, unquestionably, the legatee could not be treated as a purchaser.

General legacies, bequeathed to creditors, whose debts have been previously liquidated by composition at less than their real amounts, are merely voluntary, and therefore not exempt from abatement together with other general legacies upon a deficiency of assets (n). So where the testator bequeaths money to pay the debts of a relation or friend, such legacies must be considered as bounties, and in no better condition than other general legacies (o).

(l) It is enacted by stat. 3 & 4 W. IV. c. 105 (Act for the amendment of the Law relating to Dower), s. 12, that nothing in this Act contained shall interfere with any rule of equity, or of any Ecclesiastical Court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies. See *Re Green-*

wood [1892], 2 Ch. 295.

(m) 1 Younge, 341.

(n) *Coppin v. Coppin*, 2 P. WMS. 296. See *Turner v. Martin*, 7 De Gex, M. & G. 429. *Ante*, p. 1074, note (a). See, however, *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449, 451, and compare with that case *Ex parte Banner*, 17 C. D. 480, 490.

(o) *Shirt v. Westby*, 16 Ves. 396.

instances
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legatees is not
allowable:

It must here be observed, that a legacy, which is, in its nature, general, and given to a volunteer, will not be entitled to any exemption from abatement, on the ground of its being applied to any particular object or purpose: Thus legacies of a certain sum each to executors for their care and trouble (*p*), or of sums of money for mourning rings (*q*), or to servants (*r*), or to charities (*s*), are not to be preferred to other general legacies. And although the bequest is made in favour of a wife or child of the testator, it can claim no preference, but must abate with the rest of the general legacies (*t*).

annuity
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is a general
legacy.

Again, an annuity charged on the personal estate is a general legacy (*u*). And, therefore, as between annuitants and legatees, there is no priority where there is a deficient estate, but both must abate proportionably (*x*). And whether

(*p*) *Duncan v. Watts*, 16 Beav. 204.

(*q*) *Apreece v. Apreece*, 1 Ves. & Bena. 364. In *Masters v. Masters*, 1 P. Wms. 423, Lord Parker exempted a legacy of a certain sum for building a monument to the memory of a relation from abating with the general legacies; but this decision has been doubted on strong grounds: See *Blackshaw v. Rogers*, cited 4 Bro. C. C. 349.

(*r*) *Att.-Gen. v. Robins*, 2 P. Wms. 25.

(*s*) *Att.-Gen. v. Hudson*, 1 P. Wms. 675. *Bishop of Peterborough v. Mortlock*, 1 Bro. C. C. 566.

(*t*) *Blower v. Morret*, 2 Ves. Sen. 420. Unless from the construction of the Will it appears that the testator has shown intention to give priority to a particular legacy. *Re Hardy*, 17 C. D. 798. In the case of *Re Hardy*, Malins, V.-C., seems to have said, "*Blower v. Morret* is in my opinion distinguishable in many respects, but if

it is not, then I say 'nt from it and decline to follow. In the late case of *Re Schweder's Estate* [1891], 3 Ch. 44, Chitty, J., said, "In my opinion *Re Hardy* was not distinguishable from *Blower v. Morret*, and with all due respect to the learned Vice-Chancellor (who decided it) he was bound by it. I think I am constrained by *Blower v. Morret*, and by the continued course of the authorities since that decision, to dissent from *Re Hardy* as I do."

(*u*) *Innes v. Mitchell*, 1 Phill. Ch. C. 716, per Lord Lyndhurst. 11 Cl. & F. 508, per Lord Cottenham. *Miller v. Huddleston*, 3 Mac. & G. 512. But if annuities are given as specific gifts of interest in the real estate, they shall not abate with legacies charged generally on the real estate: *Creed v. Creed*, 11 Cl. & F. 491 (overruling the decision of Sugden, C., of Ireland, 1 Dr. & W. 416).

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an annuity is to commence immediately on the death of the testator or at a future period, this principle will equally apply (y). And if annuities abate with reference to other legacies, they must, of course, abate between themselves. Accordingly, in *Innes v. Mitchell* (z), a testator had bequeathed an annuity of 800*l.* to his three daughters, and the survivors and survivor, with a gift over to the last survivor of the sum set apart to answer the annuity: After the death of one of the daughters, the fund set apart was lost by the misconduct of the trustee, and the annuity remained unpaid for the rest of the lives of the other two; but after their deaths a sum of money, forming part of the residue, but of less amount than the original fund, became available: And it was held, that the annuity must be supposed to have continued until it was put an end to by the principal money falling in; and that such money must be apportioned rateably between the arrears which would, on that supposition, be due to the daughters respectively, and the sum originally set apart, and which belonged to the last survivor (a).

But if by the express words or fair construction of the Will, the intent of the testator is clearly manifest to give one general legatee a priority to the others, that intention must be carried into effect (b): as where the testator gave legacies to his two sons and his daughter, with a proviso, that if the assets should fall short for the satisfaction of those legacies,

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valued, and the annuitant will be entitled at once to the amount of the valuation, subject to an abatement in proportion to the abatement of the pecuniary legacies: *Wroughton v. Colquhoun*, 1 De G. & Sm. 357. *Carr v. Ingleby*, *ibid.* 362. *Long v. Hughes*, *ibid.* 364. But see *Wright v. Callender*, 2 De Gex, M. & G. 652. *Gratrix v. Chambers*, 2 Giff. 321.

(y) *Innes v. Mitchell*, 1 Phill. Ch. C. 716.

(z) 2 Phill. Ch. C. 346, reversing in part the decision 1 Phill. Ch. C. 710.

(a) See also *Todd v. Bielby*, 27 Beav. 353, as to the proper mode of ascertaining the value of the annuities, in a case where several annuities are given, and the fund proves deficient, and some of the annuitants are dead and some are living. *Heath v. Nugent*, 29 Beav. 226. See also *Potts v. Smith*, L. R. 8 Eq. 683. *Re Wilkins*, 27 C. D. 703. As to the period at which the value must be taken, see *Fielding v. Preston*, 1 De G. & J. 438.

(b) *Lewin v. Lewin*, 2 Ves. Sen. 415. *Re Hardy*, 17 C. D. 798, 803.

his daughter notwithstanding should be paid her full legacy, and the abatement be borne proportionally by the legacies of the sons only (c). So where the testator, after giving various legacies, expressed at the end of his Will his apprehension that there would be a considerable surplus of his personal estate, beyond what he had before given away in legacies, for which reason he gave several further legacies; and afterwards, by a codicil, he gave several other legacies; it was decreed, that the subsequent legacies given by the Will, having been given on a presumption that there would be a surplus, and there happening to be no surplus, the former legacies should have a preference, and the legacies at the end of the Will should be lost; and also, that the same apprehension of a surplus must be intended to have continued in the testator at the time of making his codicil: and therefore, unless the inference could be repelled, the legacies given by the codicil must be lost also (d). Again, where a testator gave 1,000*l.* to trustees upon trust to pay the interest to his wife, during her life, and after her decease he declared his will to be, that the 1,000*l.* should become part of his personal estate, and applicable to the trusts or payment of the legacies given by his Will; and he gave a legacy of 500*l.*, in trust for N. M. and his wife, in nearly the same words; it was held, that a priority was given to these two legacies (e).

But the *onus* lies on the party seeking priority, to make

(c) *Marsh v. Evans*, 1 P. Wms. 668.

(d) *Att. Gen. v. Robins*, 2 P. Wms. 53. See also *Accord. Stammers v. Halliley*, 12 Sim. 42.

(e) *Brown v. Brown*, 1 Keen, 275. *Re Hardy*, 17 C. D. 798. There would seem to be no presumption of an intention to give priority to a wife or children before strangers, notwithstanding the observations of Malins, V.-C., in this case; as the learned Vice-Chancellor himself recognizes in

Roper v. Roper, 3 C. D. 714, 720. See for further examples of preference of general legatees in payment, in consequence of the intention of the testator, not expressed in terms, but sufficiently apparent from the whole contents of the Will, *Lewin v. Lewin*, 2 Ves. Sen. 415. *Beeston v. Booth*, 4 Madd. 161, 170. *Pepper v. Bloomfield*, 3 Dr. & W. 499. *Haynes v. Haynes*, 3 De Gex, M. & G. 590. *Gyett v. Williams*, 2 Johns. & H. 429.

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out that such priority was intended by the testator, and the proof of this must be clear and conclusive (*f*). The reason of it is, that the testator, in the absence of plain proof to the contrary, must be deemed to have considered that his estate would be sufficient to answer the purposes to which he has devoted it, and consequently not to have thought it necessary to provide against a deficiency by giving a priority, in case of a deficiency, to some of the objects of his bounty. Therefore where the expressions are ambiguous, and do not mark with certainty the testator's intention, no priority can be allowed: Thus it is not sufficient that the testator gives a direction as to a general legacy to his wife, that it shall be paid *immediately* after his death, out of the *first* money that shall be received by the executors (*g*). So if the words are "*Imprimis*," or "in the first place, I give 1,000*l.* to A.," this will not give a priority to other general legatees (*h*). In the case of *Beeston v. Booth* (*i*), the testator gave his personal estate to executors, in the first place, to pay debts, funeral and testamentary expenses; and in the next place, three legacies to B., C., and D., with legal interest from three months after his death; and afterwards to raise and set apart three sums of money to be applied as therein mentioned: Upon a question of abatement, the Court declared, upon the principle before stated, that none of the legacies were entitled to a priority of payment, and therefore, that all of them must abate proportionally, according to the general rule (*k*).

(*f*) *Miller v. Huddlestone*, 3 Mac. & G. 523, by Lord Truro.

(*g*) *Blower v. Morret*, 2 Ves. Sen. 420. But this case was expressly dissented from by Malins, V.-C., in *Re Hardy*, 17 C. D. 798, 801, where he held that a bequest by a testator to his wife of all his furniture and effects, together with the sum of 500*l.* "*which I direct to be paid to her immediately after my decease*," had priority over all the

other pecuniary legacies. See, however, *contra*, *Re Schweder's Estate* [1891], 3 Ch. 44.

(*h*) *Brown v. Allen*, 1 Vern 31.

(*i*) 4 Madd. 161.

(*k*) See also *Thwaites v. Foreman*, 1 Coll. 409. *Creed v. Creed*, 1 Dr. & W. 416. 11 Cl. & F. 491. *Ashburnham v. Ashburnham*, 16 Sim. 186. *Miller v. Huddlestone*, 17 Sim. 71. 3 Mac. & G. 513. *Lord Dunboyne v. Brander*, 18 Beav.

Legacies in
the nature of
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legacies.

It is necessary here to refer to the class of legacies alluded to in a previous section (*l*), as being in the nature of specific legacies, and sometimes called demonstrative legacies, viz. bequests of money with reference to a particular fund for their payment, and not simply a gift of the specific fund itself; Those legatees have such a lien upon the specific fund referred to, that they will not be obliged to abate with general legatees: And in this, as in the preceding cases, the testator's intention is the principle: for it is inferred, that he, in referring to specific parts of his estate for payment for particular legacies, intended those legacies as a preference to others which he had not so secured (*m*).

Of the abate-
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cific legacies.

It has appeared, that as long as any of the assets, not specifically bequeathed, remain, such as are specifically bequeathed are not to be applied in payment of debts (*n*); although to the complete disappointment of the general legacies: But when the assets, not specifically bequeathed, are insufficient to pay all the debts, then the specific legatees must abate, in proportion to the value of their individual legacies (*o*). So a legatee entitled to a legacy of the sort just mentioned, in the nature of a specific legacy, must abate with the specific legatees (*p*).

An important inquiry, connected with this subject, some-

313. *Eavestaff v. Austin*, 19 Beav.
591. *Haynes v. Haynes*, 3 De Gex,
M. & G. 591. *Coore v. Todd*, 23
Beav. 92. 7 De Gex, M. & G.
520. *Wright v. Weston*, 26 Beav.
429. *Haslewood v. Green*, 28
Beav. 1. *Elwes v. Causton*, 30 Beav.
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(*l*) *Ante*, p. 1021.

(*m*) *Roberts v. Pocock*, 4 Ves.
150. *Lambert v. Lambert*, 11 Ves.
607. *Robinson v. Geldard*, 3 M.
& G. 735, 745, by Lord Truro.
Acton v. Acton, 1 Meriv. 178.
Creed v. Creed, 11 Cl. & F. 491,

509, *per* Lord Cottenham. *Tem-
pest v. Tempest*, 2 K. & J. 635,
affd. 26 L. J. Ch. 501.

(*n*) Or of costs, when a suit has
been instituted: *Barton v. Cocke*,
5 Ves. 464. But see *Newbegin v.*
Bell, 23 Beav. 386.

(*o*) *Sleech v. Thorington*, 2 Ves.
Sen. 561, 564. *Clifton v. Burt*,
1 P. Wms. 680. *Duke of Devon*
v. Atkins, 2 P. Wms. 382, 383.
2 Fonbl. Treat. Eq. B. 4, Pt. 1,
ch. 2, s. 5, note (*g*). See *Fielding*
v. Preston, 1 De G. & J. 438.

(*p*) *Roberts v. Pocock*, 4 Ves. 160.

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times occurs; viz. under what circumstances the specific legatees of chattels can compel the devisees of the real estate of the testator to contribute to the satisfaction of his debts, in case the general personal estate proves insufficient for that purpose. But it will be more convenient to consider this question hereafter, together with the subject of the exoneration of real estate (7) and the doctrine of marshalling assets (r).

SECTION III.

Of the Executor's Assent to a Legacy.

The whole personal property of the testator, as it has appeared in a former part of this work, devolves upon his executor (s). It is his duty to apply it, in the first place, to the payment of the debts of the deceased; and he is responsible to the creditors for the satisfaction of their demands, to the extent of the whole estate, without regard to the testator's having by the Will directed that a portion of it shall be applied to other purposes (t). Hence, as a protection to the executor, the law imposes the necessity that every legatee, whether general or specific, and whether of chattels real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect (u).

Necessity of executor's assent to complete the title of legatee.

Hence, also, the legatee has no authority to take possession of his legacy without such assent, although the testator, by his Will, expressly direct that he shall do so: for if this were permitted, a testator might appoint all his effects to be thus taken, in fraud of his creditors (x).

Before such assent, however, the legatee has an inchoate right to the legacy, such as is transmissible to his own per-

(q) *Post*, Pt. IV. Bk. I. Ch. II. § 1.

(r) *Ibid.* § II.

(s) *Ante*, p. 570.

(t) *Ante*, p. 1202.

(u) *Swinb.* Pt. 1, § 6, pl. 5, s. 7, pl. 1. 1 *Saund.* 427, note (3) to *Duppa v. Mayo*.

(x) *Wentw. Off. Ex.* 409, 14th edit.

sonal representatives, in case of his death before it be paid or delivered (y).

Again, if the testator by Will forgive a debt due to him from a particular person, it is the better opinion, that the assent of the executor is necessary to give effect to the testator's intention; for although on the one hand, it may be alleged that the party, to whom the debt is bequeathed, must necessarily have it by way of retainer, and that such a clause operates rather as an extinguishment than as a donation, and therefore that it needs no such assent, as where there is to be a transfer of the property: yet on the other hand, a debt so forgiven is regarded, with great reason, in the light of a legacy, and, like other legacies, not to be sanctioned by the executor, in case the estate be insufficient for the payment of debts: But as soon as the executor assents, and not before, it shall be effectually discharged (s).

Until modern times, it appears to have been the practice of the Bank of England, with respect to government stock or annuities, grounded upon the statute 5 W. & M. c. 20, by which the Bank was instituted, and upon the other Acts of Parliament which regulate the devise of property transferable at the Bank (by which the probates of Wills are directed to be there deposited, for the purpose of having the trusts extracted), in cases where stock, &c., has been specifically bequeathed, without the intervention of trustees, to permit the transfer to be made to the legatees, and not to the executor; and when trustees have been appointed, then to the trustees, with a restriction not to allow of a transfer to any other persons, except those named in the Will: It seems, however, to be now clear, that this practice is erroneous, and that the executor, having the legal right to the specific as well as to the general assets, to pay debts, &c., has the sole right to call upon the Bank to transfer the

(y) Wentw. Off. Ex. 69, 14th edit. 332. *Sibthorp v. Moxom*, 3 Atk. 581. *Elliott v. Davenport*, 1 P.

(s) Wentw. Off. Ex. 72, 14th edit. *Rider v. Wager*, 2 P. Wms. 41. Wms. 83. *Izon v. Butler*, 2 Price,

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stock into his name: as no interest in it vests in the legatees prior to his assent (*a*). It also appears to be immaterial whether such property be given specifically in the strict sense of the word, or as a residue; such property being to be considered in no other view than the other general assets as to this purpose, and therefore subject to all the incidents of a testamentary disposition of personal estate (*b*). And now, by stat. 33 & 34 Vict. c. 71, s. 23, it is expressly enacted, that all stock, standing in the name of any deceased person, shall and may be assigned and transferred by the executors or administrators of the deceased, notwithstanding any specific bequest thereof (*c*).

It follows from the rule respecting the necessity of the executor's assent, that if, without it, the legatee takes possession of the thing bequeathed, the executor may maintain an action of trespass or trover against him: So although a chattel, real or personal, specifically bequeathed, be in the custody or possession of the legatee, and the assets be fully adequate to the payment of debts, he has no right to retain it in opposition to the executor; by whom, in such case, an action will lie to recover it (*d*).

If an executor refuse his assent without cause, he may be compelled to give it, by a Court of Equity (*e*).

With respect to what shall constitute such assent on the part of the executor, the law has for this purpose prescribed no specific form; and it may be either express or implied (*f*): The executor may not only in direct terms authorize the legatee to take possession of his legacy, but his concurrence may be inferred either from direct expressions or particular

What shall constitute an assent.

(*a*) See *ante*, p. 721. *Humberstone v. Chase*, 2 Younge & C. 209.

(*b*) 1 Rep. Leg. 732, 3rd edit.

(*c*) See *ante*, pp. 721, 722.

(*d*) *Mead v. Orrery*, 3 Atk. 239. *Wentw. Off. Ex.* 409, 14th edit. *Com. Dig. Admon. (C. 5). Bac. Abr. Exors. (L.) 3.*

(*e*) *Com. Dig. Admon. (C. 8).*

(*f*) Whether there has been an assent or not may involve matters of law, but it is generally a question of fact: *Elliott v. Elliott*, 9 M. & W. 27, *per* Lord Abinger. *Mason v. Farnell*, 13 M. & W. 674.

acts; and such constructive permission shall be equally available (*g*). Thus, for instance, if a horse is bequeathed, and the executor requests the legatee to dispose of it; or if a third person proposes to purchase the horse of the executor, and he directs him to buy it of the legatee; or if the executor himself purchases the horse of the legatee, or merely offers him money for it, this amounts to an assent by implication to the legacy (*h*). So where the legatee of a term of years grants it to the executor, his acceptance of the grant, either for himself or as trustee, is an implied permission that the term shall be the legatee's to grant (*i*). So in a case where the rents or interest of a bequest are directed to be applied for the maintenance of the legatee during minority, if the executor commences so to apply them, his consent to the principal will be presumed (*k*); or if the legacy be subject to a charge, which is paid by the executor; for assent to the charge is assent to the disposition of the fund out of which it is to be satisfied (*l*).

Again, when the executor informs a legatee that he intends him to have the legacy according to the devise (*m*), or that the legacy is ready for him whenever he will call for it (*n*); such declarations clearly amount to a good assent to the bequest.

On the other hand, since the assent to a legacy by an executor may, in its consequences, be of great prejudice to

(*g*) Com. Dig. Admon. (C. 6). Toller, 308, 309.

(*h*) Wentw. Off. Ex. 414, 14th edit. Com. Dig. Admon. (C. 6). Toller, 309.

(*i*) Wentw. Off. Ex. 414, 14th edit. Com. Dig. Admon. (C. 6). So where a term of years, subject to a quit rent, was devised, and after the testator's death, his administrator with the Will annexed paid the quit rent for six years, and in an account rendered to the devisee, debited him with the pay-

ments so made; Tindal, C. J., held that this was sufficient to show the assent of the administrator to the bequest: Doe v. Mabblerley, 6 C. & P. 126.

(*k*) Paramour v. Yardley, Plowd. 539.

(*l*) Young v. Holmes, 1 Stra. 70. (*m*) Touchst. 456. Barnard v. Pumfrett, 5 M. & Cr. 70, per Lord Cottenham.

(*n*) Hawkes v. Saunders, Cowp. 293. Barnard v. Pumfrett, 5 M. & Cr. 70.

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him, it is but reasonable that the act or expressions deemed sufficient to impart that assent should be unambiguous (*o*). Hence a proposition stated in a book of authority (*p*) may be doubted; viz., that if the executor say to a legatee "God send you joy of your legacy," those expressions will amount to an assent: For if such words were uttered before the executor had had an opportunity of examining the testator's affairs, it would surely be unjust to construe words of congratulation into terms of assent to a legacy, so as to involve the executor in the consequences of a *devastavit*; although it may be otherwise, if those expressions were uttered after the executor had had sufficient time to acquaint himself with the state of the assets (*q*).

If a term of years or other chattel be bequeathed to A. for life, with remainder to B., and the executor assents to the interest of A., such interest will enure to vest that of B.; and *e converso*: for the particular estate and the remainder constitute but one estate (*r*). So an assent to a bequest of a lease for years is an assent to a condition or contingency annexed to it (*s*): As if there be a devise of a term to the testator's widow so long as she continue unmarried; and if she marry, then of a rent payable out of the land; the executor's assent to the devise of the term is an assent to that of the rent in case of the devisee's marriage (*t*). So an assent to a devise of a chattel lease is an assent to a devise of rent out of it (*u*). But if a lessee for years bequeaths a rent to A. and the land to B., it has been doubted whether the executor's assent that A. shall have the rent is an assent that B. shall have the land (*x*). However,

(*o*) See *Doe v. Harris*, 16 M. & W. 517.

(*p*) *Shep. Touchat.* 456.

(*q*) 1 *Rop. Leg.* 736, 3rd edit.

(*r*) *Stevenson v. Mayor of Liverpool*, L. R. 10 Q. B. 81. But where there is a bequest of a number of articles, as stock in trade or plate, the executor may properly withhold his assent as

to part: *Elliott v. Elliott*, 9 M. & W. 23.

(*s*) *Com. Dig. Admon.* (C. 6).

(*t*) *Goffe v. Haywood*, 1 Roll. Abr. 620, tit. Devise (E.) pl. 2.

(*u*) *Com. Dig. Admon.* (C. 6). 1 Roll. Abr. 620, tit. Devise (E.) pl. 3.

(*x*) *Gough v. Howard*, 3 Bulst. 122.

it is said to be now established, that in this case also, an assent to the bequest to one shall enure to the benefit of the other; on the ground that as the assent of the executor is required as well for the benefit of creditors as for his own, an inference arises, from his assent to one of the legatees of the specific property, that he had no occasion for the term or rent to pay debts; for if he had, then his assent to either of the legatees would be improper, as both ought to abate *pro ratâ* (y).

Presumed
assent.

In certain cases, the assent of the executor may be presumed; upon the principle, that, in the absence of evidence, the executors shall be taken to have acted in conformity with their duty; as when executors die after the debts are paid, but before the legacies are satisfied (z). So, as it should seem, the assent of an executor may be concluded from the legatee's possessing himself of the subject bequeathed, and retaining it for some considerable time without complaint by the executor (a).

Conditional
assent.

The assent of the executor may also be upon a condition precedent, as if he should tell the legatee that he will pay the legacy, provided the assets are sufficient to answer all demands: or in the case of a devise of a term for years, provided the devisee will pay the rent in arrear at the testator's death; and in that case, if the condition be not performed, there is no assent (b). But it should seem that if the condition is such as the executor had no authority to impose, for example, if he should declare his assent, provided the legatee went to York, and there did a thing for the executor's personal benefit, the assent would be considered absolute (c). So if the assent be on a condition subsequent, as, provided the legatee will pay the executor a certain sum annually,

(y) 1 Rep. Leg. 738, 3rd edit.

(z) See *Cray v. Willis*, 2 P. Wms. 531, 532.

(a) Mathews on Presumptions, 267. 3 Preston Abstr. 145, 2nd edit. *Cole v. Miles*, 10 Hare, 179. This appears to be a question for

the jury: *Richardson v. Gifford*, 1 Adol. & Ell. 52.

(b) Wentw. Off. Ex. 429, 14th edit.

(c) *Elliott v. Elliott*, 9 M. & W. 28, *per Parke*, B.

such condition is void, and a failure in performing it shall not divest the legatee of his legacy (*d*).

It must now be inquired by whom the assent to a legacy may be given. It has appeared in an earlier part of this work, that a person appointed executor may assent to a legacy before he proves the Will (*e*), and that even if he should die without taking probate, his assent would be effectual (*f*). Again, there has already been occasion to observe that if several executors be appointed, the assent of any one of them is sufficient (*g*); and therefore if there be a legacy to one of several executors, he may take it of his own assent, without the others (*h*). Further, the efficacy of an assent by an administrator *durante minore etate*, in case of an infant being constituted executor (*i*), has been elsewhere previously considered in this Treatise.

By whom the assent can be given :

At law, after an assent by the executor to a specific legacy, the interest in the chattel bequeathed vests in the legatee (*k*), so that he may bring ejectment (*l*), or trover (*m*), to recover it, even against the executor himself. And there has already been occasion to show (*n*), that an executor who has assented unconditionally to a specific bequest of the testator's leaseholds, is not entitled, in a Court of Equity, to require an indemnity out of the testator's general estate in respect of his covenants contained in the leases.

effect of assent :

If there be a specific bequest to the executor himself in trust, and he assents to it, the thing bequeathed thereupon ceases to be a part of the testator's assets, and the executor becomes a trustee of it for those who are beneficially interested (*o*).

(*d*) Wentw. Off. Ex. 429, 14th edit.

(*e*) *Ante*, p. 250.

(*f*) *Ibid*.

(*g*) *Ante*, p. 818.

(*h*) 1 Roll. Abr. 618. Devise, (B.) pl. 2, Perk. s. 572. Com. Dig. Admon. (C. 8). Townson v. Tickell, 3 B. & A. 31, 40.

(*i*) *Ante*, p. 423.

(*k*) Doe v. Guy, 3 East, 120.

(*l*) *Ibid*.

(*m*) Williams v. Lee, 3 Atk. 223.

(*n*) *Ante*, p. 1205. Shadbolt v. Woodfall, 2 Coll. 30.

(*o*) Dix v. Burford, 19 Beav. 409.

in what cases
the assent may
be retracted.

It is likewise true, as a general proposition, that if an executor once assent to a legacy, he can never afterwards retract (*p*); and notwithstanding a subsequent dissent, a specific legatee has a right to take the legacy, and has a lien on the assets for that specific part, and may follow them (*q*). But if the assent has not been completed by payment, in the case of a general legacy, or possession, in that of a specific one, and its recall is not attended with injury to a third person, as to a *bonâ fide* purchaser from the legatee on the faith of such assent, it seems only reasonable, that the executor under particular circumstances, should have the power of retracting it; as where he assents upon a reasonable ground for considering that the assets are sufficient to answer all demands, but unknown debts are unexpectedly claimed, which occasion a deficiency (*r*). Moreover, if the assent has been completed by payment or possession, and afterwards debts appear, of which the executor had no previous notice, he may compel the legatee to refund (*s*).

Relation of
assent to death
of testator.

The assent of an executor shall have relation to the time of the testator's death: Hence, in the case of a devise of a term of years in tithes, in an advowson, or in a house or land, if after the testator's death, and before the executor's assent, tithes are set out, the church becomes void, or rent from the undertenant becomes payable, the assent by relation shall perfect the legatee's title to these several interests (*t*). So

(*p*) Wentw. Off. Ex. 415, 14th edit. Com. Dig. Admon. (C. 8). The author of the Office of an Executor expresses his opinion that an assent cannot be after a dissent, but thinks the question doubtful: p. 415, *et seq.* 14th edit. So, if executors have set apart and appropriated assets to meet a legacy, and have admitted to the legatee that such appropriation has been made, they cannot retain or impound any

part of such appropriated assets to meet a debt from the legatee to the general estate of the testator: Ballard v. Marsden, 14 C. D. 374.

(*q*) Mead v. Orrery, 3 Atk. 238. Toller, 311.

(*r*) See 1 Rep. Leg. 743, 3rd edit.

(*s*) See *post*, p. 1312. Doe v. Guy, 3 East, 123. *Ante*, p. 802, note (*f*).

(*t*) Wentw. Off. Ex. 445, 446,

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such assent shall by relation confirm an intermediate grant by the legatee of his legacy (*u*).

In a case of a legacy bequeathed to the executor, the union of the two characters of executor and legatee in one person makes no difference; for his assent is as necessary to a legacy's vesting in him in the capacity of legatee, as to a legacy's vesting in any other person (*x*): and that on the same principle, *viz.* that until he has examined the state of the assets, he is incompetent to decide whether they will admit of his taking the thing bequeathed as a legacy, and whether it must not of necessity be applied in satisfaction of debts (*y*).

Executor's assent to his own legacy :

His assent to his own legacy, may, as well as his assent to that of another legatee, be either express or implied: He may not only, in positive terms, announce his election to take it as a bequest, but such election may also be implied from his language or his conduct (*z*). The rule as to the latter, as laid down by Gibbs, C. J., *Doe v. Sturges* (*a*), is that "if an executor, in his manner of administering the property, does any act which shows he has assented to the legacy, that shall be taken as evidence of his assent; but if his acts are referable to his character of executor, they are not evidence of assent to the legacy."

Therefore, if the executor say that he will have the legacy according to the Will (*b*); or if by deed reciting that he has a term for years by devise, he grant it over (*c*); this will amount to an assent to take it as legatee. So if he take the

14th edit. Saunders's case, 5 Co.

12, b.

(*u*) Toller, 311. This is put doubtfully in Wentw. Off. Ex. 69, 445, 14th edit.; and see the remark of Gibbs, C. J., at the conclusion of his judgment, in *Doe v. Sturges*, 7 Taunt. 223.

(*z*) Toller, 345.

(*y*) Wentw. Off. Ex. 67, 68, 14th

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edit. Toller, 345.

(*a*) Toller, 345. *Fenton v. Clegg*, 9 Exch. 680.

(*a*) 7 Taunt. 223.

(*b*) Com. Dig. Admon. (C. 6). *Garrett v. Lister*, 1 Lev. 25.

(*c*) Com. Dig. Admon. (C. 6). So if he disposes of it by his own Will: *Fenton v. Clegg*, 9 Exch. 680.

profits of a term to his own use (*d*), or repair the tenement bequeathed, at his own expense (*e*), or if he exclude a co-executor from a joint-occupancy of a term with him (*f*), all these acts indicate an assent to the bequest. So if a term of years be devised to the executor for life, and afterwards to A. B., if the executor say that A. B. will have it after him, that implies an election to take it as legatee (*g*). In like manner, if he perform a condition or trust annexed to the devise; as if a lessee for years devise his term to his executor, on condition of his paying 10*l.* a year to J. S., which he pays accordingly; this payment amounts to an election on his part to take the lease as a legacy, and it is in law an execution of the legacy for ever; for he who performs the charge of a thing, claims the benefit which is annexed to it (*h*). Again, an assent to take part as a residuary legatee, is an assent also to take the whole residue in the same character (*i*). On the other hand, if the executor merely say, that the testator "left all to him" (*k*), this will not amount to an election to take as legatee. Further, if the executor demise a term bequeathed to him by the description of executor, this cannot be construed into an assent, because the act is consistent with his power and character as executor (*l*): And even a lease by him in his own name, if the lease be in its terms inconsistent with his title as legatee, will not amount to an assent to take as legatee (*m*): It is a rule, that it is not sufficient, to constitute an implied assent, to show that the act is equally applicable to the title of legatee as to the character of executor (*n*).

(*d*) Com. Dig. Admon. (C. 6.)

(*e*) Com. Dig. Admon. (C. 6.)
Cheyney v. Smith, 1 Leon. 216.

(*f*) Anon. Dyer, 277, b. Com.
Dig. Admon. (C. 6.)

(*g*) Garrett v. Lister, 1 Lev. 25.
Com. Dig. (C. 6.)

(*h*) Paramour v. Yardley, Plowd.
544. Com. Dig. Admon. (C. 6.)

(*i*) Hinson v. Button, 2 Roll.
Rep. 158.

(*k*) 1 Roll. Abr. 620. Devise,
(D.) pl. 6. Com. Dig. Admon.
(C. 7.)

(*l*) Cheyney v. Smith, 1 Leon.
316. Com. Dig. Admon. (C. 7.)

(*m*) Doe v. Sturges, 7 Taunt.
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(*n*) *Ibid.* 217. See also Trail v.
Bull, 1 Coll. 360, per K. Bruce,
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Until the executor has made his election, either express or implied, he shall take the legacy as executor, though all the debts have been paid independently of such bequest (o).

With regard to the effect of *entry* by the executor into possession of a term of years bequeathed to him, the following distinction exists: Where the *entire* term is given to the executor, an entry will amount to an election to take as legatee: But where a sole executor, or one of several executors, takes an interest in a leasehold estate for life, or any *partial* interest, he must do something more than enter, in order to give assent to his legacy (p). There is a substantial reason for this distinction; for if his general entry on his life estate were an election to enter as legatee, it would necessarily confirm the remainder devised over (q); and that might happen in cases wherein he might want the estate in remainder for sale, in order to pay the testator's debts: Such an assent would be a *devastavit* in the executor, which might be a grievous hardship to him: But if the devise to him be absolute, the same reason does not exist; for he has the value of the whole term, as an equivalent, to indemnify himself against the consequences of the *devastavit* (r).

In *Doe v. Sturges* (s), the law on this subject was fully considered by the Court of Common Pleas: In that case the testator bequeathed a term of years to his nephew Samuel Haynes for life, with remainder over, appointing Samuel and two other persons trustees and executors, with power for Samuel during life, and afterwards for the surviving executors and trustees, to demise the lands for twenty-one years: Samuel alone entered upon the property at the testator's death, and demised it for fourteen and forty-two years, reserving the rent to himself, his executors, &c.: He also made the contract for this lease in his own name, and

Effect of executor's entry into possession of a term bequeathed to him.

(o) Com. Dig. Admon. (C. 5.)

(q) See *ante*, p. 1220.

(p) *Doe v. Sturges*, 7 Taunt.

(r) *Doe v. Sturges*, 7 Taunt. 217,

217, 221. S. P. *per* Parke, J., *Doe*

221, by Gibbs, C. J., 514.

v. Tatchell, 3 B. & Adol. 680. See

(s) 7 Taunt. 217.

Touchs. 457, *contra*.

disposed of the estate by his Will, one of his co-executors being alive: The estate was claimed by the plaintiff, deriving title under the Will of the first testator, in opposition to the interest of the defendant, a purchaser from the lessee: The lease could not be supported under the power, and, as a demise by a mere tenant for life, it determined upon his death; but as a lease by one of several executors, it might be supported, unless the executor Samuel had previously assented to the devise himself: In that event, the legal interest in the term in remainder after his death vested in the devisees over, which entitled them to recover; since the demise by the executor, in the character of a legatee, could only continue during his life; But the Court decided, that neither his entering into the land, nor his sole lease reserving rent to himself and his executors, (which was alike inconsistent with his interest as tenant for life, and his duty as executor,) should be deemed an assent to the legacy; and that the lease should therefore take effect for the whole forty-two years, out of the lessor's legal interest as executor.

In the case of the *Atty.-Gen. v. Potter* (t), a testator bequeathed a leasehold house, and his residuary estate, to his wife, and John Lane and James Potter, whom he appointed his executrix and executors, in trust to permit his said wife to receive the rents, interest and profits for life, and afterwards to pay certain legacies, and the residue was given to Ann, the wife of the said James Potter, and three others, or such of them as should be living at his death: The widow, with the permission of her co-executors, retained possession of the house during her life, and Ann Potter, together with the three others, executed a deed, whereby they agreed to take as tenants in common; and it was also executed by James Potter the executor, and husband of Ann; And it was held by Lord Langdale, M. R., that no assent to the legacy of the house in remainder had been constituted by these facts.

(t) 5 Beav. 164.

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However an entry by an executor, to whom a partial interest only in a term of years had been bequeathed, may, accompanied by other circumstances, amount to an election to take as legatee: As where an executor, devisee for life of a term of years, enters upon the lands, explaining the act by a declaration that he claims the estate as devisee for life (*u*). So where a lease is devised to an executor, during the minority of the testator's eldest son, to the intent that with the profits he should educate all the children, and the residue of term, after the son attains twenty-one, is given to him; the entry of the executor generally, coupled with an application by him of the rent in educating the children, will amount to an assent, not only to the devise to himself, but of the residue of the term to the eldest son (*x*). In *Doe v. Tatchell* (*y*), a testator bequeathed a term in premises to R. Sharp, his executors, &c., in trust to sell and dispose of the same, as might seem most advantageous, and apply the proceeds to the maintenance of the testator's son during his life: He bequeathed the remainder after the son's decease to such uses as the son should by his Will appoint; and he appointed Sharp his executor: When the testator died, his journeyman was managing his business on the premises, as he had done for some years, and the testator's son also resided there: At the funeral, Sharp said, in presence of the journeyman and other persons, "The house is young Batten's (meaning the son's), Tatchell (the journeyman) must stay in the house and go on with the business, but young Batten must have a biding place:" Tatchell accordingly continued on the premises, carrying on the business, paying no rent, but maintaining the testator's son who was weak in intellect and unable to provide for himself: Sharp lived twenty years afterwards, and did not interfere further with the property: And the Court of King's Bench held, that that was a sufficient evidence of a disposal of the property by Sharp

(*u*) *Welcken v. Elkington, Dyer*, 539. See also *Young v. Holmes*, 358, *b.* 359. 1 Str. 710.

(*x*) *Paramour v. Yardley, Plowd.* (*y*) 3 B. & Adol. 675.

according to the trusts in the Will, and that he had assented to take under the Will as legatee in trust, and not as executor (2).

This decision, it may be observed, demonstrates that it is not essential for the efficacy or validity of an assent to a bequest that it should confer a legal interest, or affect the mere legal title to the subject of the bequest: And accordingly, in *Trail v. Bull* (a), where a testator bequeathed all his personal estate to his wife, with the exception of two leasehold houses, the rents of which he gave her for life, and after her death he directed that they should be sold and the produce divided among his four children, and he appointed his wife and another person his executrix and executor; and upon his death his wife entered into possession of his personal property, including the leasehold houses, and paid all his debts; it was held by Knight Bruce, V.-C., that, under the circumstances of the case, she had assented to the legacy to the children.

Executor taking possession of chattels bequeathed to him for life.

In *Richards v. Brown* (b), a testator bequeathed to a Miss Wade, whom he appointed executrix, his household furniture for her life, and after her death to Sarah Chapple: The testator, at the time of his decease, which took place in the year 1825, was indebted in 100*l.* on a promissory note, which he had made in the year 1816, and on which he had regularly paid interest during his life: On his death, Miss Wade took possession of the furniture, and continued to pay interest on the note up to the year 1831: On her death, in the year 1832, Sarah Chapple took possession of the furniture: And it was contended that Miss Wade, by so taking possession under the bequest to her for life, had assented to the residuary bequest of S. Chapple: But the Court of Common Pleas held, that this did not, under the circumstances, amount to such an assent: And Tindal, C. J., said, that though an assent to a particular estate in the property bequeathed is an assent to the estate in remainder also, yet, as Miss Wade might have

(2) See also *Fenton v. Clegg*, 9 Ch. 1082.

Exch. 680.

(b) 3 Bingham, N. S. 493. *Ante*,

(a) 1 Coll. 352, *affd.* 22 L. J. p. 1206.

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taken the furniture either as executrix or as legatee, and as there was no reason for presuming that she took it on the bad title of a legatee while debts remained unpaid, when she might have taken it on a good one as executrix, it must be intended that she held it as executrix.

If an executor legatee renounce probate, his assent to his own legacy will be ineffectual; and if he take the thing bequeathed without the permission of the administrator *cum testamento annexo*, he will incur the same liabilities as any other legatee so acting (c).

Executor's assent to his own legacy after renouncing.

If one of several executors be a legatee, his single assent to his own legacy will vest the complete title in him (d): And if the subject be entire and given to all the executors, the assent of any one of them to his own proportion will be sufficient (e).

Assent of one of several executors to his own legacy.

SECTION IV.

At what time Legacies are to be paid: and herewith of Requests for Life, with remainder over.

On the same principle that the assent of an executor to a legacy is necessary, he cannot, before a competent time has elapsed, be compelled to pay it. The period fixed by the civil law for that purpose, which our Courts have also prescribed, and which is analogous to the Statute of Distributions (as will hereafter be seen), is a year from the testator's death, during which it is presumed that the executor may fully inform himself of the state of the property (f). But within

Legacies generally payable at the end of a year from testator's death.

(c) *Broker v. Charter*, Cro. Eliz. 92. And by reason of Stat. 20 & 21 Vict. c. 77, s. 79 (*ante*, p. 233), the law is now the same, where the legatee, being one of several executors, renounces, and the others prove the Will.

(d) 1 Roll. Abr. 618, Devise,

(B.) pl. 2, 3. *Townson v. Tickell*, 3 B. & A. 31, 40. *Ante*, pp. 819, 1231.

(e) *Ibid*.

(f) *Wood v. Penoyre*, 13 Ves. 333, 334. *Pearson v. Pearson*, 1 Scho. & Lefr. 11. *Toller*, 312.

that period he cannot be compelled to pay a legacy, even in a case where the testator directs it to be discharged within six months after his death (g).

This allowance, however, to executors is merely for convenience, in order that the debts of the testator may be ascertained, and the executors made acquainted with the amount of assets, so as to be able to make a proper distribution of them (h); Therefore, if the state of the testator's circumstances be such as to enable the executors to discharge legacies at an earlier period, they have authority to do so (i).

Again where a legacy was given to A. to be paid at twenty-one, and if he should die before attaining that age, then to B., and A. died before twenty-one, several years after the testator; it was holden that B. was entitled to receive the legacy immediately upon the death of A.: for although it was objected, that this being a new substantive legacy to B., the executor ought to have a year's time for the payment of it, yet the Court held, that the year's time must be intended to be from the death of the testator; whereas in this case the testator had been dead much longer (k).

(g) See *Benson v. Maude*, 6 Madd. 15. In *Brooke v. Lewis*, 6 Madd. 358, the testator gave certain legacies, which he directed to be paid within six months after his decease; and he directed the residue to be divided among certain persons named, or such of them as should be living at the time the same should be distributed. And it was holden, that the residue was to be divided among the legatees named, who were living at the end of one year after the death of the testator.

(h) *Garthshore v. Chalie*, 10 Ves. 13.

(i) *Pearson v. Pearson*, 1 Scho. & Lefr. 12, by Lord Redesdale. "I know of no case," said Lord

Eldon, in *Angerstein v. Martin*, 1 Turn. & R. 241, "which prevents executors, if they choose, from paying legacies, or handing over the residue, within the year: and if it is clear, *currente anno*, that the fund for the payment of debts and legacies is sufficient, there can be no inconvenience in so doing." His Lordship also observed, on another occasion, that if a case was produced in which it was quite clear that there were no debts, the Court would give the fund to the party, notwithstanding there had not been a lapse of twelve months: *Garthshore v. Chalie*, 10 Ves. 13.

(k) *Laundy v. Williams*, 2 P. Wms. 478.

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According to the ordinary practice in an action to administer the assets of a deceased testator, the Court in the first place waits until all the claims on the estate are settled, and until the clear fund is ascertained; and then the particular legatees are paid (l): They are paid their principal, and if entitled to interest, they are paid interest at the rate of four per cent. up to that time (m).

Practice in an administration action.

But if it clearly appears, that a surplus will remain, after discharging all the testator's debts and liabilities, although the exact amount of the surplus cannot be ascertained for a considerable time, the Court will, by anticipation, direct proportional payments to be made to pecuniary legatees, as far as that can be done with safety to the creditors (n).

In a case (o) where it appeared, upon affidavits, that the estate was large, with but few debts or charges thereon, the Court ordered the jointure of the widow of the testator and annuities given by his Will, to be paid out of the income of the estate, *before decree*, but refused to direct the payment of the pecuniary legacies.

Where a legacy is given generally, subject to a limitation over upon a subsequent event, the divesting contingency will not prevent the legatee from receiving his legacy at the end of the year from the testator's death; and he is not bound to give security for repayment of the money, in case the event should happen: Thus where a legacy was given on condition to be void in case the legatee should succeed to an estate in the event of the death of A. without issue of her body, payment was decreed in the lifetime of A., and without security for refunding (p). But where a legacy was given to

Legacy subject to a divesting contingency.

(l) *Thomas v. Montgomery*, 1 Russ. & M. 737. tual demands established: See R. S. C. 1883, Ord. L., r. 9.

(m) See R. S. C. 1883, Ord. LV., r. 64. (o) *Digby v. Boycatt*, 4 Hare, 444.

(n) *Thomas v. Montgomery*, 1 Russ. & M. 729. But the legatees are not entitled to have the fund appropriated, subject to the eventual demands established: See *Fawkes v. Gray*, 18 Ves. 131. See also *Griffiths v. Smith*, 1 Ves. 97. 1 Rep. Leg. 752, 3rd edit.

a father, on condition that he did not interfere with the education of his daughter; on a bill by the father, for his legacy, the Court required from him security to that effect, to be approved by the Master, and directed the costs of the proceedings to be paid out of the legacy (*q*).

Annuity.

If an annuity be given by Will, it shall commence immediately from the testator's death, and consequently the first payment shall be made at the expiration of a year next after that event (*r*). Where an annuity is expressly directed to commence within the year, as at the first quarter-day after the testator's death (*s*), or where an annuity is given with a direction that it shall be paid monthly (*t*), the money will be due at the first quarter-day in the former case, and at the end of the first month after the testator's death, in the latter, although not payable by the executor, till the end of the year (*u*). Where a testator gives an annuity to A. for life, and directs the first payment to be made within one month from his, the testator's death, the annuity commences from the death of the testator; and though the first year's payment is due at the appointed time, the payment for the second year does not become due till the end of the year (*x*). Where a testator gives an annuity to A. for life, payable

(*q*) *Colston v. Morris*, 6 Madd. 89.

(*r*) By Lord Eldon, in *Gibson v. Bott*, 7 Ves. 96, 97, and in *Fearn v. Young*, 9 Ves. 553. *Stammer v. Pickering*, 9 Sim. 176. See also *Houghton v. Franklin*, 1 Sim. & Stu. 392, where Sir J. Leach observes, that as a Will speaks at the death of a testator, it must be intended that the payment of an annual sum given by it is to commence from that period, unless there be some circumstances or expressions in the Will to control that intention. But in *Storer v. Prestage*, 3 Madd. 168, his Honor

said, that "when annuities are given out of a residue, and there is no time of payment mentioned in the Will, it may be questioned whether the principle must not be the same as if there were one tenant for life of the residue, and the annuities be payable only from the end of one year after the testator's death."

(*s*) *Storer v. Prestage*, 3 Madd. 167.

(*t*) *Houghton v. Franklin*, 1 Sim. & Stu. 390.

(*u*) See *ante*, p. 1154.

(*x*) *Irvin v. Ironmonger*, 2 Russ. & M. 531.

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quarterly, the first payment to be made within eighteen months after his death; the annuity does not commence till fifteen months from the death of the testator (*y*).

A distinction was taken by Lord Eldon, in *Gibson v. Bott* (*z*), between an annuity and a legacy for life: "If an annuity," said his Lordship, "is given, the first payment is paid at the end of the year from the death; but if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest of the legacy; and till the legacy is payable, there is no fund to produce interest" (*a*).

Bequests for
life, remainder
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However, a different doctrine prevails with respect to a bequest of the *residue* of personal estate for life, with remainder over: For the later decisions have established that the person taking the residue for life is entitled to the income, in some shape or other, from the death of the testator (*b*).

But some difficulty exists in applying this doctrine in instances where the testator has directed the residue to be invested in specified securities: And the rule in cases of such a nature appears not to be yet exactly settled.

In *La Terriere v. Bulmer* (*c*), Sir Anthony Hart, V.-C., held, that the tenant for life of a residue, which was directed to be laid out in certain securities, was entitled to the income accrued in the first year after the testator's decease, on such parts of the testator's estate as were invested at his death

(*y*) *Ibid*.

(*z*) 7 Ves. 96.

(*a*) It is a doubtful point whether a sum of money, directed to be placed out to produce an annuity, is to be considered as a legacy payable at the end of a year, or as an annuity, payable from the death: *ib.* 97.

(*b*) *Angerstein v. Martin*, 1 Turn. & R. 232. *Hewitt v. Morris*, 1 Turn. & Russ. 241. *La Terriere*

v. Bulmer, 2 Sim. 18. *Dimes v. Scott*, 4 Russ. 195. *Douglas v. Congreve*, 1 Keen, 410. *Taylor v. Clarke*, 1 Hare, 161. *Macpherson v. Macpherson*, 1 Macq. H. of L. 243. But see *contra*, *Taylor v. Hibbert*, 1 Jac. & Walk. 308. *Stott v. Hollingworth*, 3 Madd. 161. *Griffith v. Morrison*, 1 Jac. & Walk. 311, note, and *Amphlett v. Parke*, 1 Sim. 275.

(*c*) 2 Sim. 18.

in the proper securities, and on such parts as were afterwards so invested within the same year; but that the income before such investment formed part of the capital of the residue. In *Dimes v. Scott* (d), the testator directed the residue of his personal estate to be converted into money, and invested in government or real securities in trust for A. for life, and after his death for B.: Part of the estate consisted of a share which the testator had in an Indian loan bearing interest at ten per cent.: After it had been determined that a conversion ought to have been made into three per cent. stock at the end of a year after the testator's death (e), a question arose, whether the tenant for life was entitled to the interest actually made during the year: and it was held by Lord Lyndhurst, that the tenant for life should be allowed during that period, in lieu of the actual income, the dividends on so much three per cent. stock as the proceeds of the property, if converted at the end of that year, would have purchased. In *Douglas v. Congreve* (f), a testator bequeathed the residue of his estate and effects real and personal to trustees, upon trust to convert the same into government securities in their own names, and to pay the interest and dividends thereof to M. S. for her life, and after her decease to pay and transfer such residue in equal moieties to the person therein mentioned: And Lord Langdale, M.R., said, that in a case where there is no direction to accumulate, and therefore no direction to add interest to capital, it appeared to him more likely to have been the intention of the testator that, until the lapse of such convenient time as may be allowed to the executor to make the conversion directed by the Will, the tenant for life should enjoy the interest actually accrued; and if it should be held, as in *Dimes v. Scott*, that the conversion ought to be made in a year, his Lordship thought that no inconvenience could follow from allowing the tenant for life the interest of the residue, making interest as it stood

(d) 4 Russ. 195.

(f) 1 Keen, 410.

(e) See *post*, p. 1248.

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at the time of the testator's death, until the end of one year, or so much of that year as should elapse before the conversion of the residue according to the direction of the Will: And the learned Judge held accordingly. In *Taylor v. Clarke* (g), Wigram, V.-C., considered that *Douglas v. Congreve* and *Dimes v. Scott* could not stand together, and his Honor said, that he felt bound to follow the authority of the latter case, and did accordingly act upon it, although he expressed his own unfettered opinion to be, that *La Terriere v. Bulmer* was altogether right, and that so far as that case is impugned by the decision of *Dimes v. Scott*, the latter decision was to be regretted. However, in *Morgan v. Morgan* (h), Romilly, M. R., not only considered himself bound to follow the decision in *Dimes v. Scott*, and adopted accordingly the principle there laid down, but added that it seemed to him to be that which was least open to objection (i).

(g) 1 Hare, 161.

(h) 14 Beav. 72, 92.

(i) See *Accord. Re Llewellyn's Trusts*, 29 Beav. 171. *Yates v. Yates*, 28 Beav. 637. *Holgate v. Jennings*, 24 Beav. 623. *Brown v. Gellatly*, L. R. 2 Ch. 751. *Porter v. Baddeley*, 5 C. D. 542. See also *Macpherson v. Macpherson*, 1 Macq. H. of L. 243. The rule in *Dimes v. Scott* applies where securities ought to be converted, and in such case the tenant for life will be entitled to the dividends upon so much 3 per cent. stock as the proceeds would have purchased at the end of the year. The rule does not apply where there is a prohibition against conversion: *Green v. Britten*, 1 De G. J. & S. 649, for in such case, as in the case where the testator has authorised retention of the fund in specified securities other than

those which a Court of Equity would approve, the tenant for life is entitled during the continuance of the investment to the specific income: *Brown v. Gellatly*, L. R. 2 Ch. 751. *La Terriere v. Bulmer*, 2 Sim. 18. *Caldecott v. Caldecott*, 1 Y. & C. Ch. 312, 337. Where there is no prohibition against conversion but merely a power to delay conversion, and in the meantime to maintain the investment or user as it was at the testator's death, the property must be valued as of the time of the testator's death, and the tenant for life will have 4 per cent. on such value as falling within the third division pointed out by Parker, V.-C., in *Meyer v. Simonsen*, 5 De G. & S. 723, which divisions are the following:—First, where the subject matter of the bequest is either invested in the funds or in some

With respect to cases where the testator simply bequeaths all the residue of his personal estate for life with remainder over, without any direction to invest it in any particular

security of which the Court approves, mere conversion is not necessary, and the tenant for life takes the interest of the fund as it is, and the *corpus* belongs to those in remainder. The second class is where part of the estate can be sold and converted so as not to sacrifice the interest of the tenant for life or of the remainder-man; such a case is one of partial conversion and the proceeds of the part converted must be laid out on the permanent securities approved of by the Court, of which the tenant for life will take the interest and the remainder-man the *corpus*. The third class is where the property is so laid out as to be secure and to produce a large annual income, but is not capable of immediate conversion without loss and damage to the estate as in *Gibson v. Bott*, 7 Ves. 89; *Caldecott v. Caldecott*, 1 Y. & C. Ch. 312, and *Re Llewellyn's Trust*, 29 Beav. 171. There the rule is not to convert the property but to set a value upon it and to give the tenant for life 4 per cent. on such value, and the residue of the income must then be invested and the income of the investment paid to the tenant for life, but the *corpus* must be secured for the remainder-man. In calculating the value of a reversionary interest of property within the third division, although generally the value is to be taken as at the end of one year from the testator's death according to tables of life average, yet, if the reversion

has fallen in before valuation, the estimate must be on the assumption that the reversion would fall in when it actually did. *Wright v. Lambert*, 6 C. D. 649. It is to be observed, with regard to funds which are found to be in a proper state of investment, that, although the tenant for life of the residue is entitled to the income of that property from the death of the testator (*Angerstein v. Martin*, 1 Turn. & Russ. 232. *Hewitt v. Morris*, *ibid.* 241), yet these authorities clearly show that supposing a testator has a large sum, say 50,000*l.* in the funds, and has only 10,000*l.* worth of debts, the executors will be justified, as between themselves and the whole body of persons interested in the estate, in dealing with it as they think best in the administration. But the executors, when they have dealt with the estate, will be taken by the Court as having applied in payment of debts such portion of the fund as, together with the income of that portion for one year, was necessary for the payment of the debts. The executors must not be taken to have applied the whole income. Until the debts and legacies were paid there would have been no interest which by any possibility could have come to the tenant for life. It is necessary to ascertain what part, together with the income of such part for a year, would be wanted for the payment of debts, legacies, and other charges during the year, and the proper

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It is, in the language such as to life to receive of the testator as it stood nothing in property converted, or might have proper debt 14 Sim. 205 Hare, 709 Beav. 524 the tenant at all during course, before investment a residue is in land, to for life, with the interest money is satisfaction shall year from

manner, it must be observed, that, as between the tenant for life and the remainder-man, where the residue consists in part, or wholly, of property in its nature perishable, and daily wearing out, such as leaseholds (not specifically given),

and necessary fund must be ascertained by including the income for one year which may arise upon the fund which may be so wanted. See the judgment of Wood, V.-C., in *Allhusen v. Whittell*, L. R. 4 Eq. 295-302, 303. This rule was applied to real estate in *Marshall v. Crowther*, 2 C. D. 199. With regard to contingent legacies, the tenant for life is entitled to the intermediate income of the fund set apart to meet them. That fund is residue until it is wanted. *Allhusen v. Whittell* (*ubi sup.*).

It is, however, obvious, that the language of a Will may be such as to entitle the tenant for life to receive the actual income of the testator's property *in specie*, as it stood at his death, and nothing more or less until the property shall be actually converted, or at all events, until it might have been so, but for improper delay: See *Wrey v. Smith*, 14 Sim. 202. *Mackie v. Mackie*, 5 Hare, 70. *Sparling v. Parker*, 9 Beav. 524. Again, the claim of the tenant for life to any income at all during the year may, of course, be controlled by an opposite disposition of the income before investment. Thus, where a residue is directed to be laid out in land, to be settled on a person for life, with remainder over, and the interest to accumulate until the money is so laid out, the accumulation shall cease at the end of the year from the testator's death,

and from that period the legatee for life will be entitled to the interest: *Sitwell v. Bernard*, 6 Ves. 520. *Stair v. Macgill*, 1 Bligh, N. S. 662. *Vigor v. Harwood*, 12 Sim. 172. *Tucker v. Boswell*, 5 Beav. 607. *Macpherson v. Macpherson*, 1 Macq. H. of L. 249. See also *Parry v. Warrington*, 6 Madd. 155. *Greisley v. Lord Chesterfield*, 13 Beav. 288.

As to the allocation of profits to interest and capital under a partnership deed, and the effect on the interest of a tenant for life, see *Straker v. Wilson*, L. R. 6 Ch. 503.

Where the testator directed a sale of his real estate with all convenient speed after his death, and that the produce, together with his residuary personal estate, should be invested, and the dividends be paid to one for life, and further directed that the trustee should stand possessed of the trust monies and rents and profits until sale and investment; and the land remained unsold; Sir J. Leach, M. R., said that the tenant for life, by the clear language of the Will, was not entitled to the rents and profits of the residuary real estate until it had been sold and the produce invested: That it was consistent with principle and authority, that twelve months should be considered as the time within which the sale might reasonably have been made: And that from that time the tenant for life was entitled to the rents:

the tenant for life will not be entitled to the annual produce which the property so wearing out is actually making, but to interest from the death on the estimated value (*k*). And it is a general rule (usually called the rule in *Howe v. Lord Dartmouth*), that where personal property is bequeathed for life, with remainder over, and not specifically, it is to be converted into the three per cents., subject, in the case of a real security, to an inquiry, whether it will be for the benefit of all parties : and the tenant for life is entitled only, upon that principle (*l*). And it appears to be now established

Vickers v. Scott, 3 M. & K. 500.

(*k*) *Gibson v. Bott*, 7 Ves. 89.
Fearn v. Young, 9 Ves. 552.
 2 Rep. Leg. 298, 3rd edit. The general rule being that, where property is invested on a security of a wasting character, that must be realised, or, if not realised immediately, then the tenant for life is only entitled to interest on the realised value. But a testator can say what he likes, and if he chooses to say that the investment may be continued or the sale of it may be postponed, and that the profits arising from such security in the meantime shall be paid to the tenant for life, he can do so. It is not sufficient that trustees should exercise discretionary power given to them to postpone conversion that the tenant for life should get the profits till conversion : *Brown v. Gellatly*, L. R. 2 Ch. 751, 757. This will not affect the rights of beneficiaries ; but, when a testator has himself expressly directed what shall be done with the income accruing during the period the sale is postponed, the general rule does not apply : *Re Chancellor*, 26 C. D. 42. It will be observed that this case differs from *Brown v. Gellatly*

by the presence in the former case of an express direction that the profits pending conversion should be paid to the tenant for life.

(*l*) *Howe v. Lord Dartmouth*, 7 Ves. 137, *a. Ante*, pp. 1037, 1038. Railway Shares, unless within sect. 3 of the Trust Investment Act, 1889, must be converted : *Thornton v. Ellis*, 15 Beav. 193. But this general rule does not attach upon property of a testator who makes his Will and dies in India, leaving property and a family there, unless the parties come to this country ; and then the person in remainder is entitled to have the fund brought here and invested : *Holland v. Hughes*, 16 Ves. 111. Dividends in a public company earned before the testator's death, but declared afterwards, form income, and not *corpus* : *Bates v. Mackinley*, 31 Beav. 280. See also *McLaren v. Stainton*, 27 Beav. 460 : reversed 3 De G. F. & J. 202. *Gilly v. Burley*, 22 Beav. 618. *Lock v. Venables*, 27 Beav. 598. *Post*, p. 1303. Where trustees, without authority, lent trust money at interest at 5 per cent., it was held that the tenant for life was entitled to the whole

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with respect to the application of this rule, that the tenant for life is to be allowed, *as from the death of the testator*, the income of such parts of the personal estate as were at his death, and have remained, in a state of investment which ought to be recognised and allowed to be continued by a Court of Equity (*m*). But that with regard to those parts of the personal estate which neither were at the testator's death, nor have since been, in such a state of investment as ought to be recognised and allowed to be continued by the Court, they must be valued as at a period of one year after his death; and interest from his death, on the value so taken, not exceeding four per cent., must be paid to the tenant for life (*n*).—But though, for the purpose of determining the

interest, and that the remainderman had no right to insist that the excess of the interest beyond the dividend, which would have been produced, if the money had been invested in Consols, formed capital: *Stroud v. Gwyer*, 28 Beav. 130. (See also *Ibbotson v. Elam*, L. R. 1 Eq. 188.)

(*m*) It should be noted that though the general rule in *Howe v. Lord Dartmouth* remains in full effect, yet it is no longer absolutely necessary to invest either in the three per cents. or on real security, for since the decision of that case various statutes have enlarged the class of securities, in which an executor or trustee may invest. The Act now in force is the Trust Investment Act, 1889 (52 & 53 Vict. c. 32), which enables an executor or trustee, unless expressly forbidden by the instrument (if any) creating the trust, to invest in any of the securities mentioned in sect. 3 of the Act, whether the trust was created before or after the passing

of the Act. See *post*, p. 1710.

(*n*) *Caldecott v. Caldecott*, 1 Y. & Coll. Ch. C. 312, 737. See also *Turner v. Newport*, 2 Phill. Ch. C. 14. 14 Sim. 32. *Cox v. Cox*, L. R. 8 Eq. 343. *Wilkinson v. Duncan*, 23 Beav. 469. *Wright v. Lambert*, 6 C. D. 649. *Re Chesterfield's Trusts*, 24 C. D. 643. *Beavan v. Beavan*, 24 C. D. 649, n. In *Meyer v. Simonsen*, 5 De G. & Sm. 723, a testator gave the residue of his real and personal estate to trustees, upon trust, to pay to his widow, or permit her to receive, the income and profits, and after her death he gave the capital over: The Will contained no direction as to the conversion of his estate: Part of it consisted of 12,000*l.*, invested in a partnership: Under a stipulation in the deed of partnership, the surviving partner gave a warrant of attorney to the executors of the testator, securing payment of that sum by instalments of 1,500*l.* a-year, with interest at 5 per cent. on the unpaid balances: And it was held, by

amount of income to which the tenant for life is entitled, the property must be thus feigned to be in a proper state of investment at that period, it does not follow that he can demand payment of an income to that amount, until the property in respect of which it is payable shall be gotten in (o).

Parker, V.-C., that the rule in *Howe v. Lord Dartmouth*, as applied to this case, required the trustees not to convert the property, but to set a value on it, and to give the tenant for life 4l. per cent. on the value, and to invest the residue of the surplus income, paying the income of these investments to the tenant for life, and appropriating the corpus to the remainder-man. See *Accord. Re Llewellyn's Trust*, 29 Beav. 171.

(c) *Taylor v. Clarke*, 1 Hare, 161, 170. This principle is applied where there is a deficiency in the assets. Thus, where an obligor covenanted to pay three months after his death a fund to trustees, upon trust for a tenant for life and remainder-man with interest from the date of his death until payment, and, several years after the obligor's death, assets were recovered which were insufficient to fulfil the covenant and bond, it was held that a calculation must be made of what principal would at four per cent. interest from the obligor's death amount to the sum recovered, and the difference, between such principal and the sum recovered, paid to the tenant for life : *Cox v. Cox*, L. R. 8 Eq. 343. The true principle in all these cases is that neither the tenant for life nor the remainder-man is to gain an ad-

vantage over the other, neither is to suffer more damage in proportion to his estate and interest than the other suffers. The two must share the loss in the same way as they would have shared it had it occurred when they first became entitled in possession. *Re Grabowski's Settlement*, L. R. 6 Eq. 12, is distinguishable because there the intention was to settle a specific fund and not the debt, whatever it might amount to. In making the valuation in cases where the tenant for life dies before the assets are recovered, the valuation must be made according to the fact and not according to the tables of life average. See *Wright v. Lambert*, 6 C. D. 649, following *Wilkinson v. Duncan*, 23 Beav. 469, which was not altered by *Brown v. Gellatly*, L. R. 2 Ch. 751. The principle applies where a testator has bequeathed his residuary personal estate to trustees upon trust for conversion, with power to postpone such conversion at their discretion, and to hold the proceeds upon trust for a person for life with remainder over, and such residue includes outstanding personal estate, the conversion of which the trustees in the exercise of their discretion postpone for the benefit of the estate, and which eventually falls in some years after the testator's death, as, for instance, a mortgage

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The rule in *Howe v. Lord Dartmouth* amounts to this, that where there is a residuary bequest of personal estate to be enjoyed by several persons in succession, a Court of Equity, in the absence of any evidence of a contrary intention, will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession, and as the only means of giving effect to such intention, will direct the conversion into permanent investments of a recognized character of all such parts of the estate as are of a wasting or reversionary character, and also all such other existing investments as are not of the recognized character, and are consequently deemed to be more or less hazardous (*p*). This presumed intention of the testator may of course be rebutted

debt with arrears of interest, or arrears of an annuity with interest, or monies payable on a life policy. Such outstanding personal estate should, on falling in, be apportioned as between capital and income by ascertaining the sum, which put out at interest at four per cent. per annum on the day of the testator's death, and accumulating at compound interest calculated at that rate, with yearly rests and deducting income tax, would, with the accumulation of interest, have produced at the day of receipt the amount actually received, and the sum so ascertained should be treated as capital and the residue as income: *Re Chesterfield's Trusts*, 24 C. D. 643, following *Beavan v. Beavan*, *ib.* 649, *n.* *Re Hobson*, 55 L. J. Ch. 422. *Re Flower*, 62 L. T. 217. If leaseholds which a tenant for life is entitled to enjoy *in specie* are taken compulsorily under the Lands Clauses Consolidation Act or sold under the Settled Estates Act, the purchase-money should be invested in an annuity having

as many years to run as the original lease, and the proceeds paid to the person entitled to the proceeds of the leaseholds: *Askew v. Woodhead*, 14 C. D. 27, 34, *per* Jessel, M. R. Where in such a case the purchase-money was invested in consols it was held after the death of the tenant for life that her estate was entitled to the difference between the dividends received by her and the aggregate amount of the rental which would have been received during her life: *Jeffreys v. Connor*, 28 Beav. 328. And where, under similar circumstances, the tenant for life outlives the term he will be entitled to the whole fund: *Re Beaufoy's Estate*, 1 Sm. & Giff. 20. See also 45 & 46 Vict. c. 38, s. 34, Settled Land Act, 1882, as to sales under that Act. As to the mutual rights of tenants for life and remaindermen in respect of renewable leases and the duties of trustees with regard to them, see *Lewin on Trusts*, Chap. xv.

(*p*) *Macdonald v. Irvine*, 8 C. D. 101, 112, *per* Baggallay, L. J.

by the words of his Will. Accordingly, as there has already been occasion to show, where the bequest to the tenant for life is *specific*, the legatee in remainder is not entitled to have the property so converted, notwithstanding, by reason of its being a decreasing fund, the legacies over may altogether fail (*q*). So where the bequest is not "*specific*," in the strict sense of the expression, yet if the Court find in the Will an indication of intention that the property is to be enjoyed in its existing state, that intention must be carried into effect, and the property shall be so enjoyed (*r*).

Inventory by
legatee for life.

If personal chattels are bequeathed to A. for life, remainder to B., A. will be entitled to the possession of the goods, upon

(*q*) Vincent v. Newcombe, 599. Lord v. Godfrey, 4 Madd. 455. Co. Kran v. Cockran, 14 Sim. 248. Bethune v. Kennedy, 1 My. & Cr. 114. And see *ante*, p. 1037. As to what constitutes a specific legacy, see *ante*, p. 1019, *et seq.*

(*r*) *Ante*, pp. 1038, *et seq.* Collins v. Collins, 2 M. & K. 702. Alcock v. Sloper, 2 M. & K. 699. Pickering v. Pickering, 4 M. & Cr. 289. Goodenough v. Tremamondo, 2 Beav. 512. Vaughan v. Buck, 1 Phill. Ch. C. 75. Harvey v. Harvey, 5 Beav. 134. Daniel v. Warren, 2 Y. & C. C. C. 290. Hinves v. Hinves, 3 Hare, 609. Cafe v. Bent, 5 Hare, 24. Hubbard v. Young, 10 Beav. 203. Hunt v. Scott, 1 De G. & Sm. 219. Burton v. Mount, 2 De G. & Sm. 383. Neville v. Fortescue, 16 Sim. 333. Harris v. Poyner, 1 Drew. 174. Crowe v. Crisford, 17 Beav. 507. Marshall v. Bremner, 2 Sm. & G. 237. Vachell v. Roberts, 32 Beav. 140. Hind v. Selby, 22 Beav. 373. Wearing v. Wearing, 23 Beav. 99. Skirving v. Williams, 24 Beav. 275. Holgate v. Jennings, 24 Beav. 623. Boys v. Boys, 28 Beav. 436. Rowe v. Rowe, 29 Beav. 276. Green v. Britten, 1 De G. J. & S. 649. Wilday v. Sandys, L. R. 7 Eq. 455. *Re* Sewell's Estate, L. R. 11 Eq. 80. Thursby v. Thursby, L. R. 19 Eq. 395. Gray v. Siggers, 15 C. D. 74. *Re* Chancellor, 26 C. D. 42. *Re* Sheldon, 39 C. D. 50. For cases where the Court has not been able to find such intention, see Lichfield v. Baker, 13 Beav. 447. (See also 2 Beav. 481.) Benn v. Dixon, 10 Sim. 636. Caldecott v. Caldecott, 1 Y. & C. C. C. 312. Sutherland v. Cooke, 1 Coll. 498. Johnson v. Johnson, 2 Coll. 441. Chambers v. Chambers, 15 Sim. 183. Morgan v. Morgan, 14 Beav. 27. Thornton v. Ellis, 15 Beav. 193. Blann v. Bell, 2 De G. M. & G. 775. Murton v. Markby, 18 Beav. 126. Hood v. Clapham, 19 Beav. 90. Jebb v. Tugwell, 20 Beav. 84. Brown v. Gellatly, L. R. 2 Ch. 751. Tickner v. Old, L. R. 18 Eq. 422. Porter v. Baddeley, 5 C. D. 542. Macdonald v. Irvine, 8 C. D. 101.

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signing and delivering to the executor an inventory of them admitting their receipt, expressing that he is entitled to them for life, and that afterwards they belong to the person in remainder (s). The old practice of the Court of Chancery was to require the tenant for life to give security for the protection of the remainder-man: But such security is not now required, unless a case of danger is shown (t).

It may here be observed, that a gift for life of things *que ipso usu consumuntur*, as corn and wine, if *specific*, is an absolute gift of the property; but if *residuary*, the things must be sold and the interest of the produce paid to the legatee for life (u).

Gift for life of things *que ipso usu consumuntur*.

Farming stock and implements of husbandry are not things *que ipso usu consumuntur* within this rule (x). Where a wine merchant, possessed of a large stock of wine, by his Will gave everything he died possessed of to his wife for life, it was held that she took absolutely the wine which the testator had for his private use, but a life interest only in that kept for the purpose of trade (y).

Where the legatee is an infant, the executor cannot safely pay him, or any other person on his account, until he attains twenty-one, unless under the provisions of the statute 36 Geo. III. c. 52, s. 82. In certain cases, indeed, he may apply the *interest* of the legacy to the maintenance of the infant: This subject will be pursued hereafter, together with

Legacy to an infant.

(s) *Slanning v. Style*, 3 P. Wms. 336. *Leeke v. Bennett*, 1 Atk. 471. *Bill v. Kinaston*, 2 Atk. 82. (t) *Foley v. Burnell*, 1 Bro. C. C. 279. *Conduitt v. Soane*, 1 Coll. 285.

(u) *Randall v. Russell*, 3 Meriv. 194. *Andrew v. Andrew*, 1 Coll. 690. See *Porter v. Tournay*, 3 Ves. 314. According to the old rule of the common law, a bequest of a term of years, or of a personal chattel, passed the whole property,

and no remainder could be limited after it. But the objection was removed by changing the name from *remainders* to *executory bequests*. *Manning's case*, 8 Co. 94, b. 95, a. 2 Saund. 338, k.

(x) *Groves v. Wright*, 2 Kay & J. 347. But see *Breton v. Mockett*, 9 C. D. 95.

(y) *Phillips v. Beal*, 32 Beav. 25. *Cockayne v. Harrison*, L. R. 13 Eq. 432.

Payment when
legatee dies
under age.

the inquiry as to the proper person to whom legacies are to be paid (z).

If a legacy be given to A. to be paid at twenty-one, and the intermediate interest is not given, and A. dies before that period, his representative must wait for the money until A., if living, would have attained twenty-one (a): But where interest is given during the minority, and the legatee dies under age, his executors or administrators will be entitled immediately on his death (b).

Again, in case a legacy be left to A. at twenty-one, and if he die before that period, then to B., and A. dies before he attains his age, B. shall be entitled immediately; for he does not claim under A., but the devise is a distinct substantive bequest, to take effect on the contingency of A.'s dying during his minority (c).

A legacy of a
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lutely is pay-
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It should here be remarked, that where a testator gives a legatee an absolute vested interest in a defined fund, so that, according to the ordinary rule, he would be entitled to receive it on attaining twenty-one, but by the terms of the Will payment is postponed to a subsequent period, *e.g.* till the legatee attains the age of twenty-five, the Court will, nevertheless, order payment on his attaining twenty-one; for at that age he has the power of charging or selling, or assigning it, and

(z) *Infra*, pp. 1261, *et seq.*

(a) *Crickett v. Dolby*, 3 Ves. 13.

(b) *Cloberry v. Lampen*, 2 Freem.

25. *Crickett v. Dolby*, 3 Ves. 13. But if a legacy be payable out of *land* at a future day, although given with interest in the meantime, if the legatee die before the day of payment, the Court will not direct the legacy to be raised until the time for payment arrives: *Gawler v. Standerwick*, 2 Cox, 15.

(c) *Laundy v. Williams*, 2 P. Wms. 478. But where legacies were given to A., B., and C., the three co-heiresses of the testator,

to be paid at their respective marriages, and if either of them should die, her legacy to go to the survivors; and one of them died unmarried; it was held, that the survivors should not receive the legacy of the deceased before their respective marriages: for the condition, though not repeated, was annexed to the whole, whether it accrued by survivorship, or by the original devise: *Moore v. Godfrey*, 2 Vern. 620. See also, as to a legacy charged on *land*, *Feltham v. Feltham*, 2 P. Wms. 27.

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the Court will not subject him to the disadvantage of raising money by these means, when the thing is absolutely his own (*d*). So, notwithstanding a legacy is directed to accumulate for a certain period, *e. g.* until the legatee attains the age of thirty, yet if he has an absolute indefeasible interest in the legacy, he may require payment the moment he is competent, by reason of having attained twenty-one, to give a valid discharge (*e*).

Where, in the administration of an estate, a Court of Equity decrees the payment of legacies which by the Will are directed to be invested in stock, it never enters into the consideration whether the executor might or might not have been able, with reasonable diligence, to have provided for the legacies at an earlier period, in order to fix him with such amount of stock as at the earlier period might have been purchased with the legacy: And the reason, probably, is, because the difficulty and expense which would attend such an inquiry in the case of an executor, make it more convenient in practice that the legacy should be provided for in money at the time of the administration by the Court, without reference to the price of stocks: But where a legacy is given by a Will to a trustee, who is not an executor, and he is directed to invest it immediately upon receiving it in the purchase of stock, and he receives it from the executor, and in the place of such investment he keeps it in his own hands, his conduct is a plain breach of trust, and he is clearly answerable to his *cestui que trust* for any loss by a subsequent rise in the price of stock: There is in such a case no difficulty or inconvenience in ascertaining the extent of the loss: And accordingly, when an executor, who happens also to be

Laches by neglect to invest legacies directed to be laid out in stock.

(*d*) *Curtis v. Lukin*, 5 Beav. 147, 155, 156. *Roche v. Roche*, 9 Beav. 66. *Re Young's Settlement*, 18 Beav. 199.

(*e*) *Josselyn v. Josselyn*, 9 Sim. 63. *Saunders v. Vautier*, 4 Beav. 115. 1 Cr. & Ph. 240. *Greet v. Greet*, 5 Beav. 123. *Re Col-*

son's Trusts, Kay, 133, 141. *Re Jacob's Will*, 29 Beav. 402. *Gosling v. Gosling*, Johns. 265. *Coventry v. Coventry*, 2 Dr. & Sm. 470. *Holloway v. Webber*, L. R. 6 Eq. 523. See also *Gott v. Nairne*, 3 C. D. 278.

named a trustee of a legacy to be laid out in stock, has fully administered the estate, and assented to the legacy, and retains the legacy in his hands, not as assets of the testator, but as trustee of the legacy, then the principles which would apply to another trustee must apply to him: He is no longer clothed with the character of executor, but is, as to the legacy, a mere trustee (*f*).

Appropriation
of legacies
payable in
futuro.

It is necessary, in conclusion, to advert to the subject of the payment of legacies which, by the Will, are given payable in *futuro*. Although legatees are not entitled in any case to receive their legacies before the day of payment arrives, yet they are entitled to go into the Court of Chancery, and pray that a sufficient sum be set apart to answer the legacy when it shall become due (*g*).

Thus, in *Ferrand v. Prentice* (*h*), a bill was filed by a legatee for the security of a legacy of 200*l.*, which the executor, the defendant, was directed by the Will to pay at the end of ten years after the death of the testator: The bill prayed that the defendant might admit assets and give security, or pay the money into the Bank: And, although no particular reasons were assigned, as wasting assets, or insolvency, in the defendant, yet Sir Thomas Clark, M. R., decreed that the defendant should pay the money into the Bank, and that he should have the interest in the meantime; and that, at the end of the ten years, the principal should be paid to the plaintiff. So in *Walker v. Cook* (*i*), a legacy was left to one to be paid at the age of twenty-four: The legatee being only twelve years old, his father filed a bill that the legacy might be invested in the funds: And it

(*f*) *Byrchall v. Bradford*, 6 Madd. 13. S. C. *ibid.* 235, 240.

(*g*) By Lord Hardwicke, in *Phipps v. Annesley*, 2 Atk. 58. It is otherwise where the legacy is to be raised out of real estate:

Gawler v. Standerwick, 2 Cox, 15.

(*h*) *Ambl.* 273. S. C. 2 Dick. 568. S. C. cited by Lord Thurlow, 1 Bro. C. C. 105.

(*i*) Cited by Lord Thurlow, in *Green v. Pigot*, 1 Bro. C. C. 105.

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was so decreed, though it was declared that the legatee was not entitled to the money before attaining the age of twenty-four. So in *Johnson v. Mills* (k) the sum of 2,000*l.* was left to the testator's daughter at twenty-one; and in default, to her child, and if no child, to one Mills: A bill was filed to secure the fund; which was opposed by the executrix, on the ground there was no danger of insolvency in the case: But Lord Hardwicke said, "I thought nothing was better settled than what is now endeavoured to be made a question; that whenever a demand was made out of assets certainly due, but payable at a future time, the person entitled thereto might come against the executor, to have it secured for his benefit, and set apart in the meantime, that he might not be obliged to pursue these assets through several hands: Nor is there any more useful part of the jurisdiction of this Court in the administration of assets: therefore it is admitted to be done in the case of a legacy always, although contingent and payable at a future day, so that it might fall into the bulk of the estate: and this is done to secure the interest of every party, of course, as a common equity, without expecting any suggestion of insolvency of the executor, or of wasting the assets" (l).

Again, in *Green v. Pigot* (m), a legacy of 5,000*l.* was given to a female infant, to be paid at twenty-one or marriage, with interest at four per cent.; but if she died before, it was directed by the Will that the legacy should sink into the residue: And Lord Thurlow ordered the sum of 5,000*l.* (with interest at four per cent. from the end of a year after the testator's death) forthwith to be laid out in three per cents.

(k) 1 Ves. Sen. 282. S. C. cited by Lord Thurlow, *nomine* Johnson v. De la Creuze, 1 Bro. C. C. 105.

(l) But in *Re Braithwaite*, 21 C. D. 121, it was held that the rule that if personal property consisting of money or stock is limited to A. for life, and after his death

to B. absolutely, it will be ordered into Court for administration in an action by B. for the purpose is not absolute, and will only be enforced as against A. where there is reasonable ground, such as danger to the fund, for the application.

(m) 1 Bro. C. C. 103.

in the name of the Accountant-General, upon the trust and subject to the contingencies in the testator's Will: And his Lordship said that he did not see any distinction as to the legacy being contingent or merely future (*n*). So in *Carey v. Askew* (*o*), the testator gave 15,000*l.* to his daughter, to be paid to her at twenty-one or marriage, with interest in the meantime; but if she died before, to sink: And Lord Kenyon, M. R., held, that the money must be immediately raised and appropriated, although the child might not live to attain her age, or day of marriage (*p*).

However, it should appear from the case of *Webber v. Webber* (*h*), that where a legacy of a certain sum of money is given, on a contingency, the Court will not direct a sum of stock belonging to the estate to be appropriated to pay the legacy when the contingency happens; but will direct the whole residue to be paid over to the residuary legatee, on his giving satisfactory security: The principle on which this was so ruled was, that the legatee being entitled to receive a certain sum in money when the contingent event happens, the legacy is not capable of being secured by the present appropriation of any sum of stock (*i*).

When the appropriation is made under the direction of the Court, it should seem, according to the opinion of Lord Thurlow, in *Green v. Pigot* (*k*), that the legatee must bear any losses and enjoy any additions which the fluctuation of the price of stock may cause: But in *Sitwell v. Bernard* (*l*), Lord Eldon said, that there had been other cases since *Green v. Pigot*, in which it had been held not to be the legitimate effect of appropriation to give a larger interest than if there had been no appropriation: However, in the subsequent case

(*n*) See *Pullen v. Smith*, 5 Ves. 21, for an instance of an appropriation on the application of a contingent legatee. See also the observation of Buller, J., in *Hutchinson v. Hammond*, 3 Bro. C. C. 144, 145.

(*o*) 2 Bro. C. C. 58.

(*p*) See also the *Governesses Benevolent Institution v. Rushbridger*, 18 Beav. 467.

(*h*) 1 Sim. & Stu. 311.

(*i*) By Sir John Leach, V.-C., 1 Sim. & Stu. 312, 313.

(*k*) 1 Bro. C. C. 105, 106.

(*l*) 6 Ves. 543.

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of *Burgess v. Robinson* (n), where there had been an investment of 500*l.* in stock, in pursuance of an order made on the application of a trustee, without the consent of the plaintiff, who was entitled thereto, Sir William Grant held that the investment of the money was an appropriation by which all parties were bound, and therefore that the plaintiff was entitled to the stock, and all the benefit accrued from the rise thereof (n).

When a fund has been appropriated for the payment of an annuity given by Will, a question may arise whether the legatee is to suffer the loss consequent on the partial failure of the fund. In cases where the annuity is a charge upon the whole personal estate, it seems clear that the executor cannot affect the legatee's right to the entire annuity by any appropriation (o). Thus in *May v. Bennett* (p), a testator having directed his executors to lay out, in what government security they pleased, as much money as would produce a certain annual interest, and having given that annual interest to his wife during her life, in case she did not marry again, the executors invested in the five per cents. a sum which yielded dividends exactly equal to the specified income: Those dividends were afterwards diminished by the conversion of the five per cents. into four per cents. And Lord Gifford, M. R., held, that the widow was entitled to have the deficiency made good, either by the sale from time to time of portions of the appropriated stock, or out of any other part of the residue which could be made available. Again in *Davies v. Wattier* (q), a testator having directed an annuity to be paid out of his personal estate, a sum of five per cent. stock was, in the course of the cause, ordered to be set apart to answer the annuity: This fund having become

Appropriation
to secure
bequest of an
annuity.

(m) 3 Meriv. 9, 10.

(n) See also *Rock v. Hardman*, 4 Madd. 254, by Sir John Leach, V.-C. *Kimberley v. Tew*, 4 Dr. & W. 139, 140.

(o) *Gordon v. Bowden*, 6 Madd.

342.

(p) 1 Russ. Chan. Cas. 370. And this was adopted in the case of *Carmichael v. Clew*, 5 App. Cas. 588.

(q) 1 Sim. & Stu. 463.

insufficient for the purpose, by the conversion of the five per cents. into four per cents., the deficiency was directed by Sir John Leach, V.-C., to be supplied out of another fund, to which other persons interested in the residue had been declared to be entitled (r). But it may be otherwise where the appropriation is made in certain stock by the executor in conformity with the direction of the testator, so that the bequest may be regarded as a gift of the interest of the particular stock. Thus in *Kendall v. Russell* (s), a testator gave the yearly sum of 2,000*l.* sterling to his wife for her life, and after her decease, to his trustees, upon the same trusts as after declared concerning the yearly sum of 3,000*l.*: He then gave to his trustees the yearly sum of 3,000*l.* sterling to issue out a sufficient sum of stock in the five per cents., to be invested in the names of his trustees for that purpose, in trust for his daughter for her life, and, after her decease, for her children: The trustees invested 100,000*l.* five per cents., to answer the two yearly sums: The stock was afterwards converted into four per cents., whereby the dividends became insufficient to pay the yearly sums: And Sir L. Shadwell, V.-C., held that the legatees were not entitled to have the deficiency supplied out of the testator's residuary estate. Where, although the requisite amount of stock has been appropriated in the name of the executor, he afterwards sells it out and wrongfully applies the proceeds to his own use, he and all those who may stand in his place, including a claimant by assignment from him for valuable consideration, even when made before the *devastavit*, of his share in the testator's residuary estate, are precluded from contending that due provision was

(r) See also *Boyd v. Buckle*, 10 Sim. 595.

(s) *8 Sim.* 424. See also *Bague v. Dumergue*, 10 Hare, 462. *Baker v. Baker*, 6 H. L. C. 616, 628. *Hickman v. Upsall*, 2 Giff. 124. If the holder of the annuity assents to the appropriation of some par-

ticular fund for the payment of it, the failure thereof, whether partial or total, would probably be at his risk: *Lumley on Annuities*, p. 298. But such assent must be clearly established: See *Arundell v. Arundell*, 1 M. & K. 316.

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ante, p. 8

made for the annuity; and consequently the deficiency caused by the executor's *devastavit* must be supplied out of his share of the residue (*t*).

Where the existence and amount of a testator's debts are contingent, and depend upon the result of legal proceedings, before a foreign tribunal, which are not likely to be speedily settled, the Court, in administering his assets, will not be induced by that circumstance to direct an appropriation of the fund in Court to answer pecuniary legacies subject to such demands as creditors may eventually establish (*u*).

Appropriation where the amount of the testator's debts is contingent.

SECTION V.

To whom Legacies are to be paid.

This inquiry is one of great importance to an executor, who must be careful to pay legacies into the hands of those who have authority to receive them.

If a legacy be given to A., to be divided between himself and his family, and the executor pays the legacy to A., it is well paid to discharge the executor (*x*). So if one was to give a legacy to the senior Six Clerk, to be divided among himself and the other Six Clerks, it would be well paid to the senior (*y*).

Legacy to A. and his family

It is a general rule, that, where a legatee is an infant, and would be entitled to receive the legacy, if he were of age, the executor is not justified in paying it either to the infant, or to the father, or any other relation of the infant, on his account, without the sanction of a Court of Equity (*z*): And

Infant legatee.

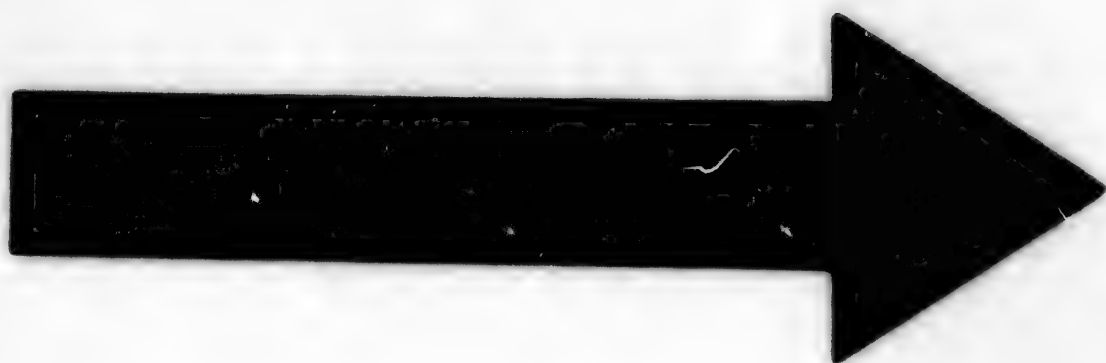
(*t*) *Morris v. Livie*, 1 Y. & C. Ch. C. 380. See also *Barnett v. Sheffield*, 1 De G. M. & G. 371.

(*u*) *Thomas v. Montgomery*, 1 Russ. & M. 729. *Ante*, p. 1241.

(*x*) *Cooper v. Thornton*, 3 Bro. C. C. 96, 186. *Robinson v. Tickell*, 8 Ves. 142. See the cases collected *ante*, p. 989.

(*y*) *Cooper v. Thornton*, 3 Bro. C. C. 99, by Lord Alvanley.

(*z*) *Dagley v. Tolferry*, 1 P. Wms. 285. S. C. *nomine* *Doyley v. Tolferry*, 1 Eq. Cas. Abr. 300, pl. 2. S. C. *nomine* *Dawley v. Ballfrey*, Gilb. Eq. Rep. 103. A contrary doctrine was acted upon in the early case of *Holloway v. Collins*,



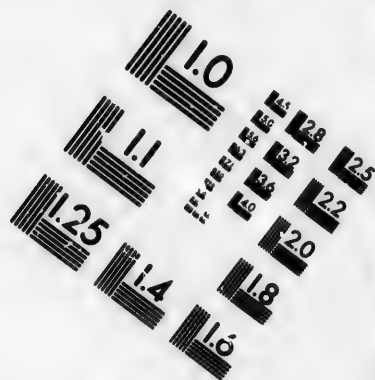
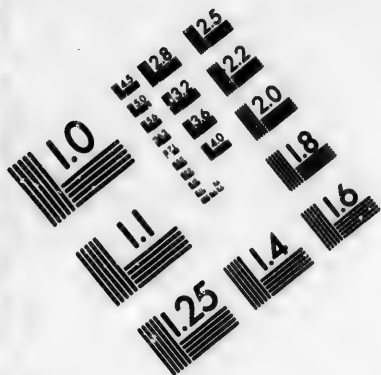
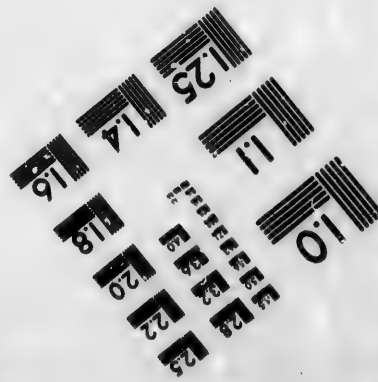
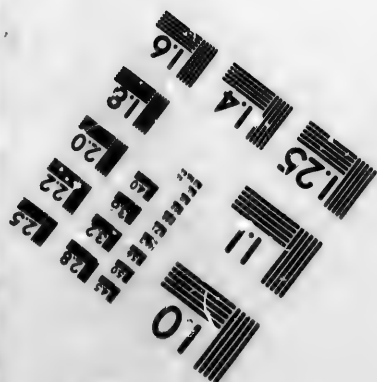
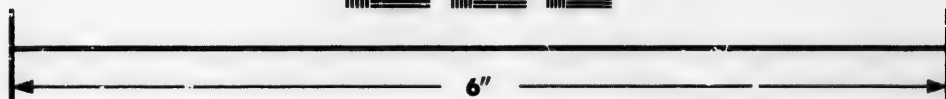
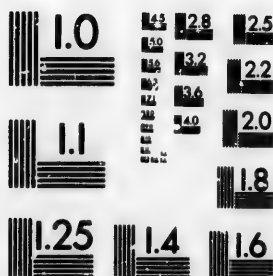


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even in the case of a legatee who has attained majority, payment to the father is not good, unless it be made by the consent of the legatee, or confirmed by his subsequent ratification (a). It may happen that an executor has, with the most honest intentions, paid the legacy to the father of the infant; nevertheless he will be held liable to pay it over again to the legatee on his coming of age: And although such cases have been attended with many circumstances of hardship on the executor, yet he has been held responsible, on the policy of obviating a practice so dangerous to the interests of infants, and so naturally productive of domestic discord (b).

Confirmation
by legatee
after attaining
majority of
previous ap-
plication of
legacy.

But, if a Court of Equity can discover a clear act of the legatee, when of age, confirmatory of the application of his legacy by the executor during his minority, it will hold him estopped from claiming a repayment (c). Accordingly Lord Alvanley observed (d), with reference to the case of *Dagley v. Tolferry* (e), "Although the son acquiesced a great length of time, still it was competent to him, or his representatives, to demand it; because a contrary determination would encourage such payment, and because the son must acquiesce, or pursue his father; or, which is the same thing, by bringing his suit against the executor, occasion his pursuing the father: and that I take to be the ground on which Sir John Trevor and Lord Cowper went: and if the legatee did not stand in that relation to the person to whom the legacy was paid, the bill would be dismissed." But the intention, on the part of the legatee, to confirm such application must be unequivocal (f).

1 Chan. Cas. 245. S. C. 1 Eq. Cas. Abr. 303, pl. 1. In *Walsh v. Walsh*, 1 Drewr. 64, Kindersley, V.-C., under special circumstances, ordered an infant's legacy of small amount to be paid to the father.

(a) *Cooper v. Thornton*, 3 Bro. C. C. 97, by Lord Alvanley. If a suit was instituted in the Spiritual Court for an infant's legacy by the father, to have it paid into his

hands, an injunction or prohibition would have been granted: *Rotherham v. Fanshaw*, 3 Atk. 629.

(b) Toller, 314. *Dagley v. Tolferry*, *ubi supra*.

(c) 1 Rep. Leg. 771, 3rd edit.

(d) 3 Bro. C. C. 97.

(e) *Ubi supra*.

(f) See *Lee v. Brown*, 4 Ves. 362.

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When the direction to the executor is not to pay the legacy to the child, but the bequest is made to a *trustee* for him, the executor will be justified in paying the money to the person so appointed (*g*). Hence, if the testator order the sum to be paid to the father, he will be a trustee for his child, and entitled to receive the money; and his receipt will be a good discharge to the executors (*h*). It seems clear, that the direction for payment to the trustee must appear upon the face of the Will, and cannot be proved by parol evidence (*i*).

But the executor may discharge himself from all responsibility, with respect to the payment of legacies due to infants, by virtue of the statute 36 Geo. III. c. 52, s. 32, by which it is enacted, that "where by reason of the infancy, or absence beyond the seas, of any person entitled to any legacy, or to the residue of any personal estate, or any part thereof, chargeable with duty by virtue of this Act, the person or persons having or taking the burthen of any Will or testamentary instrument, or the administration of such personal estate, cannot pay such legacy or some part thereof, although he, she, or they may have effects for that purpose, or cannot pay such residue, or some part thereof, although he, she, or they may have the same, or some part thereof, in his, her, or their hands, it shall be lawful for such person or persons to pay such legacy, or residue, or any parts or part thereof respectively, or any sum or sums of money on account thereof, after deducting the duty chargeable thereon, into the Bank of England with the privity of the Accountant-General of the Court of Chancery (*k*), to be placed to the account of the person or persons for whose benefit the same shall be so paid: and such payment into the

Payment of bequest to a trustee for an infant.

36 Geo. III. c. 52, s. 32.

(*g*) 1 Rep. Leg. 771, 3rd edit.

(*h*) *Cooper v. Thornton*, 3 Bro. C. C. 98. *Robinson v. Tickell*, 8 Ves. 142. *Ante*, p. 1261.

(*i*) *Cooper v. Thornton*, 3 Bro. C. C. 97.

(*k*) By stat. 35 & 36 Vict. c. 44, the office of Accountant-General has been abolished, and his duties

transferred to the Paymaster-General, whose duties with regard to the investment of money paid in under the above section, and to a grant of a certificate of the same are now regulated by Rules 73 and 99 of the Supreme Court Fund Rules, 1886.

Bank shall be a sufficient discharge for the money so paid in, provided the duty be also paid thereon as aforesaid.

Before the passing of this Act, if a suit was commenced to secure a legacy to an infant, the costs were allowed out of the testator's general assets: But after the statute was passed, Lord Alvanley took occasion to say (*l*), that in future he should not give the costs in such a case; for since the statute, the executor has nothing to do but under that Act to pay the legacy into Court; and then he has done: and the infant, when of age, may petition for it.

The executor is not bound to pay the legacy into the Bank, under the statute, till the expiration of a year from the testator's death (*m*).

When the executor may allow maintenance out of a legacy:

(a) out of capital;

It must also be observed that generally an executor cannot, without risk, pay any part of a legacy bequeathed to an infant, either to the infant or to any person for his use. Therefore the executor is not, as a rule, justified in applying any part of the capital of the legacy for the maintenance of the child (*n*), nor indeed of the interest except under the conditions hereinafter appearing. But the Court will in some cases, upon application being made for its sanction, authorise the application of part of the capital for maintenance, if either the total fund is small (*o*), or there is no other means of providing for the support of the child (*p*). And it appears that the executor may do the same on his own authority, if he does no more than the Court would have directed if it had been resorted to in the first instance (*q*). For the principle is established, that if an executor do, without application, what the Court would have approved, he shall not be called upon to account, and forced to undo that, merely because it was done without application (*r*). At the same time

(*l*) Whopham v. Wingfield, 4 Ves. 630. See *Accord*. Wells v. Malton, 31 Beav. 48.

(*m*) Toller, 319.

(*n*) Davies v. Austen, 3 Bro. C. C. 178; 1 Ves. 247. Carmichael v. Wilson, 3 Moll. 79. Robison v. Killey, 30 Beav. 520.

(*o*) Barlow v. Grant, 1 Vern. 255; *Ex parte* Green, 1 Jac. & W.

253. Compare Robison v. Killey, *ubi sup*.

(*p*) Harvey v. Harvey, 2 P. Wms. 21. Prince v. Hine, 26 Beav. 634. Compare *Re* England, 1 R. & M. 499.

(*q*) Rep. Leg. (3rd ed.) 768.

(*r*) Lee v. Brown, 4 Ves. 362, 369, *per* Lord Alvanley. Prince v. Hine, 26 Beav. 634.

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it is the prudent course for an executor in every case to apply to the Court before devoting any part of the capital of a legacy to maintenance (s).

The power of applying the interest of a legacy to the maintenance of an infant legatee is now principally regulated by the Conveyancing and Law of Property Act, 1881 (t). This Act repealed section 26 of Lord Cranworth's Act (u), which dealt with the same matter in almost identical terms (x). By the Conveyancing and Law of Property Act, 1881 (section 43) it is provided as follows:—

(b) out of income of fund;

(1) by statute:

(1.) Where any property is held by trustees in trust for an infant (y), either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securi-

(s) For the manner of application, see below, p. 1275.

(t) 44 & 45 Vict. c. 41, s. 43.

(u) 23 & 24 Vict. c. 145, s. 26.

(x) This section provided: "In all cases where any property is held by trustees in trust for an infant, either absolutely or contingently, they may at their sole discretion pay to his guardians, or otherwise apply for his maintenance or education, the whole or any part of the income of the property; and they shall accumulate the residue of such income by way of compound interest, for the

benefit of the person who shall ultimately be entitled to the property, unless it appears to them expedient to apply such accumulations & if the same were part of the income arising in the then current year." By Sect. 34, these provisions only applied to instruments executed after August 28, 1860.

(y) Where a residue is bequeathed to an infant and the residue has been ascertained, the executor is trustee of such residue for the infant within the meaning of this section: *Re Smith*, 42 C. D. 302.

ties on which they are by the settlement, if any, or by law, authorised to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property (*yy*) from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

(3.) This section applies only if and as far as a contrary intention (*z*) is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provision therein contained.

(4.) This section applies whether that instrument comes into operation before or after the commencement of this Act.

It was held (*a*) that the corresponding section of Lord Cranworth's Act applied only to cases in which the legacy was given to the infant either absolutely, or contingently on the

(*yy*) Where there is no gift of capital but only a gift of the life interest in income, it is suggested by North, J., in *Re Wells*, 43 C. D. 281, that the word "property" in sub-sect. 2 of sect. 3 of the Conveyancing Act, 1881, means the income from which the accumulations arise, because to hold in such a case that "property" necessarily means the capital would be to give to those entitled in remainder accumulations of income to which, apart from the statute, the infant would be entitled, and this would not be a proper construction of a section in an Act the object of which is to shorten and simplify conveyancing: See *Re Buckley's Trusts*, 22 C. D. 583.

(*z*) A direction to accumulate the income of a fund given contingently to a class of infants and to pay the same to them as and when their presumptive shares

become payable, is not the expression of a "contrary intention": *Re Thatcher's Trusts*, 26 Ch. D. 426. If a Will expressly gives the intermediate income to the residuary legatee, that may amount to the expression of a contrary intention: *per Kay, J.*, in *Re Dickson*, 28 Ch. D., at p. 297. But there is no need to look for a contrary intention in such a case since the Act has no application to income to which the infant cannot become entitled, and the application of the Act is equally prevented whether the interest of the infant in the income is negated by the income being expressly given to some other person or whether by construction of law the intermediate income falls into the residue or goes to the next of kin as upon an intestacy, *see infra*.

(*a*) *Re Buckley's Trusts*, 22 Ch. D. 583.

infant attaining twenty-one or on some event happening or not happening, and not to cases in which the gift was absolute in the first instance, but liable to be defeated on the infant legatee not attaining twenty-one, or on the happening or not happening of some future event. It has also been held, both under Lord Cranworth's Act and under the Conveyancing Act, that no payments for maintenance can be made out of the income of a fund, unless the interest would go with the capital so as to belong to the infant on the gift of the capital becoming absolute (b). It is also clear that, if the gift depends on a further contingency, so that the infant legatee will not necessarily become entitled on attaining twenty-one or sooner, this section of the Conveyancing Act does not apply (c).

Under such circumstances as are indicated in the last paragraph, and in other cases to which the Conveyancing Act does not apply, the old rules of equity with regard to payment of income by way of maintenance still hold good. The general principle was that payments may be made for maintenance out

(2) independently of statute.

(b) *Re Dickson*, 28 Ch. D. 291; 29 Ch. D. 331 (under the Conveyancing Act). *Re George*, 5 Ch. D. 837 (under Lord Cranworth's Act). In *Re Cotton*, 1 C. D. 232, maintenance was allowed under Lord Cranworth's Act, and the effect of the Act considered by Jessel, M.R. A future devise of lands does not carry the intermediate rents, and maintenance cannot be ordered out of such rents; but if you find a testator mixing a gift of realty and personality in the same clause, this was held by Lord Eldon to justify the conclusion that the testator intended that the same rule should operate on both and that the intermediate rents of realty and the intermediate income of personality should (when not expressly disposed of) be both dealt with according to the rule with regard to personality. *Genery v. Fitz-*

gerald, Jac. 468, 470; and this rule has been extended to cases where the realty and personality are not given by the same clause, and where the funds are not, strictly speaking, mixed or blended, but merely given for the same object, *Re Dumble*, 23 C. D. 370; *Bellairs v. Bellairs*, L. R. 18 Eq. 510; and compare *Hodgson v. Bective*, 1 H. & M. 376. It would seem that, in these cases falling within the rule in *Genery v. Fitzgerald*, an order may be made for maintenance out of the interim profits of realty and personality thus mixed or appropriated to a common object. *Re Burton's Will*, [1892] 2 Ch. 44; compare *Re Jeffery*, [1891] 1 Ch. 671. *Re Adams*, [1893] 1 Ch. 329, and *Wolstenholme's Conveyancing Acts*, 6th ed., p. 102.

(c) *Re Judkin's Trusts*, 25 Ch. D. 743.

of the income of a legacy only when the legacy is vested in possession (*d*), not when it is vested and payable *in futuro* (*e*), nor when it is contingent (*f*). If the gift is in the first instance absolutely vested in possession, it is immaterial that it is liable to be defeated (*g*) or the legatee not attaining twenty-one, or on the happening or not happening of any future event, unless there is also a direction to postpone payment (*h*). It may be stated generally that, if the income as it accrues from year to year becomes the infant's property absolutely, then the income or part of it may be applied to maintenance; otherwise not. It is hardly necessary to add that an executor must be careful not to pay money for the maintenance of an infant until it is clear that, on the final settlement of all accounts relating to the testator's estate, there will be a clear fund out of the income of which maintenance can be provided (*i*).

Exceptions to
general rule.

The exceptions to the above general rule as well as the rule itself, depend on the well recognised principle that every Will must be interpreted according to the intention of the testator as shown by the Will. Accordingly, the gift of a legacy not vested in possession carries with it the right to intermediate maintenance whenever the Will, either expressly or by implication, authorises the provision of maintenance. It is still common, as formerly it was universal, to insert in well-drawn

(*d*) *Collis v. Blackburn*, 9 Ves. 470. *Stretch v. Watkins*, 1 Madd.

253. For the question what legacies are vested in possession, see Pt. III. Bk. III. Ch. II. § v.

(*e*) *Descrambes v. Tomkins*, 4 Bro. C. C. 149 n.

(*f*) *Butler v. Freeman*, 3 Atk. 58. *Gotch v. Foster*, L. R. 5 Eq. 311. But this must be limited to the case where the legacy is of capital, for where the contingent legacy is a legacy of capital and accumulated interest, or of interest with accumulations, maintenance may, it would seem, be allowed: *Re Wells*, 43 C. D. 281.

(*g*) It will be remembered, however, that trust property in which the infant has a defeasible interest is not within the Statutes and therefore that it is not under the Statutes but *dehors* them that maintenance in such a case is allowed.

(*h*) *Taylor v. Johnson*, 2 P. Wms. 504. See also *Re Buckley's Trusts*, 22 Ch. D. 583, and the chapter on Interest below. Maintenance may be allowed out of any interest to which the infant is entitled.

(*i*) *Warter v. Anon.*, 13 Ves. 92. *Batt v. Anns*, 11 L. J. Ch. 52.

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Wills clauses dealing fully with this subject. And the testator's intention that the legatees shall be maintained out of the property bequeathed to them may be inferred from a gift over of the interest or from other circumstances (*k*). In two classes of cases a rule of construction has grown up by which such an intention is regularly implied, in the absence of directions to the contrary. The first of these classes comprises the cases in which the donor was the father of the legatee or stood *in loco parentis* towards him. In that case the executor may allow maintenance out of the income of a legacy, even though contingent (*l*), or vested and payable *in futuro* (*m*). It is presumed that the parent intended to provide for his children's support during infancy. But this exception holds good only when the testator has provided no other means of maintenance for the children. For if he has provided any other means of maintenance, however small, the presumption of intention is rebutted, and the Court will authorise no further allowance, unless indeed the legacy be vested (*n*). It should be noticed that this rule of construction relating to legacies given by persons *in loco parentis* has not been extended to legacies given by husbands to wives, or given to any other relations than children, unless in fact the testator stood towards them *in loco parentis* (*o*).

The second class of exceptions, in which maintenance may be allowed out of legacies not vested in possession, comprises cases in which a legacy is given contingently to members of a class of infants in either of the following cases. (1.) If it is inevitable that one or more members of the class will

Second class
of exceptions

(*k*) *Sardars v. Millar*, 25 Beav. 154.

(*l*) *Chambers v. Goldwin*, 11 Ves. 1. *Martin v. Martin*, L. R. 1 Eq. 369.

(*m*) *Green v. Belcher*, 1 Atk. 507. In the case of a legacy to a child, let the testator give it how he will, either at twenty-one or marriage, or payable at twenty-one or marriage, and the child has no other provision, the Court will

give interest by way of maintenance, for it will not presume a father so unnatural as to leave a child destitute. *Heath v. Perry*, 3 Atk. 101. *Crickett v. Dolby*, 3 Ves. 10.

(*n*) *Hearle v. Greenbank*, 3 Atk. 716. *Wynch v. Wynch*, 1 Cox, 433. *Ellis v. Ellis*, 1 Sch. & Lef. 1. *Re George*, 5 C. D. 837.

(*o*) See *post*, pp. 1287, 1288.

ultimately take (*p*), or (2.) if the consent of all parties who may be ultimately interested in reversion or otherwise has been obtained. Speaking of the former of these cases, Lord Eldon says in *Ex parte Kebble* (*q*). "The cases after great struggle go this length, that where there are equal legacies to a class of children, even with a direction for accumulation, the principal with the accumulation to be paid at twenty-one, with survivorship in case of the death of any under that age to the others, the chance of all taking or the survivor being equal, the Court takes the fund which belongs to all, and must go to all or some of them, and maintains them all out of the interest (*r*). But the principle cannot be applied where the legacy is not given absolutely to the children and the survivor, but in the case of the death of a child under twenty-one, there is a limitation to the issue; who, for that purpose, are as strangers: In this case, as in that, the property may never belong to any of the children." (*s*).

In the case of a legacy to a class contingently on attaining twenty-one, with benefit of survivorship to the rest in the event of any of the class dying before twenty-one, it is necessary to obtain the consent of any of the class who have attained twenty-one at the time when the payment for maintenance is desired, as well as that of the remaindermen (*t*). A direction to accumulate does not prevent the application of the income for maintenance (*u*). It is probable, but not definitely settled, that the possibility of future members of the class coming into existence does not prevent the allowance of maintenance for those who already exist. It would appear, from some remarks of Sir G. Jessel, M.R., in *Re Breed's Will* (*x*),

(*p*) *Haley v. Bannister*, 4 Madd. 275.

(*q*) 11 Ves. 606.

(*r*) See also to the same effect the subsequent cases of *Marshall v. Holloway*, 2 Swanst. 436, and *Haley v. Bannister*, 4 Madd. 275.

(*s*) See *Accord. Errat v. Barlow*, 14 Ves. 202. *Marshall v. Holloway*, 2 Swanst. 436. *Ex parte Whitehead*, 2 G. & J. 249. *Turner v.*

Turner, 4 Sim. 430. *Cannings v. Flower*, 7 Sim. 523.

(*t*) See *Simpson on Infants*, 2nd ed., 282. *Re Breed's Will*, 1 C. D. 226.

(*u*) *Mole v. Mole*, 1 D. & L. 310. *McDermott v. Kealey*, 3 Russ. Ch. C. 264. *Re Allen*, 17 C. D. 807. *Re Thatcher's Trusts*, 26 C. D. 426. *Re Collins*, 32 C. D. 229.

(*x*) 1 C. D. 226.

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that a trustee or executor can never, on his own authority, make payments for maintenance in the case of a contingent gift to a class. In such a case it is certainly wiser to apply to the Court.

In order to provide maintenance for infants who are only contingently entitled upon attaining twenty-one, where there is nothing in the instrument to warrant maintenance, the course has been taken of effecting a policy of insurance, so as in the event of the infant dying under twenty-one to recoup the amount paid for maintenance and for the premiums upon the policy (*y*). To effect the same result the plan has also been adopted of charging other interests of an infant under the same Will to secure the recouping of sums to which the remainderman would be entitled if a contingency did not occur (*z*).

As a general rule the Court will not allow maintenance to an infant during the lifetime of the infant's father, if the father be of ability (*a*); and the executor will therefore pay it at his peril. It must be noticed that the father's ability must be understood in the sense of ability to maintain and educate according to the fortune and expectations of the infant, and the infant's needs must be considered with reference to the same standard of fortune and expectation. Thus in *Jervois v. Silk* (*b*), 1200*l.* a year was allowed for maintenance although the father had an income of 6000*l.* (-).

No maintenance allowed as a general rule in lifetime of father if he be of ability.

(*y*) *Re Arbuckle*, 14 W. R. 535. *De Witte v. Palin*, L.R. 14 Eq. 251. But see and compare *Re Hamilton*, 31 C. D. 291. *Cadman v. Cadman*, 33 C. D. 397.

(*z*) *Re Colgan*, 19 C. D. 305.

(*a*) *Butler v. Butler*, 3 Atk. 60. *Darley v. Darley*, 3 Atk. 399.

(*b*) *Coop*, 52.

(*c*) See also *Ex parte Williams*, 2 Coll. 740. Another exception to this rule is where a testator has made a provision for a family, in the ordinary sense of the word, that is, the children of a particular stirps in succession or otherwise, but has postponed the enjoyment,

either for a particular purpose or generally for the increase of the estate. It is assumed that he did not intend that the children should be left unprovided for or in a state of such moderate means that they should not be educated properly for the position and fortune which he designs them to have, and the Court has accordingly found, from the earliest times, that, where an heir-at-law is unprovided for, maintenance ought to be provided for him: *Revel v. Watkinson*, 1 Ves. Sen. 93. *Re Allen*, 17 C. D. 907. *Re Collins*, 32 C. D. 229. In *Re Colgan*, 19 C. D. 305, the

Amount
allowed.

The amount allowed for maintenance depends partly on the age and quality of the infant, and partly on the amount of the fund. When the total fund is small, the whole income may be allowed (*d*). In other cases no rule has been established to fetter the discretion of the Court: a reference to the cases in the note (*e*), will show the proportion of the income that

Court ordered a sum for maintenance of infants, entitled to contingent legacies and a share of residue, to be paid in excess of the sum mentioned in the Will of the testator, but charged the increased allowance on the interests ultimately coming to them under the Will in the residue of the testator's estate. It would seem, however, that the Court will not, where there is a trust for accumulation, order a sum to be paid for the education or maintenance of the person who is to succeed to the property in the absence of special circumstances: *Re Alford*, 32 C. D. 383. See also *Josselyn v. Josselyn*, 9 Sim. 63. Even where there is an express provision for the maintenance of an infant legatee, it has been laid down, that the Court will not permit such provision to be applied, if the parent be of ability to maintain the infant legatee: *Andrews v. Partington*, 3 Bro. C. C. 60; S. C. 2 Cox, 223. But though a father is undoubtedly bound to maintain and educate his children, yet it is competent for him to contract that certain property shall be applied to those purposes. Accordingly, in *Meacher v. Young*, 2 M. & K. 490, Leach, M. R., held that, if under a marriage contract a fund has been settled upon trust for the children of the marriage at twenty-one, with a proviso that till their shares become payable the interest shall be applied towards their

maintenance, the father is entitled to receive such interest for that purpose, without reference to his own ability to maintain them. See also *Stocken v. Stocken*, 4 Sim. 152; 4 Myl. & C. 95. *Hawkins v. Watts*, 7 Sim. 199. *Thompson v. Griffin*, 1 Cr. & Ph. 317. And for a further relaxation of the rule, see *Hoste v. Pratt*, 3 Ves. 733. *Sisson v. Shaw*, 9 Ves. 285. *Maberly v. Turton*, 14 Ves. 499. *Brophy v. Bellamy*, L. R. 8 Ch. 798. Where there is a trust for maintenance in a settlement made upon marriage, and the father has maintained the children without calling for a contribution from the fund, he is in the position of purchaser of so much of the fund as it would have been proper to apply towards maintenance: but this rule applies only where the trust for maintenance is contained in an antenuptial marriage settlement which has a basis of contract to support it: *Re Kerrison's Trusts*, L. R. 12 Eq. 422.

(*d*) *Brown v. Smith*, 10 C. D. 377. *Re Hodges*, 7 C. D. 754, where the whole income was allowed by the Court contrary to the discretion of the trustees.

(*e*) *Re Allsop*, C. P. C. 44; 7 L. J. Ch. 194. *Ex parte Williams*, 2 Collyer, 740. *Nunn v. Harvey*, 2 De G. & Sm. 301. *Re Herons, Minors*, 3 Ir. Eq. Rep. 589. And see generally *Simpson on Infants* and *Eversley on Domestic Relations*.

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(*i*) *Foljar*
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1 Eq. 369.

has in different cases been allowed. When the income fluctuates, the executor or trustee may generally calculate the amount to be allowed for maintenance on the basis of the average annual income. It has been held that the executor or trustee may, in some cases, make use of past accumulations for the purpose of maintenance; but this depends upon the wording and construction of the Will (*f*). In some cases the amount allowed for maintenance has been increased in order to provide for the parents or brothers or sisters of the infant, on the ground that it is for the infant's interest to have his near relations living in respectable circumstances (*g*). But this principle appears to apply only to such relations of the infant as reside in the same home with him (*h*).

Where there are two or more funds applicable to the maintenance of an infant, the interest of the infant alone will determine which of the funds is primarily liable (*i*). With regard to allowances for past maintenance of an infant, the general rule is that the Court will not direct an inquiry as to the propriety of an allowance to the *father* unless a special case be made (*k*). The Court, however, is not so strict in the matter of past maintenance in cases other than that of a father: thus an executor (not a father) may be allowed maintenance for the time past (*l*). This allowance, even in the case of a mother, must be limited to what has actually been expended upon such maintenance, though such expenditure may have been less than what the amount of the child's fortune

Allowances for
past main-
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(*f*) See Simpson on Infants, 281.

2nd ed. 299.

(*g*) Wellesley v. Beaufort, 2 Russ. 28. Lanoy v. Athol, 2 Atk. 447. Petre v. Petre, 3 Atk. 511. Allen v. Coster, 1 Beav. 202. Bradshaw v. Bradshaw, 1 J. & W. 647.

(*h*) See Simpson on Infants, 2nd ed. 302 *et seq.*

(*i*) Foljambe v. Willoughby, 2 Sim. & S. 165. Lygon v. Coventry, 14 Sim. 41. Lucas v. King, 11 W. R. 818. Martin v. Martin, L. R. 1 Eq. 369. Re Wells, 43 C. D.

(*k*) *Ex parte Bord*, 2 My. & K. 439. For cases where the Court has found such special circumstances, see Reeves v. Brymer, 6 Ves. 425. Sherwood v. Smith, 6 Ves. 455. Collis v. Blackburn, 9 Ves. 470. Maberly v. Turton, 14 Ves. 499. Stopford v. Lord Canterbury, 11 Sim. 82. Stephens v. Lawry, 2 J. & C. C. C. Carmichael v. Hughes, 20 L. J. Ch. 396.

(*l*) Sisson v. Shaw, 9 Ves. 285. Greenwell v. Greenwell, 5 Ves. 194.

would have justified (m). Where a mother made advances to a son during his minority, and not with the intention of afterwards claiming against his estate, it was held that there was no debt due to her for maintenance during such minority, and it was also held that to support a claim by a mother for maintenance during a period after the son attained majority, there must have been a contract; and as none had been shown the claim was disallowed (n). The case of *Brown v. Smith* (o), which was said by Brett, L.J., to be a case of past maintenance seems in the circumstances of the case to have been rather in the nature of an application for an *ex post facto* approval by the Court of the sum paid as maintenance by the trustees to the mother of the infant. The principle that is to govern the allowance of past maintenance is laid down in that case by the learned Lord Justice as follows:—"Two questions arise, first, what would the Court have allowed, and, secondly, what amount has been expended. The Court cannot allow the trustee all he has expended, if he has expended more than it would have sanctioned; and it cannot allow him as much as it would have sanctioned if he has not expended so much."

Maintenance
out of capital.

As regards maintenance out of capital, it was said by Sir W. Grant (p), that it had very rarely occurred that the Court had broken in upon the capital of a legacy for the mere purpose of maintenance, though frequently for the purpose of putting out the child for life. However, in *Ex parte Green* (q), the petition prayed, that the principal of a sum of 298*l.* belonging to two infants, might from time to time be applied to their maintenance: They had no other property, except some copyhold premises yielding about 6*l.* per annum: Sir Thomas Plumer said, that as the sum was so small, he would venture to make the order; and the order was made without a reference (r).

(m) *Bruin v. Knott*, 1 Phill. Ch. C. 572.

(n) *Re Cottrell's Estate*, L. R. 12 Eq. 566.

(o) 10 C. D. 377.

(p) *Walker v. Wetherell*, 6 Ves. 474.

(q) 1 J. & W. 253.

(r) See also *Barlow v. Grant*, 1 Vern. 254. *Harvey v. Harvey*, 2

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Similar principles to those regulating the power of executors to allow maintenance regulate their power to pay money for the purpose of the advancement of infants. The word "advancement" is commonly used, in contradistinction to maintenance, to describe payments made for the purpose of ensuring a permanent benefit to an infant, generally by establishing him in some profession or career. It can seldom, if ever, be advisable for the executor to make such a payment without the sanction of the Court, but the rule laid down by Lord Alvanley in *Lee v. Brown* (s), applies to advancement as well as to maintenance. The Court has less reluctance to break in upon the capital for the purpose of advancement than for the purpose of maintenance, since advancement is regarded as an investment of the infant's capital for his future benefit (t). It is to be noticed that the Conveyancing Act, 1881, applies only to payments out of the income of the infant's property. Advancement out of capital depends, therefore, on the old law as explained above with regard to maintenance. When advancement is expressly authorised by the Will, the executor may of course always apply the infant's property to that purpose, subject to the terms of the Will.

Advancement.

Applications for the allowance of maintenance or advancement (except when there is an action or matter pending affecting the infant's property when they should be made by summons in the action) are directed to be made at Chambers in the Chancery Division by an originating summons, which should be served on all persons interested in the fund out of which the maintenance or advance is to be paid and supported by an affidavit setting forth the facts on which the application depends.

Mode of application for maintenance to Court.

If a legacy were given to a married woman the rule at

In case of *feme covert* legatee.

P. Wms. 23. *Payne v. Low*, 1
Rus. & L. 223. *Re England*, *ibid.*
49 *ex parte Swift*, *ibid.* 575.
Ex parte Chambers, *ibid.* 577.
Bridge v. Brown, 2 J. & C. C. C.
181. *Carmichael v. Wilson*, 3
Moll. 79. *Nottley v. Palmer*, 14

W. R. 170; 13 L. T. N. S. 647.
Re Clarke, 17 Jur. 362. *Re*
Howarth, L. R. 8 Ch. 415. *Cadman*
v. Cadman, 33 C. D. 397.
(s) 4 Ves. 362.
(t) *Walker v. Wetherell*, 6 Ves.
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common law was that it must be paid to the husband (*u*). So where a legacy was given to a married woman, living separate from her husband, with no maintenance, and the executor paid it to the wife, and took her receipt for it, yet on a suit instituted by the husband against the executor, he was decreed to pay it over again with interest (*x*). It was also adjudged, that if the husband and wife were divorced *à mensâ et thoro*, and a legacy were left to her, the husband alone might release it (*y*), and consequently, to him alone it was payable (*z*). But by the Matrimonial Causes Act (20 & 21 Vict. c. 85), which declares that thereafter a decree for a judicial separation shall take the place of divorce *à mensâ et thoro*, it is provided (sect. 25), that a wife who has been judicially separated from her husband shall from the date of the sentence be considered a *feme sole* in respect of any property which may come to or devolve upon her, and if she die intestate such property shall go as if her husband were then dead: and a wife who has obtained a protection order under section 21 is entitled to payment of a legacy bequeathed to her (*a*).

But this right of the husband to receive a legacy given to the wife was considerably modified by the doctrines of separate property and of the wife's equity to a settlement.

Separate property of wife.

Even before the passing of the Married Women's Property Act, 1882, a legacy given to the *separate use* (*b*) of a married woman vested in her personally, and she alone could give a

(*u*) See *ante*, pp. 659, 660.

(*x*) *Palmer v. Trevor*, 1 Vern. 261. *Toller*, 320.

(*y*) *Stephens v. Totty*, Cro. Eliz. 908.

(*z*) See *Green v. Otte*, 1 Sim. & Stu. 250.

(*a*) See *ante*, p. 55. *Re King-ley's Trusts*, 26 Beav. 84. *Cooke v. Fuller*, *ibid.*, 99. A fund given to trustees in trust for a wife did not, even before the Felony Act,

1870 (33 & 34 Vict. c. 23), vest in the Crown. *Re Harrington*, 29 Beav. 24.

(*b*) It should also be noticed that ever since the Married Women's Property Act, 1870, a legacy not exceeding 20*l.* given to a married woman became her separate property, and her receipt was a good discharge for the same, 33 & 34 Vict. c. 23, s. 7.

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good discharge for it. The effect of this Act is that women married after the commencement of the Act (1 Jan. 1883), are entitled to hold as their separate property any legacy, and that women married before the commencement of the Act are so entitled if their title to the legacy, whether vested or contingent, and whether in possession, reversion, or remainder, accrues after the commencement of the Act. Where, therefore, a legacy is separate property either independently of or by reason of the Act, an executor must pay such legacy to the wife personally and she alone can give a good discharge for it.

The effect of the Married Women's Property Act will be that questions of a wife's equity to a settlement will arise much less frequently, but, inasmuch as many cases may still occur outside this Act, it is still necessary to examine shortly into the subject (c).

If the husband has not made any provision for his wife, the executor may decline to pay the legacy, (however small the amount (d),) until her husband consents to make a suitable settlement upon her; as the Court of Chancery, upon the bill of the husband for the money, would refuse to order payment to him, unless he consented to a reasonable settlement out of it upon the legatee (e). Nor does the Court confine its

Wife's equity
to a settle-
ment.

(c) Such cases will only occur in respect of women married before the commencement of the Act whose title to the property in question accrued before that time. It is to be remembered that if a woman married before the commencement of the Act has before that time acquired a title, whether vested or contingent, and whether in reversion or remainder, to any property it is not made her separate estate by sect. 5 (1) of the Act, though it falls into possession after the Act. *Reid v. Reid*, 31 C. D. 402. See *ante*, pp. 57, 662.

(d) If the amount of the legacy does not exceed 200*l.*, the consent

of the wife in Court to waive her right is not requisite for an order to pay the amount to her husband: But if she insists on her equity for a settlement, the modern doctrine appears to be that she must have it, however small the sum: *Re Cutler*, 14 Beav. 220: *Re Kincaid*, 1 Drewr. 326 (overruling *Foden v. Finney*, 4 Russ. 428). The Court will sometimes, to save expense, dispense with the rule as to requiring the consent in Court of the wife, although the sum is somewhat above 200*l.*: *Roberts v. Collett*, 1 Sm. & G. 138.

(e) *Browne v. Elton*, 3 P. Wms. 202. *Lady Elibank v. Montolieu*,

interposition in favour of the wife, and compel a provision for her, against those persons only, who are seeking to

5 Ves. 742, in note. But the husband is entitled to the *interest* of his wife's property, though he refuses to make a settlement on her. *Sleech v. Thorington*, 2 Ves. Sen. 562, by Sir Thomas Clarke, M. R. See also *Life Association of Scotland v. Siddal*, 3 De G. F. & J. 271. As to how much of the sum bequeathed should be settled on the wife; according to the old practice and in ordinary cases, where there was no misconduct, the fund used to be divided equally between the husband (or those claiming through him) and the wife: But according to the modern practice, the amount to be settled is discretionary, and depends on the particular circumstances of each case. *Re Suggett's Trusts*, L. R. 3 Ch. App. 215; See *Spirett v. Willows*, L. R. 1 Ch. 520; L. R. 4 Ch. 407. And though the rule was, in Lord Eldon's time, that the whole of the fund could not be given to the wife, it is now fully established that where the wife is deserted, or the husband is unable to maintain her, or there are other special circumstances entitling the wife to have the whole fund settled, the Court has the power to order such a settlement: *Scott v. Spashett*, 3 Mac. & G. 599. *Dunkley v. Dunkley*, 2 De G. M. & G. 390. *Re Kincaid*, 1 Drewr. 326. *Koeber v. Sturgis*, 22 Beav. 588. *Squires v. Ashford*, 23 Beav. 132. *Duncombe v. Greenacre*, 29 Beav. 578. *Ward v. Yates*, 1 Dr. & Sm. 80. *Smith v. Smith*, 3 Giff. 121. *Re Groves*, *ibid.* 575. *Barrow v. Barrow*, 5 De G. M. & G. 782.

Re Cordwell's estate, L. R. 20 Eq. 644. *Taunton v. Morris*, 11 C. D. 779. *Boxall v. Boxall*, 27 C. D. 220. *Reid v. Reid*, 33 C. D. 220. The wife's equity includes all unsettled property to which she is entitled, whether it be vested in her in interest before or after the marriage: *Vaughan v. Buck*, 1 Sim. N. S. 284. *Barrow v. Barrow*, 18 Beav. 529, 534. The mere fact that a settlement was made on the marriage of part of her property, does not entitle the husband to be treated as a purchaser of the residue: *ibid.* But in considering the question of the wife's equity, the Court will take into account, not only all moneys of the wife previously received by the husband, but also all moneys which have been settled on the wife: *Re Erskine's Trust*, 1 K. & J. 302. A wife has the same equity to a settlement out of property in which she has only a life interest as out of property in which she has an absolute interest: *Taunton v. Morris*, 11 C. D. 779; but she has no equity to a settlement out of property given for the benefit of herself and her husband during their joint lives, and the life of the survivor of them. *Re Bryan*, 14 C. D. 516; nor out of arrears of past income of real or leasehold property which the husband has assigned to a particular assignee. *Re Carr's Trusts*, L. R. 12 Eq. 609. It may be observed that the wife has no equity to a settlement against her own creditors, for it is plain that there can be no equity to a settlement till the wife's debts are provided

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obtain her property by the assistance of the Court; but, in extension of the principle of those cases in which equity used to restrain the husband from proceeding in the Ecclesiastical Court, because that jurisdiction could not enforce a settlement for the wife, will entertain a bill by a married woman against an executor or administrator and the husband, praying for a provision out of a legacy bequeathed to her, or out of a share of an intestate's estate, to whom she is next of kin (*f*).

But if the wife be an adulteress living apart from her husband, a Court of Equity will not interfere upon her application for a settlement to her separate use out of a legacy given to her: neither will it order the legacy to be paid to her husband; not to the former, because she is unworthy of the Court's notice or interference; nor to the latter, because he does not maintain her, in respect of which duty only the law gives to him her fortune (*g*). It may, however, be inferred from the case of *Ball v. Mont-*

Where wife guilty of misconduct and living apart from husband.

for. *Barnard v. Ford*, L. R. 4 Ch. 247. As to the form of the settlement, see *Spirett v. Willows*, L. R. 4 Ch. 407. *Croxtan v. May*, L. R. 9 Eq. 404. *Walsh v. Wason*, L. R. 8 Ch. 482. *Oliver v. Oliver*, 10 C. D. 765.

(*f*) *Lady Elibank v. Montolieu*, 5 Ves. 737; *Toller*, 321. So where a married woman was entitled under a Will to a legacy charged on land, with power of entry and receipt of the rent and profits, it was held by Lord Campbell, C., affirming the decision of Romilly, M. R., that this power did not deprive the legacy of its equitable character, so as to enable the husband to assign it free from the wife's equity to a settlement, but that the Court would, at the suit of the wife, and on the devisee

paying the legacy into Court, restrain the husband's assignee from enforcing the legal remedies for the recovery of the legacy: *Duncombe v. Greenacre*, 28 Beav. 472. 2 De G. F. & J. 509. So a settlement of the personal estate of an intestate was directed in favour of a married woman, who was his sole next of kin, though her husband being his administrator could obtain possession of it at law: *Smith v. Matthews*, 2 De G. F. & J. 139. As to the origin and nature of the wife's equity for a settlement, see the judgment of Turner, V.-C., in *Osborn v. Morgan*, 9 Hare, 432.

(*g*) *Carr & Eastabrooke*, 4 Ves 146. 1 Rep. Husb. & Wife, 375 2nd edit.

gomery (*h*), that though the Court may not make a settlement on the wife then living in adultery, yet that it will secure her trust property for the benefit of the survivor, or of the children (*i*).

Where wife
not guilty of
misconduct
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Again, where no criminality attaches to the wife, but while she is living apart from her husband, under a deed of separation, a legacy is given to her, as the Court will interpose in her behalf for a provision, and the husband is entitled to the money upon making it, the executor may insist upon a settlement on the wife, as a condition preceding his paying the legacy to the husband (*j*). Accordingly it has been held, that a married woman who had left her husband and was living separate from him, but not in a state of adultery, was held to be entitled to a settlement out of a sum of stock to which her husband had become entitled in her right (*k*).

Wife may
waive right to
settlement.

However, whether the husband shall make any provision, before he receives the legacy, depends solely upon the wife, who may waive her right by appearing in Court and consenting to his receiving it (*l*); even though the clear amount payable has not been ascertained (*m*). Hence, although in making a provision for the wife, the Court always includes

(*h*) 2 Ves. 191. 1 Rep. Husb. & Wife, 276, 2nd edit.

(*i*) The Court, under very peculiar circumstances, ordered the whole income of a fund in Court belonging to a wife who was an adulteress, to be paid to her, on terms: *Re Lewin's Trust*, 20 Beav. 378.

(*j*) *March v. Head*, 3 Atk. 720. 1 Rep. Leg. 773, 3rd edit.

(*k*) *Eedes v. Eedes*, 11 Sim. 569.

(*l*) A married woman while an infant will not be allowed to waive her equity to a settlement: *Shipway v. Ball*, 16 C. D. 376; nor will

she if she is a ward of Court, and has married without its authority: *Stackpole v. Beaumont*, 3 Ves. 89. If a wife waives her equity to a settlement, and consents that her husband shall have the property, the Court requires an affidavit by the husband and wife that no previous settlement affecting the property has been made. *Britten v. Britten*, 9 Beav. 143. Such affidavit, however, has been dispensed with, where the property in question has been very small. *Veal v. Veal*, L. R. 4 Eq. 115.

(*m*) *Packer v. Packer*, 1 Coll. 92.

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the children of the marriage (*n*), yet the wife's title to a settlement is, according to the most approved opinions, *personal* to her, and does not extend to her children (*o*): so that if she be entitled to her legacy, and die, leaving a husband and children, the latter although unprovided for by settlement, can claim no provision out of the legacy (*p*); and if he files a bill to recover such legacy, his children cannot oblige him to make a provision for them out of it (*q*). Where, indeed, there was a decree for a settlement on the wife, the children were entitled to the benefit of it, although the wife might have died before any proposal for a settlement was carried into the Master's office (*r*). Nevertheless, if the wife, after the institution of the suit, to which she is a party defendant, for administering the estate out of which the legacy is to be paid, appears in court, and consents that her husband shall have the fund wholly and absolutely, it will be so ordered, and the children will be deprived of any provision out of it (*s*). Hence it appears to follow that the wife's

(*n*) See *Groves v. Clarke*, 1 Keen. 140. If there are no special circumstances, the Court provides for the wife for life out of the fund, and afterwards gives it to the issue, if any, with an ultimate reversion to the husband or his representatives. *Spirett v. Willows*, L. R. 1 Ch. 520. *Croxton v. May*, L. R. 9 Eq. 404. In the latter case *Carter v. Taggart*, 1 De G. M. & G. 286, and *Bagshaw v. Winter*, 5 De G. & Sm. 466, were questioned.

(*o*) *Winch v. Brutton*, 14 Sim. 379. See stat. 20 & 21 Vict. c. 57, enabling a wife, after Dec. 31, 1857, to release and extinguish her right or equity to a settlement.

(*p*) See *Ranking v. Barnard*, 5 Madd. 33.

(*q*) *Scriven v. Tapley*, Amb. 509. *Murray v. Lord Elibank*, 10 Ves. 84. 1 Rep. Husb. & Wife, 264.

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2nd edit. See *Lovett v. Lovett*, Johns. 118.

(*r*) *Rowe v. Jackson*, 2 Dick. 604. *Fenner v. Taylor*, 1 Sim. 171. *Groves v. Perkins*, 6 Sim. 584. *De la Garde v. Lempriere*, 6 Beav. 343, 345, *per* Lord Langdale. And it will make no difference, that by the form of the decree, made without discussion, the settlement to be made is a settlement on the wife alone, and not on the wife and her children: *Groves v. Clarke*, 1 Keen, 132.

(*s*) *Murray v. Lord Elibank*, 10 Ves. 88, 90. S. C. 13 Ves. 6. *Lloyd v. Williams*, 1 Madd. 466. *Fenner v. Taylor*, 1 Sim. 169, 171. *Baker v. Bayldon*, 8 Hare, 210: *Secus*, where there is an agreement by the husband for a settlement: *Fenner v. Taylor*, 1 Sim. 169: or where the interest is reversionary, in part

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equity does not attach, for the benefit of her children, upon the mere filing of the bill (t). But in *Lloyd v. Mason* (u), where the wife appeared by her counsel at the hearing of the cause and claimed her equity, and the legacy was directed to be carried to the separate account of the husband and wife; and, the husband being a bankrupt, and his assignee having sold his interest in the legacy, the solicitors for the purchaser and for the wife agreed to refer the claim of the wife to their counsel, who determined that she was entitled to a settlement, subject to the costs: but before any further steps were taken, she died, leaving children; it was held by Sir J. Wigram, V.-C., that the husband and those claiming through him were, after the steps which had been taken, bound to allow a settlement of part of the fund on the wife and children, and that on her death the children were entitled to the portion which would have been settled: And his Honor observed, that the question whether the children could, after the death of their mother, insist on her equity, depended, not on the question whether she was bound, but whether her husband was: That there might be a case in which she was not absolutely bound, but in which, as against the husband, the children were entitled; and that if he was bound, the children were certainly entitled.

Wife's equity
obligatory on
those claiming
from or under
husband.

The equity of the wife to oblige her husband to make a suitable provision for herself and children, in consideration of her fortune, is obligatory upon all persons claiming generally from or under him, as executor, trustee in Bankruptcy, or assignees by deed in trust to pay debts: So that if the husband becomes a bankrupt, or assigns his property to

vested and in part contingent: *Wade v. Saunders*, 1 Turn. & R. 306. See *ante*, p. 743, note (q). Where a wife established her right to a settlement, as against her husband's assignees, to the extent of one-half of the fund, Lord Langdale, M. R. held that she could not afterwards waive the making of the settlement

so as to defeat the rights of her children: *Whittem v. Sawyer*, 1 Beav. 593.

(t) *De la Garde v. Lempriere*, 6 Beav. 344, overruling *Steinmetz v. Halthin*, 1 Gl. & J. 64. *Wallace v. Auldjo*, 1 De G. J. & S. 643.

(u) 5 Hare, 149.

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trustees for the benefit of his creditors, including the interest of his wife, the trustee in Bankruptcy or assignees under the deed of assignment will be obliged to make provision for her and children, before they are permitted to receive it, whether the legacy be absolute or for life only (*x*): or the Court, in its discretion, may order the whole of the fund to be settled (*y*).

It must here be remarked, that an executor *may* pay a wife's legacy to her husband, which will defeat her right to a settlement; but if there be a suit pending, the executor cannot make the payment, because his office is suspended (*z*). But he is always justified in refusing to pay over the wife's fund to the husband, even at her request, and insisting on giving her an opportunity of asserting her equity to a settlement (*a*).

When the wife is the subject of a foreign state, by the law of which her husband would be entitled to receive the whole of her property, without making any provision for her, the Court will dispense with her consent, and order the fund to be paid to her husband, without requiring any settlement (*b*).

Where the wife is a subject of a foreign state.

(*x*) *Carr v. Taylor*, 10 Ves. 574. *Beresford v. Hobson*, 1 Madd. 362. *Green v. Otte*, 1 Sim. & Stu. 250. *Ex parte O'Ferrall*, 1 Gl. & Jam. 347. 1 Rep. Leg. 774, 3rd edit. *Wilkinson v. Charlesworth*, 10 Beav. 324. *Taunton v. Morris*, 11 C. D. 779.

(*y*) *Ante*, p. 1277, note (*e*), and the cases there cited. So the wife's equity will prevail against a purchaser from the husband for a valuable consideration, if she takes an absolute interest in the fund: *Scott v. Spashett*, 3 Mac. & G. 589: *Secus*, if she has only a life interest: *Tidd v. Lister*, 10 Hare, 141. *Re Duffy's Trust*, 28 Beav. 386. See also *Life Association of Scotland v. Siddal*, 3 De G. F. &

J. 271. See also *Roberts v. Cooper*, [1891] 2 Ch. 335, in which case, however, the wife's conduct was held to bar her equity. As to what amounts to a reduction into possession sufficient to exclude the wife's equity, see *ex parte Norton*, 8 De Gex, M. & G. 258. *Allday v. Fletcher*, 1 De G. & J. 82.

(*z*) *Murray v. Lord Elibank*, 10 Ves. 90.

(*a*) *Re Swan*, 2 Hemm. & M. 34.

(*b*) *Sawer v. Shute*, 1 Anst. 63. *Campbell v. French*, 3 Ves. 323. 1 Rep. Husb. & Wife, 265, 2nd edit. S. P., where the husband and wife are domiciled in Scotland: *McCormick v. Garnett*, 5 De G. M. & G. 278.

Where the
legatee is
abroad.

A difficulty may occur with respect to the payment of legacies, in cases where a legacy is given to a legatee who has been abroad, and not heard of for a long time.

In one case, a legatee having been abroad twenty-eight years, and not heard of for twenty-seven, the Court presumed him to be dead (*c*). And the same was done in a subsequent case (*d*), after an absence, without any tidings, of sixteen years.

But in some cases the Court has required that the parties entitled to the legacies in the event of the death of the legatees should give security to refund, in case the legatee should return (*e*).

However the executor may avoid all responsibility, by pursuing the provisions of the stat. 36 Geo. III. c. 52, s. 32 (*f*), which authorizes the executor or administrator to pay legacies, given to persons abroad, into the Bank, with the privity of the Accountant-General (*g*), as in cases of legacies given to infants.

Where legacy
has been
assigned.

An executor who receives notice that a legatee has charged his legacy is bound to withhold all further payment to him; and the executor can create no new charges or rights of set-off after that time (*h*).

Where the
legatee is a
convict felon.

Where the legatee is a convict felon, a legacy becoming payable to him during the term of his penal servitude, by virtue of the provisions of stat. 33 & 34 Vict. c. 23, vests in the administrator (*i*) (if any) appointed by the Crown (*k*) under that Act, who has absolute power to deal therewith, and sub-

(*c*) *Dixon v. Dixon*, 3 Bro. C. C. 510. See also *In the goods of Hatton*, 1 Curt. 595. *Re Lewes's Trust*, L. R. 11 Eq. 236. See *ante*, p. 264, note (*e*).

(*d*) *Mainwaring v. Baxter*, 5 Ves. 458.

(*e*) *Norris v. Norris, Finch*, R. 419. *Bailey v. Hammond*, 7 Ves.

590. *Dowley v. Winfield*, 14 Sim. 277. *Cuthbert v. Purrier*, 2 Phill. Ch. C. 199.

(*f*) See *ante*, p. 1263.

(*g*) See *ante*, p. 1263, note (*k*).

(*h*) *Stephens v. Venables*, 30 Beav. 625.

(*i*) 33 & 34 Vict. c. 23, s. 10.

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ject to the provisions of the Act, all property to which the convict is at the time of his conviction, or becomes while subject to the Act, entitled, is to be preserved and held in trust by the administrator, and on the convict ceasing to be subject to the Act, such property reverts to the convict, his heirs, executors, or administrators (l). If no administrator be appointed, an interim curator may be appointed, having the same powers as an administrator (m). A legacy acquired by a convict while at large under a ticket of leave is not subject to the Act (n).

Where a legatee of a share of residue less than 20*l.* has died and has no legal personal representative, the Court will distribute such sum amongst the next of kin of such residuary legatee, without requiring administration to be taken out (o).

Where a legacy is under 20*l.*, and the legatee is dead.

SECTION VI.

Of Interest upon Legacies.

Specific legacies are considered as separated from the general estate, and appropriated at the time of the testator's death; and consequently, from that period, whatever produce accrues upon them, and nothing more or less, belongs to the legatee (p). Therefore, where there is a specific legacy of stock, the dividends belong to the legatee from the death of the testator (q): And it is immaterial whether the enjoyment of the principal is postponed by the testator or not (r).

Produce of, or interest on, specific legacies:

- (l) Sect. 8. Beav. 289. *Clive v. Clive, Kay*, 600. See *ante*, p. 1248, note (l) for cases where the question arises between the tenant for life and the remainder-man. And *ante*, p. 729, as to apportionment.
- (m) Sects. 21—26. Sen. 563. (r) 2 *Rop. Leg.* 227, 3rd edit.
- (n) Sect. 30. (q) *Barrington v. Tristram*, 6 Ves. 345. *Bristow v. Bristow*, 5

Where a legacy is charged upon real property, and no day of pay-

Accordingly, it should seem, that the specific legatees of cows, mares, or ewes, are entitled to the brood fallen between the death of the testator and the assent of the executor to the legacy: So also as to the wool of sheep shorn, &c. (s).

on general
legacies:

General legacies in their nature carry interest (t); and, as in the case of all other claims with that incident, the interest is to be computed from the time at which the principal is actually due and payable.

If a legacy be brought into Court, and the legatee has notice of it, so that it is his fault not to pray to have the money, or that the money should be put out, the legatee, in such case, shall lose the interest from the time the money was brought into Court: But if the money was put out, the legatee shall have the interest which the money put out by the Court yielded (u).

In the further consideration of the doctrine of allowing interest on general legacies, the subject may be regarded, First,—in cases where the testator has not fixed any time of payment: Secondly, in cases where the time of payment is named by him.

1st. Where the
testator has
fixed no time
for payment:

1st. When no time of payment is fixed: The executor is by law allowed one year from the testator's death to ascertain and settle his affairs: at the end of which time the Court, for the sake of general convenience, presumes the personal estate to have been reduced into possession: Upon that ground, interest is payable from that time unless some other

ment is mentioned in the Will, interest will be given from the testator's death. *Pearson v. Pearson*, 1 Sch. & Lef. 10. *Spurway v. Glynn*, 9 Ves. 483. But where a legacy is payable out of the proceeds of the sale of real estates it was held by Jessel, M. R., that interest was payable from a year after the testator's death. *Turner v. Buck*, L. R. 18 Eq. 301.

(s) *Wentw. Off. Ex.* 445, 14th

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(t) A legacy of 50*l.* for a ring, is not specific (see *ante*, p. 1022): and therefore carries interest with other pecuniary legacies: *Apreece v. Apreece*, 1 V. & B. 364.

(u) *Maxwell v. Wettenhall*, 2 P. Wms. 27. But now in most cases money lodged in Court is placed on deposit and bears interest at 2 per cent. See Supreme Court Funds Rules, 1886, R. 76.

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period is fixed by the Will (v): Nor will interest be payable from an earlier date, although there is a direction in the Will to pay the legacy "as soon as possible" (x). If, indeed, the legacy is decreed to be a satisfaction of a debt, the Court always allows interest from the death of the testator (y). A further exception to the rule exists in the case of a legacy given to a child by a parent, or one *in loco parentis* (z), whether by way of portion or not; in which instance the Court will give interest *from the death*, to create a provision for its maintenance (a): So where a testator bequeaths a sum of money to an infant, and directs that his maintenance shall be paid out of the interest of that sum, the payment of interest will be allowed from the death, and not be postponed till the end of one year after (b). In *Lowndes v. Lowndes* (c), the Court of Exchequer decided that illegitimate children are not within the general exception of a legacy given by a parent to a child. But in *Newman v. Bateson* (d), where a legacy was given to a natural daughter of the testator, with directions that so much of the interest should be applied in her maintenance as his executors should think proper, the Court held, that although the daughter was a natural child yet the testator having given maintenance expressly to her, it came within the common rule of a legacy given to a child; and directed interest from the time of the testator's death (e). This

(v) *Wood v. Penoyre*, 13 Ves. 333, 334. See also *Gibson v. Bott*, 7 Ves. 96.

(z) *Webster v. Hale*, 8 Ves. 410, 413. *Benson v. Maude*, 6 Madd. 15.

(y) *Clarke v. Sewell*, 3 Atk. 99. So where the testator charged his real estate by Will with the simple contract debts of another person, he was considered as having adopted those debts as his own, and the creditors, as legatees, were held entitled to interest from his death:

Shirt v. Westby, 16 Ves. 393.

(x) *Wilson v. Maddison*, 2 Y. & C. Ch. C. 372. As to what persons stand *in loco parentis*, see *ante*, p. 1200.

(a) *Beckford v. Tobin*, 1 Ves. Sen. 310. *Crickett v. Dolby*, 3 Ves. 13. See *post*, p. 1289.

(b) *Re Richards*, L. R. 8 Eq. 119.

(c) 15 Ves. 301.

(d) 3 Swanst. 689.

(e) See also *Dowling v. Tyrell*, 2 Russ. & M. 343. *Acc.*

exception, however, is confined to legacies in favour of infants, and has never been extended to a legacy given to an adult (*f*). Nor does it apply to the case of a wife (*g*).

After the expiration of the year from the death of the testator, the legacy will carry interest, although payment be, from the condition of the estate, impracticable (*h*), and although the assets have been unproductive (*i*): The general rule was stated by Lord Redesdale, in *Pearson v. Pearson* (*k*): "Whether the fund bears interest or not, is totally immaterial in the case of pecuniary legacies; I remember a case of *Greening v. Barker*, where the fund did not come to be disposable for the payment of legacies till near forty years after the death of the testator, and yet the legacies were held to bear interest from the year after the testator's death; and the Court there was of opinion, that it was a general settled and fixed rule, that pecuniary legacies bear interest from the expiration of twelve months, if there should at any time be a fund for the payment of them, and that in case the fund was productive within the twelve months, all the intermediate profits belong to the residuary legatee: The executor may pay the legacy within the twelve months, but is not com-

(*f*) *Raven v. Waite*, 1 Swanst. 553. *Wall v. Wall*, 15 Sim. 513.

(*g*) *Stent v. Robinson*, 12 Ves. 461. *Re Whittaker*, 21 C. D. 657.

(*h*) *Wood v. Penoyre*, 13 Ves. 334. A testator gave a legacy to his daughter, and all his real and personal estate to his wife, and after her death, he gave his real estate, subject to the legacy to his son in fee: The wife survived the testator, and afterwards died: And Sir L. Shadwell, V.-C., held that the legacy, with interest from the end of a year after the testator's death, was raiseable out of the real estate, in case the personal estate was deficient: *Freeman v. Simpson*, 6 Sim. 75. See also *Acc.*

Milltown v. Trench, 4 Cl. & Fin. 276; S. C. 10 Bligh, N. S. 1.

(*i*) So it has been held that if a legacy be given to A., subject to the payment of a minor sum to B., interest on such minor sum is payable by A. to B. from the end of a year after the testator's death, notwithstanding that, in consequence of litigation between A. and the residuary legatees, A. did not, for several years, obtain possession of his own legacy, which did not, in the meanwhile, make interest: *Hertford v. Lowther*, 9 Beav. 56. See also *Fisher v. Brierley*, 30 Beav. 268.

(*k*) 1 Sch. & Lef. 10.

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pelled to do so: he is not to pay interest for any time within the twelve months, although during that time he may have received interest: But if he has assets, he is to pay interest from the end of the twelve months, whether the assets have been productive or not."

Where a legacy was given to A., to be paid at twenty-one, and if he should die before attaining that age, then to B., and A. died before twenty-one, several years after the testator, it was holden that B. was entitled to interest on the legacy from the death of A.; for although it was objected that, this being a new substantive legacy to B., the executor ought to have a year's time for the payment of it, yet the Court held, that the year's time must be intended to be from the death of the testator (l).

In *Pickwick v. Gibbes* (m) a testator directed his trustees, as soon as convenient after the decease of his wife, to raise 10,000*l.* for his nephew, an infant, and to invest it and apply the income towards his maintenance: The testator had previously given his wife an annuity of 1,000*l.* a year payable quarterly: The wife predeceased the testator: And Lord Langdale, M.R., held that the infant was entitled to interest on his legacy, from the testator's decease.

An annuity bestowed by Will, without mentioning any time of payment, is considered as commencing from the death of the testator, and the first payment as due at the expiration of one year (n): from which latter period interest may be claimed in cases where it is allowed at all. But, generally speaking, the Court of Chancery has refused application for interest upon the arrears of annuities given by Will (o): unless in cases where the person charged with the payment of the annuity has at law incurred a forfeiture by non-payment, against which he is obliged to seek relief in equity: there no assistance will be given him by the Court,

Interest on annuities:

(l) *Laundy v. Williams*, 2 P. Wms. 481.

(m) 1 Beav. 271.

(n) See *ante*, p. 1242.

(o) *Torre v. Browne*, 5 H. L. C.

555. *Booth v. Coulton*, 2 Giff.

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Interest on
bequests for
life :

2ndly. When
the time of
payment is
fixed :

except upon terms of doing equity, *viz.* : by consenting to pay the grantee of the annuity the arrears due, with interest (p).

The question, whether a legatee for life is entitled to interest from the death of the testator, or from the end of the year after his death, has been considered in a previous section (q).

2. With respect to interest on general legacies, where the time of payment is fixed by the testator : The general rule is, that the legacies will not carry interest before the arrival of the appointed period ; as for instance, when the legatee shall attain twenty-one (r) : Nor will it make any difference that the legacy is vested (s).

(p) *Ferrers v. Ferrers*, Cas. temp. Talb. 2. 2 Rep. Leg. 309, 3rd edit. Other cases where the Court has allowed interest on arrears have been where the annuitant has held some legal security which but for the interference of the Court he might have made available for the payment of interest, or where the accumulation of arrears has been occasioned by the misconduct of the party bound to pay. *Torre v. Browne*, 5 H. L. C. 578.

(q) *Ante*, p. 1239 *et seq.*

(r) *Heath v. Perry*, 3 Atk. 101. *Tyrrell v. Tyrrell*, 4 Ves. 1. Interest is payable only from the time the legacy is receivable : *Earle v. Bellingham*, 24 Beav. 448. But if the appointed period (*e. g.*, the legatee's attaining twenty-one or marrying with consent) arrived in the lifetime of the testator, the legacy will carry interest from his death : *Coventry v. Higgins*, 14 Sim. 30.

A legacy to an infant as executor is not payable till he can accept office, *i. e.*, at twenty-one, and there-

fore he is not entitled to interest meanwhile. *Re Garduer*, 67 L. T. 552.

(s) *Heath v. Perry*, 3 Atk. 102, by Lord Hardwicke. *Crickett v. Dolby*, 3 Ves. 10. *Festing v. Allen*, 5 Hare, 575, 577. Where a testatrix gave several legacies, and directed her husband, whom she appointed her executor, to pay the legacies as soon after her death as might be convenient, or within three years, if it should suit his convenience, *Alderson, B.*, held, that the legatees were not entitled to interest on their legacies before the expiration of the three years : *Thomas v. Atty.-Gen.*, 2 Y. & C. 525. But where there was a direction to invest the legacies within seven years of the testator's death, and such direction was for the convenience of the estate, and not for the benefit of the residuary legatee, it was held, that as the estate was sufficient to pay them at the testator's death, interest must be paid from the end of a year after : *Varley v. Winn*, 2 K. & J. 700.

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Where, however, a fund is severed immediately from a testator's death for the benefit of the objects of the gift (*t*), not only is the gift vested (*u*), but carries the interim income, though the only gift is in a direction to pay at a future time (*v*).

Again, as we have seen (*x*), this rule is subject to an exception in case of the testator being the parent (or *in loco parentis*) (*y*), of the legatee: For there, whether the legacy be vested or contingent, if the legatee be not an adult (*z*), interest on the legacy shall be allowed, as a maintenance, from the time of the death of the testator (*a*), *if there is no other provision for that purpose* (*b*). The Court will determine the *quantum* of allowance, either the whole of the usual interest allowed by the Court, or less, according to circumstances (*c*).

legacies to
children of
testator:

Where the legatee is the child of the testator, and a

(*t*) That is to say, severed by direction of the testator: thus Cotton, L. J., in *Re Dickson*, 29 C. D. 331, 336, says, speaking of what sums can properly be said to be held by trustees in trust for an infant, "As to each of these sums I should say it did not come within that description because it was not set apart by the direction of the testator so as to be held by these trustees for the benefit of the infant, but was only retained by the trustees to enable them to comply with the directions in the Will if and when the infant attained twenty-one."

(*u*) See *ante*, p. 1103.

(*v*) *Dundas v. Wolfe Murray*, 1 Hemm. & M. 425.

(*x*) *Ante*, p. 1287.

(*y*) *Acherley v. Vernon*, 1 P. Wms. 783. *Hill v. Hill*, 3 V. & B. 183. *Mills v. Robarts*, 1 Russ. & M. 555. *Leslie v. Leslie*, Cas. temp. Sugd. 4. *Rogers v. Soutten*,

2 Keen, 598. *Wilcon v. Maddison*, 2 Y. & C. Ch. C. 372. *Russell v. Dickson*, 2 Dr. & War. 133.

(*z*) *Raven v. Waite*, 1 Swanst. 553. *Wall v. Wall*, 15 Sim. 513.

(*a*) *Harvey v. Harvey*, 2 P. Wms. 21. *Inledon v. Northcote*, 3 Atk. 438. *Chambers v. Goldwin*, 11 Ves. 2. *Brown v. Temperley*, 3 Russ. Chanc. Cas. 262. *Martin v. Martin*, L. R. 1 Eq. 369. Even though the Will should contain an express direction that the interest shall accumulate: *Mole v. Mole*, 1 Dick. 310. *McDermott v. Kealey*, 3 Russ. Ch. Cas. 264, note. In the case of a child *in ventre sa mère*, interest must be computed from the time of its birth: *Kawlines v. Rawlins*, 2 Cox, 425.

(*b*) *Wynch v. Wynch*, 1 Cox, 433. *Donovan v. Needham*, 9 Beav. 164. *Rudge v. Winnall*, 12 Beav. 357. *Re Rouse's Estate*, 9 Hare, 649.

(*c*) 2 Rep. Leg. 234, 3rd edit.

specific sum is given by the Will for maintenance, no greater allowance can be claimed for that purpose, although it be less than the usual rate of interest upon the legacy (*d*): But the Court has in some cases increased the allowance, where it was insufficient for a reasonable maintenance, and where the legacy was vested (*e*); or, where maintenance has been given up to a particular date or the happening of a particular event during infancy, has allowed interest on a legacy for maintenance in the interval between that date and majority (*f*).

This exception is not extended in favour of nephews and nieces (*g*), nor of grandchildren (*h*) unless the testator were *in loco parentis*.

apparent intent that the legatees shall be maintained out of the bequest:

Again, in some instances, legacies payable at a future period will carry interest, although not given by a parent, or a person *in loco parentis*, where there appears an intention on the part of the testator that the legatees shall be maintained out of the property bequeathed to them (*i*). In *Boddy v. Daves* (*k*), a testator gave legacies out of a sum of stock to the grandchildren named in his Will on their attaining the age of twenty-one, and if any of them should die under twenty-one their portion to be equally divided among such of them as should attain twenty-one; but if the whole of his said grandchildren should die under that age, then he gave the interest of the sum of stock to the father of the said grandchildren for his life, and after his decease the principal as therein mentioned: And Lord Langdale,

(*d*) *Hearle v. Greenbank*, 3 Atk.

716. *Long v. Long*, 5 Ves. 286, note. *Ellis v. Ellis*, 1 Sch. Lef. 1. *Re George*, 5 C. D. 837.

(*e*) *Aynsworth v. Pratchett*, 13 Ves. 321. 2 Rep. Leg. 238, 3rd edit. See *Turner v. Turner*, 4 Sim. 430.

(*f*) *Chambers v. Goldwin*, 11 Ves. 2. *Martin v. Martin*, L. R. 1

Eq. 369.

(*g*) *Crickett v. Dolby*, 3 Ves. 10.

(*h*) *Haughton v. Harrison*, 2 Atk. 330. *Butler v. Freeman*, 3

Atk. 58. *Descrambes v. Tomkins*, 4 Bro. C. C. 149, note; S. C. 1 Cox, 133. *Festing v. Allen*, 5 Hare, 579.

(*i*) *Leslie v. Leslie*, Cas. Temp.

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(*k*) 1 Keen, 362.

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M.R., held, that the grandchildren were entitled to the interest during their minority.

Where the payment of a legacy is postponed by the testator to a future period, as until the legatee attains twenty-one, and the Will directs, that when that period arrives, the payment shall be made *with interest*, the legacy will bear interest only from the end of the year after the testator's death (l).

legacy given
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rest."

Where a vested legacy, either particular or residuary, is given to an infant, without appointing any time for payment, and it is subject to a limitation over upon a divesting contingency, which takes effect; as where the legacy is given upon condition to divest it upon the death of the legatee under twenty-one, and he dies under that age: yet as the legacy was payable at the end of the year after the testator's death, the executor or administrator of the infant legatee, and not the legatee over, will be entitled to the interest which accrued on the legacy during the infant legatee's life (m).

Interest of
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divests the
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The same doctrine prevails with respect to a gift of a *residue*, where the bequest is such as to *vest* immediately, but not *payable* until the legatee shall attain twenty-one, with a bequest over, divesting the legacy in case he dies under that age: In that case also, although the legatee dies under twenty-one, his personal representative will be entitled to the interest which became due during the legatee's life (n).

(l) Knight v. Knight, 2 Sim. & Stu. 792.

(m) Taylor v. Johnson, 2 P. Wms. 504. Shepherd v. Ingram, Amb. 448. Montgomerie v. Woodley, 5 Ves. 522. 3 Atk. 102, note by Sanders to Heath v. Perry. Branstrom v. Wilkinson, 7 Ves. 420. Mills v. Roberts, 1 Russ. &

M. 555. McDonald v. Bryce, 2 Keen, 284. Barber v. Barber, 3 Mylne & Cr. 688. See also Webb v. Kelly, 9 Sim. 469. Re Buckley's Trusts, 22 C. D. 583.

(n) Nicholls v. Osborn, 2 P. Wms. 419. Chaworth v. Hooper, 1 Bro. C. C. 81. Hawkins v. Combe, 1 Bro. C. C. 335. Re

The rule is otherwise with respect to contingent bequests (*p*), except in those cases where the infant is entitled to maintenance out of the income of a contingent legacy, either by reason of the testator being the father of or standing *in loco parentis* towards the infant or by reason of the infant being one of a class. So where a particular legacy, though vested, is not payable till twenty-one, and nothing is said in the Will that shows the testator's intention to give interest in the meantime, in such case, if the legacy be divested by the death of the legatee before attaining twenty-one, his personal representatives cannot claim the interest accruing till his death (*q*).

But where a particular legacy is given, even contingent upon the event of the legatee attaining twenty-one, with *interest in the meantime*, and the legatee dies before that age, the arrears of interest up to the time of his death will, it seems, belong to his personal representatives (*r*).

Rate of interest.

It remains to consider the rate of interest allowed on legacies: The rule at present established is, to allow four per cent., whether the legacy be charged upon land, or payable out of personal estate only, unless the Will directs otherwise (*s*). Nor will the rule be varied, it should seem, in the Courts here, by reference to the higher rate of interest allowed in the country where the testator resided, or where the fund was invested at the time of making the Will. Therefore, a legacy by a testator residing in Antigua will not, in an English Court, be allowed to bear Antigua interest (*t*): So if

Smith, 42 C. D. 302. And see *Skey v. Barnes*, 3 Meriv. 345, 346, *per* Sir W. Grant.

(*p*) See Cox's note to *Taylor v. Johnson*, 2 P. Wms. 506. See also *Descrambes v. Tomkins*, 1 Cox, 133; S. C. 4 Bro. C. C. 149, *in notis*. *Glanvill v. Glanvill*, 2 Meriv. 38. *Thruston v. Anstey*, 27 Beav. 337, *per* Wood, V.-C.

(*q*) See Mr. Sanders's note to *Heath v. Perry*, 3 Atk. 102, and

that of Mr. Cox to *Taylor v. Johnson*, 2 P. Wms. 506.

(*r*) *Harris v. Finch*, M'Clel. 141: but see *Errington v. Chapman*, 12 Ves. 20.

(*s*) R. S. C. 1883, Ord. LV., R. 64.

(*t*) *Malcolm v. Martin*, 3 Bro. C. C. 50. See also *Stapleton v. Conway*, 1 Ves. Sen. 427. The case of *Raymond v. Brodbelt*, 5 Ves. 199, was decided on its par-

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a legacy is given in the currency of Jamaica, where the testator resided, and there are assets and executors in both countries, the legatee shall be allowed interest at four per cent. only, and not Jamaica interest, in a suit in an English Court against the English executor (*u*). The principle is, that the fund is supposed in the course of a year after the testator's death to come into the hands of the executor, and that the executor can make four per cent. of it here. If it were proved that the fund was abroad, and greater interest made, it might be otherwise (*x*).

But interest has been directed to be computed, as against the executor, at five per cent., when the property has been employed by him in trade (*y*). Generally, an executor improperly retaining balances is charged with interest at four per cent., but if, in addition, he commits a breach of trust or changes money from a proper to an improper state of investment, he is charged five per cent. If he employ the trust money in trade, he will be charged either with the profits or five per cent. compound interest (*z*). So in a case where an executor was directed to lay out the testator's personalty in the funds, and he unnecessarily sold out stock, keeping large balances in his hands, and resisting payment of debts by a false pretence of outstanding demands, he was charged with five per cent. interest and costs (*a*). And in a case where trustees and executors after payment of a testator's debts kept the balance of the personal estate at their bankers, the Court charged them with interest on the balance at five per cent. from the date of the payment of the debts (*b*).

ticular circumstances: By Sir W. Grant, in *Bourke v. Ricketts*, 10 Ves. 334.

(*u*) *Bourke v. Ricketts*, 10 Ves. 330.

(*z*) *Malcolm v. Martin*, 3 Bro. C. C. 54, by Lord Alvanley.

(*y*) *Heathcote v. Hulme*, 1 Jac. & Walk. 122. *Williams v. Powell*, 15 Beav. 461. *Post*, pp. 1752, 1753. See also *Burnell v. Brown*, 1 Jac. &

Walk. 175, as to the interest where the property is wrongfully withheld.

(*z*) *Jones v. Foxall*, 15 Beav. 388.

(*a*) *Crackelt v. Bethune*, 1 Jac. & Walk. 586. See also *Mosley v. Ward*, 11 Ves. 581. *Knott v. Cottee*, 16 Beav. 77. *Post*, p. 1754 *et seq.*

(*b*) *Re Jones*, 49 L. T. N. S. 91.

Simple interest
except under
particular
circumstances.

The interest on legacies is to be computed upon the principal only, and not upon the principal and interest (c). But under particular circumstances, the Court will allow the legatee compound interest: As where there is an express direction in the Will that the executor should lay out the fund to accumulate, and he neglects to do so (d).

In a case where the testator gave to each of certain infant nephews and nieces by name, a sum of money "with compound interest at five per cent. per annum from the day of their birth, to be settled on their marrying or attaining twenty-one years, whichever may first happen;" it was held by Sir C. Pepys, M. R., that compound interest at five per cent. was to run on each of the legacies from the birth-days of the several legatees till their marriage or majority respectively, and not merely to the day of the testator's death (e).

SECTION VII.

In what currency Legacies are to be paid.

Upon this subject the intention of the testator, as apparent upon the construction of the Will, is to furnish the rule of decision (f). But where legacies are given generally, it will be presumed that the testator intended that they should be paid in the money of the country in which he was domiciled and the Will was made; without regard to the currency of the place where the legatees reside (g).

(c) *Perkins v. Baynton*, 1 Bro. 365.

C. C. 574. *Crackelt v. Bethune*,
1 Jac. & Walk. 586.

(d) *Raphael v. Boehm*, 11 Ves.
92; S. C. 13 Ves. 590. *Dornford*
v. Dornford, 12 Ves. 127. *Jones*
v. Foxall, 15 Beav. 388, 461. *Knott*
v. Cottee, 16 Beav. 77. See *post*,
p. 1756 *et seq.*

(e) *Arnold v. Arnold*, 2 M. & K.

(f) *Lansdowne v. Lansdowne*,
2 Bligh, 91. *Yates v. Maddan*,
16 Sim. 613.

(g) *Saunders v. Drake*, 2 Atk.
466. *Pierson v. Garnet*, 2 Bro.
C. C. 38. *Malcolm v. Martin*, 3
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So if a testator, domiciled in England, charges his lands abroad, with legacies generally, without mentioning whether they are to be paid in sterling money or in currency, they will be payable in sterling money of England (*h*).

Where a legacy is given in a foreign country and coin, as in Sicca rupees, by a Will of a testator domiciled in India, the payment, if made by remittance to this country, must be according to the current value of the rupee in India, without regard to the exchange or the expense of remittance: So as to other countries (*i*).

In *Campbell v. Graham* (*k*), a testator, domiciled in Jamaica, gave legacies in Jamaica currency, which ultimately came to be paid out of assets in England: And Sir J. Leach, M.R., held, that as there could be no expense of remittance, their value was to be computed according to the standard par of exchange between Jamaica and British currency, and not according to the actual rate at the time of payment.

In *Holmes v. Holmes* (*l*), a testator, being then domiciled in Ireland, by his Will made there prior to the stat. 6 Geo. IV. c. 79 (equalizing the currency of the United Kingdom), bequeathed an annuity: He afterwards transferred his residence to England, and died domiciled there, after the passing of that statute: And it was held by Sir John Leach, M.R., that the bequest of the annuity, though not perfected till the death of the testator, was a gift made at the time of making the Will; and, the gift being prior to the statute, that the annuity was to be computed in Irish currency.

In *Banks v. Sladen* (*m*), a testator gave a legacy of 12,500*l*.

(*h*) *Phipps v. Lord Anglesea*, 5 Vin. Abr. 209, pl. 8. S. C. 1 P. Wms. 696. *Wallis v. Brightwell*, 2 P. Wms. 88, 89. *Lansdowne v. Lansdowne*, 2 Bligh, 91, by Lord Eldon. See also *Noel v. Rochfort*, 10 Bligh, 483. S. C. 4 Cl. &

F. 158.

(*i*) *Cockerell v. Barber*, 16 Ves. 461. See *Scott v. Bevan*, 2 B. & A. 78.

(*k*) 1 Russ. & M. 453.

(*l*) 1 Russ. & M. 660.

(*m*) 1 Russ. & M. 216.

four per cent. annuities: At the making of his Will there was a stock called New four per cents., in which he had a small sum, and a stock called four per cents. consolidated, of which he was a holder to a very large amount: Before the death of the testator, the latter stock was reduced to three and a half per cent.; and another four per cent. stock was created: and Sir J. Leach, M.R., held that the investment of the legacy was to be made in an existing four per cent. stock, and not in the stock which had been reduced to three and a half per cent.

In *Sheffield v. Lord Coventry* (n), a testator gave to a son a legacy of 20,000*l.* in "the joint stock of the four per cent. Bank Annuities, transferable at the Bank of England, commonly called four per cent. Bank Annuities:" The only four per cent. Bank Annuities existing at the date of his Will were reduced to three and a half per cent.; and afterwards, and before his death, a new stock of four per cent. Bank Annuities was created: And the same learned Judge held, that the Will spoke at the testator's death, and the son was entitled to a sum of 20,000*l.* in the then existing four per cent. Bank Annuities.

SECTION VIII.

Of the Payment or Delivery of Specific Legacies.

Whether the legatee is entitled to any increase which accrued before the death of the testator:

With respect to the payment, or delivery, of specific legacies, a question may arise, whether the legatee is entitled to any increase, which may have happened to the subject, between the date of the Will and the death of the testator: or, in other words, whether the legacy shall have relation to the one period or the other.

i.e. whether the legacy shall relate to the date of the Will or death of testator:

As to Wills made, or re-executed, or republished on or after the 1st day of January, 1838, it is enacted by stat. 1 Vict. c. 26, s. 24, that "every Will shall be construed

(n) 2 Russ. & M. 317.

with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will."

The general rule, which was established, as to Wills of personal estate, before the passing of this statute, may, perhaps, be stated to be, that, in order to confine the bequest to the date of the Will, the expressions must refer unequivocally to the property which the testator then had; otherwise they would not be allowed to have that effect (o): Thus if the bequest were general, as of all the testator's goods in a particular house or place, whatever personal chattels were found there at the time of his death would pass, though not there at the date of the Will (p).

However, if the testator showed a clear intention to dispose of such goods as belonged to him in a particular place at the date of his Will, property afterwards brought there would not pass: as where the bequest is "of all such part of my personal property as is now in my house at —" (q). But in *All Souls' College v. Coddington* (r), the bequest was, "I devise my library of books, now in the custody of C., to All Souls' College in Oxford;" and the testator gave to the same college 4,000*l.* more to augment their library: He afterwards bought several valuable books, which were placed in his

(o) See *Parker v. Marchant*, 1 Y. & C. Ch. C. 290. See also the rule as stated by Lord Cottenham, in *Cole v. Scott*, 1 Mac. & G. 529. *Ante*, p. 175, note (t).

(p) *Sayer v. Sayer*, 2 Vern. 688. 1 Rep. Leg. 220, 3rd edit. But none will pass by such a bequest, which are not *actually* in the house or place at the testator's death, however clear the intention of the testator may be to have placed them there: Thus if one bequeaths to his son the furniture of his house at D, and orders goods to be carried thither from London, and

agrees with the carrier for that purpose, but dies before the goods are removed to D.; they cannot pass by the bequest: *Beaufort v. Dundonald*, 2 Vern. 739.

(q) 1 Rep. Leg. 220, 3rd edit. *Dormer v. Burnet*, cited in *Downing v. Townsend*, Amb. 281. *Atty.-Gen. v. Bury*, 2 Vin. Abr. 323, pl. 2. 1 Eq. Cas. Abr. 201. See also *Smallman v. Goolden*, 1 Cox, 329. As to the effect of the word "now" in a Will to which the Wills Act applies, see *ante*, p. 175, note (t).

(r) 1 P. Wms. 597.

library: And the question was, whether those books passed to the College: Sir Joseph Jekyll, M.R., determined in the affirmative, upon the construction of the word "now;" his Honor being of opinion, that "now" did not relate to the books which were in the library at the date of the Will; but that it denoted where the library was; and might have been intended to distinguish that particular library from any other belonging to the testator: And his Honor observed, "if I devise all my flock of sheep now on such a hill, or in such a pasture; in that case, because sheep are in their nature fluctuating, some must die, some be killed and some lambs be produced which will afterwards breed, and it being the case of a collective body, the sheep produced afterwards shall pass; and this is within the reason of a devise of a personal estate, which, because always fluctuating, shall therefore relate to the time of the testator's death; besides the Will, as to personals, does not speak till after the testator's death."

case of
accretion:

In *Harcourt v. Morgan* (s), a testator gave to W. H. and M. H. the amount of the bond he held for 1,000*l.*: when they got the principal money paid to them, they then to give their uncle, J. B., the sum of 50*l.*, and also their father and mother the sum of 50*l.* each, arising from the bond: And Lord Langdale, M. R., held, that W. H. and M. H. were entitled to the interest accrued due upon the bond in the lifetime of the testator, as well as to the principal (t).

With respect to cases where the testator has bequeathed the whole of some one *genus* of his property, as "all debts due to me on bonds," or "all my stock," or "my share," or in any other way has referred to particular property, and bequeathed it by the description of all *his* property, the Court had arrived at a conclusion, before the Wills Act, that he meant only so much of the property in that state of investment as he was possessed of at the date of his Will (u).

(s) 2 Keen, 274.

(t) See *ante*, p. 1064 (q).

(u) Kay, 404. 1 Kay & J. 347,

348. *Ante*, p. 1023.

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But in *Goodlad v. Burnett* (x), Sir W. Page Wood, V.-C., expressed his opinion that, since the above enactment of the Wills Act, it required some plainer indication of "contrary intention," than the mere circumstance that the testator has described stock by the words "my stock," to take the case out of the statutory rule that the Will shall speak as if it had been executed immediately before his death: And his Honor accordingly held that, where a testatrix, in 1850, bequeathed thus, "I give my New three and a quarter per cent. annuities," the bequest comprised all the New three and a quarter per cents. which she had at her death:—And the learned judge distinguished between a reference to a particular thing, such as a ring or a horse, and a bequest of it as "my ring" or "my horse," and a bequest of that which is generic and which may be increased or diminished (y).

The effect of section 24 of the Wills Act is not to alter the law of specific legacies (z). The only effect is that, to ascertain what is comprised in a specific bequest, it is necessary in all cases to consider the Will as made immediately before the testator's death (a). There is only one exception to this rule and that is where the testator refers to the date of the Will

(x) 1 Kay & J. 341.

(y) See also *Douglas v. Douglas*, Kay, 400, 405, where the same Judge expressed an opinion that under the Wills Act a gift of "all my stock" would pass all stock to which the testator was entitled at his death; but a gift of "all my stock which I have purchased," must be confined to stock actually purchased at the date of the Will: And his Honor took a like distinction between a gift of "all the debts due to me on judgments," and "all judgments, which I have registered:" His Honor proceeded to decide, that in a Will made since the statute, and

containing the words, "I hereby exonerate my sister from all claims in respect of money laid out by me in improvements of the estates in Scotland, and which money has, according to the laws of Scotland, been charged thereon," the exoneration only applied to moneys so charged at the date of the Will, and not to money afterwards laid out and charged, nor even to money then laid out, but afterwards charged.

(z) *Per* Jessel, M. R. *Bothamley v. Sherson*, L. R. 20 Eq. 304, 312.

(a) *Per* Turner, L. J. *Langdale v. Briggs*, 8 De G. M. & G. 391, 435.

as the point of time at which the quantum of the property is to be ascertained (*b*). There is, however, another apparent exception to the rule, which is, where a testator has used words of such a character that it is doubtful whether or not they are sufficiently extensive to cover additions to the property made between the date of the Will and that of his death. It is in the construction of gifts of this character that question have usually arisen since the Wills Act (*c*).

Bonuses
accruing in the
testator's life :
(a) after the
Will.

(b) before the
Will.

If the testator bequeaths to a specific legatee a certain quantity of Bank stock, for example 5,000*l*. standing in his name, and a bonus be given by the Bank, under the statute 56 Geo. III. c. 96, s. 8, in the interval between the date of the Will and the testator's death, the additional capital will not pass to the legatee (*d*). But in *Matthews v. Maude* (*e*), a testatrix had power to dispose by Will of property, which she enjoyed under the residuary gift of her brother; a part of this property consisted of 7,000*l*. Bank stock which after the brother's death, was increased by a bonus to 8,750*l*.; The testatrix in her Will, made shortly after the bonus was declared, described the Bank stock as consisting of 7,000*l*.: And Sir J. Leach, M. R., decreed that the 8,750*l*. passed by force of general expressions which plainly manifested an intention to bequeath all that the testatrix derived from her brother (*f*). And with regard to bonuses which accrue after

(b) *Cole v. Scott*, 1 Mac. & G. 529. *Douglas v. Douglas*, Kay, 400. *Hutchinson v. Barrow*, 6 H. & N. 583. *Williams v. Owen*, 2 N. R. 585. *Jepson v. Key*, 2 H. & C. 873. *Hepburn v. Skirving*, 4 Jur. N. S. 651. *Lord Lilford v. Powys Keck*, 30 Beav. 300. *Wagstaff v. Wagstaff*, L. R. 8 Eq. 229. And see *ante*, pp. 175-178.

(c) See for cases where the larger interpretation prevailed: *Miles v. Miles*, L. R. 1 Eq. 462. *Trinder v. Trinder*, 10. 695. *Castle v. Fox*, L. R. 11 Eq. 542. *Re Ord*, 9 C. D. 667; 12 C. D. 22. *Saxton*

v. Saxton, 13 C. D. 359. And for cases where the narrower: *Webb v. Byng*, 1 K. & J. 580. *Re Portal and Lamb*, 30 C. D. 50. And see generally as to the time from which a Will speaks, pp. 175-178, *ante*, and as to the ademption of legacies, *ante*, p. 1183 *et seq*.

(d) *Norris v. Harrison*, 2 Madd. 268. See further, *Loscombe v. Wintringham*, 12 Beav. 46. But see also *Courtney v. Ferrers*, 1 Sim. 145.

(e) 1 Russ. & M. 397.

(f) See also, *Carver v. Bowles*, 2 Russ. & M. 304.

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the death of the testator, upon shares specifically bequeathed by him such bonuses belong to the specific legatee (*g*).

Bonuses accruing after the testator's death.

It may be observed, in conclusion, that it is the duty of executors, as far as possible, to preserve articles specifically bequeathed, according to the testator's wish; and, unless compelled, they ought not to apply them to the payment of debts (*h*). And it may be further remarked, that it is also the duty of the executors to get in all the testator's estate, whether specifically bequeathed or otherwise: and that the expenses incurred in doing so must be paid out of the general estate, as part of the expenses of the administration (*i*).

Specific legacies not to be sold without necessity:

must be got in by the executor at the expense of the general estate:

It may be added, that if a testator, dying solvent, bequeaths to A. a given number of articles forming part of a stock of articles of the same description, as for instance if he has twenty horses in his stable and bequeaths six of them, the legatee, and not the executor, has the right of selection (*k*).

right of selection in a legatee of a certain number of a stock of articles.

Where there is a bequest of such of a class of articles as the legatee may select he will be apparently entitled to elect to take the whole (*l*).

There has already been occasion to point out, that if a testator should happen to direct his executor to deliver a specified packet, part of the property of the deceased, to a particular legatee, unopened, the executor cannot, consistently with his duty, comply with this direction (*m*).

Specific legacy of an unopened packet.

(*g*) See *Maclaren v. Stainton*, 27 Beav. 460, 462; reversed 3 De G. F. & J. 202. See *ante*, p. 1285.

(*h*) *Clarke v. Lord Ormonde*, Jacob, 108.

(*i*) *Perry v. Meddowcroft*, 4 Beav. 204. Where a testator bequeathed shares in Companies, in which he was an original shareholder, to his son when he had completed his majority, it was held that the legatee, on attaining twenty-one, was entitled to the dividends from the testator's death, and to have the shares fully paid

up out of the residuary estate: *Wright v. Warren*, 4 De G. & Sm. 367. See also *Clive v. Clive*, Kay, 600. *Re Box*, 1 Hemm. & M. 552. See *post*, p. 1584, as to the exoneration of specific legacies.

(*k*) *Jacques v. Chambers*, 2 Coll. 435. *Millard v. Bailey*, L. R. 1 Eq. 378. *Tapley v. Eagleton*, 12 C. D. 683.

(*l*) *Cooke v. Farrand*, 7 Taunt. 121. *Arthur v. Mackinnon*, 11 C. D. 385.

(*m*) See *ante*, p. 329.

SECTION IX.

Of Election.

Doctrine of
election :

Although the limits of this Treatise will not admit of a full discussion of the doctrine of Election, it is necessary to state briefly the nature of the subject, and some of the leading principles established with respect to it.

It is a principle of equity, that a person, who accepts a benefit under an instrument, must adopt the whole, giving full effect to its provisions, and renouncing every right inconsistent with it: If therefore a testator assumes to dispose of property belonging to A., and devises to A. other lands, or bequeaths to him a legacy, by the same Will, A. will not be permitted to keep his own estate, and enjoy at the same time the fruits of the devise or bequest made in his favour, but must *elect* whether he will part with his own estate, and accept the provisions of the Will, or continue in the enjoyment of his own property, and reject that bequeathed (n).

It is not requisite, for the operation of this principle, that the testator should be aware that the property, of which he so undertakes to dispose, is not his own: The obligation of making an election will be equally imposed on the legatee, although the testator proceeded on an erroneous supposition that both the subjects of bequests were absolutely at his own disposal (o).

(n) See Mr. Swanston's excellent notes to the case of *Dillon v. Parker*, 1 Swanst. 396, *et seq.*, and the cases collected in 2 Rep. Leg. 482, *et seq.* 3rd edit. See also *Wollaston v. King*, J. R. 8 Eq. 165, 173, *per* James, V.-C., that the ordinary principle is, that if a testator gives property, by design or by mistake, which is not his

to give, and gives at the same time to the real owner of it other property, such real owner cannot take both.

(o) *Whistler v. Webster*, 2 Ves. 370. *Thellusson v. Woodford*, 13 Ves. 221. *Welby v. Welby*, 2 Ves. & B. 199. *Naylor v. Wetherell*, 4 Sim. 114. *Re Brooksbank*, 34 C. D. 160. When it appears that

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The case, however, of an attempt by a testator to dispose of property which belongs to some one else must be distinguished from the case where a testator attempts by Will to exercise a power of appointment and the appointment is *ex facie* void; in which case the Will must be read as if the invalid appointment were not in it, and no case of election arises (*p*).

It is necessary, however, that the intention of the testator, to dispose of the property which is not his own, should be clear: the intention must appear by demonstration plain, by necessary implication (*q*). And it must appear, as it should seem, upon the face of the Will: for it seems now to be established that parol evidence is inadmissible for the purpose of showing it (*r*).

Testator's intention must be clear on face of Will.

Parol evidence inadmissible.

the testator meant only to dispose of the property provided he had power to do so, no case of election arises: *Church v. Kemble*, 5 Sim. 525.

(*p*) *Re Warren's Trusts*, 26 C. D. 208, and compare *Re Brookshank*, 34 C. D. 160.

(*q*) *Rancliffe v. Parkins*, 6 Dow, 179, by Lord Eldon. *Johnson v. Telford*, 1 Russ. & M. 244. *Crabb v. Crabb*, 1 M. & K. 511. *Dillon v. Parker*, in Dom. Proc. 7 Bligh, N. S. 325. S. C. 1 Cl. & F. 303. *Clementson v. Gandy*, 1 Keen, 309. *Dummer v. Pitcher*, 5 Sim. 35: 2 M. & K. 262. See the cases collected in 2 Rep. Leg. 408, *et seq.*, 3rd edit. See also *Langslow v. Langslow*, 21 Beav. 552. *Tomkins v. Blane*, 28 Beav. 422. *Honywood v. Foster*, 30 Beav. 14. *Re Fowler's Trusts*, 27 Beav. 362. *Maddison v. Chapman*, 1 Johns. & H. 470. *Stephens v. Stephens*, 3 Drew. 697. 1 De G. & J. 62. *Wintour v. Clifton*, 8 De Gex, M. & G. 641. *Box v.*

Barrett, L. R. 3 Eq. 244. *Cooper v. Cooper*, L. R. 6 Ch. 15. L. R. 7 H. L. 53. *Orrell v. Orrell*, L. R. 6 Ch. 302. *Wilkinson v. Dent*, L. R. 6 Ch. 339. *Synge v. Synge*, L. R. 9 Ch. 128. Where a testator, being part owner of an undivided interest in a particular property, devised that property specifically to his co-owner, it was held that his intention was to devise the entirety and that a case of election arose against his co-owner who took a beneficial interest under the Will. But where the devise is by general words, such as "all my lands and hereditaments," or the like, no case for election arises, because there is other property of the testator's sufficient to satisfy the devise itself: *Padbury v. Clark*, 2 Mac. & G. 298. *Fitzsimons v. Fitzsimons*, 28 Beav. 417. *Whitley v. Whitley*, 31 Beav. 173. *Howells v. Jenkins*, 2 Johns. & H. 706. *Miller v. Thurgood*, 33 Beav. 496.

(*r*) *Stratton v. Best*, 1 Ves. 265.

The doctrine of election is founded on the presumption of a general intention that every part of an instrument shall take effect, and the presumption of such general intention may be rebutted by an inconsistent particular intention apparent in the instrument (s). The rule of not claiming by one part of an instrument in contradiction to or while refusing to comply with another part, has exceptions; and the ground of exception seems to be a particular intention denoted by the instrument, different from that general intention, the presumption of which is the foundation of the doctrine of election (t). It is on this ground that it has been held, that the doctrine of election does not apply to the case of an interest which a married woman takes with a restraint on anticipation (u), whether the question of election is raised upon the face of two clauses in the same instrument (x), or whether it is raised by a married woman taking under a different instrument and refusing to comply with some covenant contained in the instrument, under which she takes the property with the restraint on anticipation (y).

to what cases
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applicable :

The doctrine of election is applicable to interests immediate, remote, contingent, of value, or not of value (z).

Since election arises when a testator disposes of his own property and at the same time affects to dispose of property which belongs to some one else, it follows that the rule as to election is only applicable as between a gift under a Will, and a claim *dehors* the Will and adverse to it, and not as

Doe v. Chichester, 4 Dow. 65, 76, 78, 89. *Clementson v. Gandy*, 1 Keen, 309. See the cases, *contra*, collected in the notes to *Dillon v. Parker*, 1 Swanst. 402, 403. *Pickersgill v. Rodger*, 5 C. D. 163, 171, in which case, however, *Clementson v. Gandy* and the other authorities to the same effect were not cited.

(s) *Re Vardon's Trusts*, 31 C. D. 275.

(t) 1 Swanst. 404, note.

(u) It should be noted that *Willoughby v. Middleton*, 2 J. & H. 344, is in effect overruled by *Re Vardon's Trusts*, *ubi sup.*

(x) *Re Wheatley*, 27 C. D. 606.

(y) *Smith v. Lucas*, 18 C. D. 531.

(z) *Wilson v. Townshend*, 2 Ves. 697, by Lord Loughborough. *Webb v. Lord Shaftesbury*, 7 Ves. 481.

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between one clause in a Will and another clause in the same Will (a).

The property *dehors* the Will must be such, that the person taking under the Will can give it up or make compensation out of it to those disappointed of the benefits intended for them under the Will; otherwise no case of election or compensation arises (b).

It must, however, be observed, that the doctrine does not preclude a party claiming by the Will from enjoying a derivative interest, to which he is entitled at law, under a legal estate taken in opposition to the Will: Thus a man may be tenant by curtesy of an estate tail, held by his wife in opposition to a Will under which he accepts a legacy (c).

Nor is that doctrine applicable as against creditors taking the benefit of a devise for payment of debts, and also enforcing their legal claim upon other funds disposed of by the Will (d).

Previous to the Wills Act, there were some questions heir-at-law : which arose as to whether an heir-at-law was put to his election, which cannot arise in the case of Wills made since that Act. Thus the doctrine of election was not applicable, where real property was assumed to be devised by a Will not executed so as to pass it, and by the same Will a legacy was given to the heir: In such a case the heir might take the legacy, without making good the devise (e); unless the imperfectly executed Will contained an express condition to that effect annexed to

(a) *Wollaston v. King*, L. R. p. 30.

8 Eq. 165. *Wallinger v. Wallinger*, L. R. 9 Eq. 301. *Burton v. Newbery*, 1 C. D. 234. *Bizzey v. Flight*, 3 C. D. 269.

(b) *Re Chesham*, 31 C. D. 466.

(c) *Cavan v. Pulteney*, 2 Ves. 544. S. C. 3 Ves. 384. *Dillon v. Parker*, 1 Swanst. 408, note. See also *Brodie v. Barry*, 2 Ves. & B. 127; and Mr. Jacob's note to his edition of *Roper, Husb. & Wife*, vol. i.

(d) *Kidney v. Coussmaker*, 12 Ves. 136. 1 Swanst. 408, note. 1 Pow. Dev. 437, *Jarman's* edit.

(e) *Cary v. Askew*, 1 Cox, 241. *Shedden v. Goodrich*, 3 Ves. 481. *Brodie v. Barry*, 2 Ves. & B. 127, 130. *Gardiner v. Fell*, 1 Jac. & Walk. 23. 1 Swanst. 406, note to *Dillon v. Parker*. See also *Seaman v. Wood*, 24 Beav. 372.

the legacies (*f*). Under the Wills Act, however, the requisites for a Will of realty and personalty are the same.

Again, previous to the Wills Act a testator could not effectively devise after-acquired lands, although in terms he purported to do so. But in such a case the heir-at-law taking benefits under the Will was held to be put to his election by reason of the intention appearing in the Will (*g*), even though nothing was bequeathed to him which would not have descended to him as heir, if no Will had been made (*h*).

The principle, however, on which these cases were decided, seems still to apply, the principle being, that the Court will put the legatee to his election, wherever the intention of the testator is expressed in an instrument at which the Court is entitled to look, but not where the intention is expressed in an inoperative instrument. Thus the legatee will not be put to his election where the devise of land is invalid on account of a want of capacity to devise by reason of infancy or coverture (*i*).

Where, however, a testator domiciled in England devises "all his real and personal estates, whatsoever and wheresoever," and has Scotch heritable bonds, which do not pass by the Will, for want of certain formalities required by the Scotch law, the Scotch heir is not put to his election, but may take English property under the Will without giving up the bonds; for the devise is held to refer only to such property as is capable of being given by such a Will (*k*).

(*f*) *Boughton v. Boughton*, 2 Ves. Sen. 12.

(*g*) *Churchman v. Ireland*, 4 Sim. 520. *Schroder v. Schroder*, Kay, 578. 24 L. J. Ch. 510. *Hance v. Truwhitt*, 2 J. & H. 216. But see *Johnson v. Telford*, 1 Russ. & M. 244.

(*h*) *Schroder v. Schroder*, Kay, 578. 24 L. J. Ch. 510.

(*i*) *Hearle v. Greenbank*, 3 Atk.

695, 715. *Rich v. Cockell*, 9 Ves. 369. 1 Swanst. 406, n. The rule is the same where a Will, valid at the time of its execution, ceases to be valid by determination of the coverture and want of republication: *Blaiklock v. Grindle*, L. R. 7 Eq. 215.

(*k*) *Allen v. Anderson*, 5 Hare, 163. *Maxwell v. Maxwell*, 16 Beav. 106. 2 De G. M. & G. 705.

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It was formerly important to consider the question of election as applied to the case of a widow entitled to dower. But the length of time which has elapsed since the passing of the Dower Act, 3 & 4 Will. IV. c. 105, which applies to all widows married after January 1, 1834, and which in effect puts an end to questions of election in this matter, seems to make it unnecessary to consider in this edition the effect of the authorities as formerly established.

Widow
entitled to
dower :

The chief provisions of the Act are :

Sect. 4. "No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his Will" (l).

Sect. 7. "A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when by the Will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land or out of any of his land."

Sect. 8. "The right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the Will of her husband, duly executed as aforesaid."

Sect. 9. "Where a husband shall devise any land out of which his widow would be entitled to a dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow (m), such widow shall not be entitled to dower out of or in any land of her said

(l) A general devise is within the terms of this section: *Lacey v. Hill*, L. R. 19 Eq. 346, in which Jessel, M.R., dissented from dicta of Romilly, M.R., in *Rowland v. Cuthbertson*, L. R. 8 Eq. 466.

(m) As to the individual right of election of the next of kin of a widow, where the widow has not made her election in her lifetime :

see *Fytche v. Fytche*, L. R. 7 Eq. 494. A gift of real estate upon trust to sell and to give the widow part of the proceeds in the shape of a part of the capital or of any income of the proceeds to be invested, is a gift of an "estate or interest in the land for the benefit of the widow." *Rowland v. Cuthbertson*, L. R. 8 Eq. 466. *Lacey v. Hill*, L. R. 19 Eq. 346.

husband, unless a contrary intention be declared by his Will."

Sect. 10. "No gift or bequest made by any husband to, or for the benefit of, his widow of, or out of, his personal estate, or of, or out of, any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his Will."

Case of two bequests, one onerous and the other beneficial.

Where a testator makes two distinct bequests in the same Will to the same person, one of which happens to be onerous and the other beneficial, *prima facie* the legatee is entitled to disclaim the onerous legacy and to take the other (*n*). But, in such cases, it is a question of the intention of the testator to be gathered from the Will, whether the legatee must elect to take all, or none, of the gifts in the Will, or whether he may accept the beneficial gifts, and repudiate that which is burdensome (*o*). In cases, however, where onerous and beneficial property are included in the same gift, the legatee cannot disclaim the onerous and accept the beneficial unless the Will manifests a sufficient intention of the testator to the contrary. The gifts may be in substance distinct, though given by one sentence in the Will (*p*).

What constitutes an election.

The inquiry, as to what acts or acquiescence constitute an implied election, must be decided rather by the circumstances of each case than by any general principle: The questions are, whether the parties acting or acquiescing were aware of their rights; whether they intended election; whether they can restore the individuals affected by their claim to the same situation as if the acts had never been performed; or whether these inquiries are precluded by lapse of time (*q*).

(*n*) *Guthrie v. Walrond*, 22 C. D. 573. *Syer v. Gladstone*, 30 C. D. 614.

(*o*) *Talbot v. Radnor*, 3 M. & K. 254. *Warren v. Rudall*, 1 J. & H. 1. *Guthrie v. Walrond*, *ubi sup*.

(*p*) *Re Hotchkys*, 32 C. D. 408. *Guthrie v. Walrond*, *ubi sup*.

(*q*) See Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. 332, and the cases there collected. *Grissell v. Swinhoe*, L. R. 7 Eq. 291. *Cooper v. Cooper*, L. R. 6 Ch. 15. L. R. 7 H. L. 53. Where there are several next of kin, each of them may have a separate right of

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A party bound to elect is entitled first to ascertain the value of the funds; and for that purpose may sustain an action to have all necessary accounts taken (*r*). An election, under a misconception of the extent of claims on the fund elected, is not conclusive (*s*).

Another subject of much doubt, with respect to the doctrine of election, has been, whether the election to take against the Will induces the necessity of relinquishing the benefit given by it *in toto*, or only imposes an obligation to indemnify the claimants whom it disappoints; that is, as it is sometimes expressed, whether the principle, on which the doctrine of election proceeds, is forfeiture or compensation (*t*). The more recent authorities are said to establish, that compensation only is to be made (*u*).

Effect of
election.

election, and, neither the election of the majority, nor that of the heir or administrator, will bind the others. *Fytche v. Fytche*, L. R. 7 Eq. 494.

(*r*) 1 Swanst. 332, note. *Pigott v. Bagley*, M'Clel. & Y. 576, *per* Alexander, C. B.

(*s*) 1 Swanst. 332, note.

(*t*) See the cases collected and discussed in the valuable note of Mr. Swanston to *Gretton v. Howard*, 1 Swanst. 433; and that of Mr. Jacob to his edition of *Rop. Husb. and Wife*, vol. i. p. 566.

(*u*) 1 Swanst. 442, note: But see Mr. Jacob's note, *ubi supra*, and *Greenwood v. Penny*, 12 Beav.

403. The persons disappointed by the election to take against the Will, are entitled to compensation out of the benefits given by the Will to the party so electing, in proportion to the value of the interests of which they are disappointed: *Howells v. Jenkins*, 1 De G. J. & S. 617. *Rogers v. Jones*, 3 C. D. 688. But the engrafted doctrine of compensation does not apply to the case of a person electing to take under the instrument which gives rise to the election, but only to the case of taking against the instrument. *Re Chesham*, 31 C. D. 466.

SECTION X.

Of the Refunding of Legacies.

Under certain circumstances, legatees are bound to refund their legacies, or a rateable part of them. It will, perhaps, be most convenient to consider, 1st, In what cases the executor can compel a legatee to refund; 2ndly, In what cases a creditor has that right; 3rdly, In what cases one legatee can make another refund: It will be observed, however, that the two latter of these inquiries are not properly within the scope of this Treatise.

1st. When the executor can make a legatee refund.

1st. In what case the executor can compel a legatee to refund. The general rule on this subject was laid down by Sir John Strange, M. R., in *Orr v. Kaines* (w): "Whenever an executor pays a legacy, the presumption is, that he has sufficient to pay all legacies, and the Court will oblige him, if solvent, to pay the rest; and not permit him to bring a bill to compel the legatee, whom he *voluntarily* paid, to refund" (x).

But where the payment of the legacy by the executor is under the *compulsion of a suit*, he is entitled to compel the legatee to refund, in case of a deficiency of assets (y).

Again, if the executor pays away the assets in legacies, and *afterwards debts appear*, of which he had no previous notice, and which he is obliged to discharge, he may compel the legatees to refund (z).

But an executor cannot compel residuary legatees to refund if he has "paid over the assets *with notice of a debt*" (a).

(w) 2 Ves. Sen. 194.

(x) See also *Coppin v. Coppin*, 2 P. Wms. 296.

(y) *Newman v. Barton*, 2 Vern. 205. *Noel v. Robinson*, 2 Vent. 368.

(z) *Nelthorpe v. Biscoe*, 1 Chanc.

Cas. 136. *Davis v. Davis*, 8 Vin.

Abr. 423, tit. Devise, (Q. d.) pl. 35.

1 Rep. Leg. 398, 3rd edit. *Doe v.*

Guy, 3 East, 120, 123, *per Lord Ellenborough*.

(a) *Jervis v. Wolferstan*, L. R.

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It seems that, formerly, legatees used to give security to the executor for refunding, if the assets should prove insufficient (*b*).

In *Livesey v. Livesey* (*c*), an annuity was bequeathed to a legatee, but he was not entitled to it until he attained twenty-one: The executrix, by *mistake*, made payments to the legatee in respect of his annuity for two years before he attained that age: And it was holden that the executrix was entitled to retain them out of the future payments of the annuity (*d*).

2. In what case a creditor of the testator can call on a legatee to refund. Where the testator's funds at the time of his death are not sufficient to pay both debts and legacies, it is clear that an unsatisfied creditor can compel a satisfied legatee to refund, whether the legacy was paid to him voluntarily or by compulsion (*e*): and he has the same right,

2nd. When a creditor can make a legatee refund.

a possible remote contingent liability is *not* sufficient to disable an executor from recovering back the assets when that which was formerly a possible remote liability becomes a debt. Notice of a liability on shares will not prevent executors calling on legatees to refund, for a liability on shares does not become a debt until a call is made. *Whittaker v. Kershaw*, 45 C. D. 320.

(*b*) *Chamberlain v. Chamberlain*, 1 Chanc. Cas. 257. *March v. Russell*, 3 M. & Cr. 31, 41. *Ante*, p. 1205.

(*c*) 3 Russ. Ch. C. 287.

(*d*) See also *Cooper v. Pitcher*, 4 Hare, 485.

(*e*) *Hodges v. Waddington*, 2 Ventr. 360. *Noel v. Robinson*, 1 Vern. 94. *Anon.* 1 Vern. 162. *Newman v. Barton*, 2 Vern. 205. *Gillespie v. Alexander*, 3 Russ. Ch. C. 136, 137, by Lord Eldon. *March v. Russell*, 3 M. & Cr. 31.

W.E.—VOL. II.

Noble v. Brett, 24 Beav. 499. *Jervis v. Wolferstan*, L. R. 18 Eq. 18, 25. *Hunter v. Young*, 4 Ex. D. 256, 261. An unpaid creditor has not lost his right to compel a satisfied legatee to refund even though such creditor may be the executor himself: *Jervis v. Wolferstan*, L. R. 18 Eq. 18, 25. The proviso at the end of sect. 29 of Lord St. Leonard's Act (22 & 23 Vict. c. 35), preserves the right of creditors to follow the assets of a testator, *ante*, p. 1208. If, in an action against executors for a legacy, the executors admit assets, and judgment is given for payment of the legacy *de bonis propriis*: *Quære*, whether an unpaid creditor can call upon the legatee to refund the legacy. *Semble*, the creditor could recover the legacy in such a case if it was in fact paid out of the testator's assets, but not if it was paid by the executors *de bonis propriis*. *Re Brogden*, 38

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although the testator's funds at the time of his death were sufficient to pay both debts and legacies (*f*); and although the assets were handed over to the legatee by the personal representative in ignorance of the creditor's demand (*g*).

3rd. When one legatee can make another refund.

3. In what cases one legatee can oblige another to refund. If the assets were originally sufficient to satisfy all the legacies, and afterwards, by the wasting of the executor, there is a deficiency, an unsatisfied legatee cannot oblige a satisfied one to refund, whether the legacy were paid him with or without suit (*h*). But if the assets were not originally

C. D. 546. It would seem that the executor need not be made a defendant, at all events in cases where he has given the notices required by Lord St. Leonard's Act, 22 & 23 Vict. c. 35, and had at the time of distribution no notice of the plaintiff's claim. *Hunter v. Young*, 4 Ex. D. 256.

(*f*) *Hodges v. Waddington*, 2 Vent. 380. *Thomas v. Griffith*, 2 Giff. 504. This right may be lost by laches, acquiescence, or such a course of dealing as would render the assertion of such right inequitable; *Ridgway v. Newstead*, 2 Giff. 492. S. C. on Appeal, 30 L. J. Ch. 889. And so the right of mortgagees of real estate, whose security proves insufficient, to come against the residuary legatees of the mortgagor amongst whom his personal estate has been distributed, is a purely equitable right, and the Court will not enforce it, if there are circumstances which would make it inequitable to do so. *Blake v. Gale*, 32 C. D. 571. Again, where the assets have been settled *bond fide* on the marriage of the residuary legatee, they cannot be followed: *Dilkes v. Broad-*

mead, 2 Giff. 113. So, it should seem, a purchaser of a legacy which has been paid or delivered, cannot be called on to refund or pay any part of a debt subsequently established against the testator's estate: *Noble v. Brett*, 24 F. 99.

(*g*, *see v. Russell*, 3 M. & Cr. 31. The rule applied in *Gillespie v. Alexander*, 3 Russ. 130 (*ante*, p. 1209), confining the liability of the legatee to a proportionate share of the debt, does not apply where the estate has not been administered by the Court: *Davies v. Nicolson*, 2 De G. & J. 693.

(*h*) *A fortiori* there can be no such right where the loss of the assets has occurred, not by the conduct of the executor, but from merely accidental circumstances: *Fenwick v. Clarke*, 31 L. J. Ch. 728. Where one of several residuary legatees, or next of kin, has received his share of the estate of a testator or an intestate, the others cannot call upon him to refund if the estate is subsequently wasted; *secus*, if the wasting has taken place before such share was received. The burden of proof lies on those who call upon the

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sufficient to pay all the legacies, and one legatee receives his legacy in full, in that case the unsatisfied legatees may compel the one so paid to refund (*i*).

But it should seem, that in no case, where the executor is solvent, can an unsatisfied legatee maintain a suit against another who has been satisfied: because the remedy is in the first place against the executor, who, by paying the one legacy, has admitted assets to pay all (*k*).

It remains to be considered, in what cases legatees, who are compelled to refund, shall do so with interest. On this point Lord Eldon has stated (*l*) the rule to be, "If a legacy has been erroneously paid to a legatee, who has no farther property in the estate, in recalling that payment, I apprehend that the rule of the Court is not to charge interest: but if the legatee is entitled to another fund making interest in the hands of the Court, justice must be done out of his share."

Legatee refunding not charged with interest.

residuary legatee or next of kin to refund, to show that the wasting took place before the share was paid over. *Peterson v. Peterson*, L. R. 3 Eq. 111.

(*i*) By Sir Joseph Jekyll, in 1 P. Wms. 495. *Walcot v. Hall*, 1 P. Wms. 495, note (1), by Mr. Cox. S. C. 2 Bro. C. C. 305. See also the observation of the Master of the Rolls in *Gillespie v. Alexander*, 3 Russ. Ch. C. 133, and *David v. Frowd*, 1 M. & K. 200. In a suit by a residuary legatee for the administration of the tes-

tator's estate the Court has jurisdiction to compel the residuary legatee to refund, for the purpose of paying the legacy of a legatee who is not a party to the suit, assets paid to the residuary legatee by the executor before the suit. *Prowse v. Spurgin*, L. R. 5 Eq. 99.

(*k*) *Orr v. Kaines*, 2 Ves. Sen. 194. 1 Rep. Leg. 399, 3rd edit.

(*l*) *Gittins v. Steele*, 1 Swanst. 200. See also *Jervis v. Wolferstan*, L. R. 18 Eq. 18.

CHAPTER THE FIFTH.

OF PAYMENT OF THE RESIDUE.

SECTION I.

Of the Residuary Legatee.

WHEN the executor has paid all the debts, the funeral and testamentary expenses (a), and all the legacies heretofore mentioned, he must, in the last place, pay over the surplus or residue of the personal estate to the residuary legatee, if any such be nominated: And although the residuary legatee dies before the payment of debts, and before the amount of the surplus is ascertained, yet it shall devolve on his personal representative (b).

Duty of executor as to converting the assets into money and handing over the clear residue.

The residuary legatee has a right to insist that the executor, before the end of the first year after the testator's death, shall, if possible, convert all the assets into money (bb) and pay the funeral and testamentary expenses, debts and legacies, and hand over the clear residue to the residuary legatee, or, if the residue be bequeathed to one for life, to secure the capital in the manner authorized by the Trust Investment Act, 1889 (52 & 53 Vict. c. 32 (c), for the benefit of those ultimately entitled, and if, from any cause, the assets cannot be sold, so as to effect this purpose, the right of the tenant for life will commence from that date (d).

What terms of bequest are sufficient to

No particular mode of expression is necessary to constitute

(a) Including all costs of the administration of the estate. *Trethewy v. Helyar*, 4 C. D. 53.

(b) *Brown v. Farndell*, Carth. 52. *Toller*, 341.

(bb) It is not however incumbent on an executor to convert every portion of the estate into money. He may, even though no express

authority be given him for that purpose in the will, agree with the residuary legatees that they shall accept any portion of the estate as part of their share. *Re Lepine* [1892], 1 Ch. 210.

(c) See *post*, p. 1710 *et seq.*

(d) *Wigkwick v. Lord*, 6 H. L. C. 217, 235, *ante*, pp. 1248, 1249.

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a residuary legatee: It is sufficient, if the intention of the testator be plainly expressed in the Will, that the surplus of his estate, after payment of debts and legacies, shall be taken by a person there designated (*e*). constitute a
residuary
legatee.

The following bequests have been held to constitute the donees residuary legatees under the respective Wills. "I think there will be something left after all funeral expenses, &c., being paid, to give W. B., now at school, towards equipping him to any profession he may hereafter be appointed to" (*f*). "If there is money left unemployed, I desire it may be given in charity" (*g*). "I guess there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire E. M. to do, and keep the residue for her own use and pleasure" (*h*); "all that may remain of my money after my lawful debts and legacies are paid" (*i*); "whatever remains of money" (*k*); "all the rest of my money, however invested" (*l*); "household furniture, goods, ready money, debts, and securities" (*m*); "all other chattels" (*n*); "after these legacies and my doctor's bills and funeral expenses are paid, I leave (*sic*) to my sister without any power or control of her husband" (*o*) [without stating what was left by

(*e*) *Bland v. Lamb*, 2 Jac. & W. 399. *Hearne v. Wigginton*, 6 Madd. 120. *Fleming v. Burrows*, 1 Russ. 276. The term "residuary legatee" is not of an invariable nature: it must be fashioned and moulded by the context of the Will. *Singleton v. Tomlinson*, 3 App. Cas. 404. So in a will which contained a direct gift of real property, the "residuary legatee" was held to take the freehold estate of the testator not specifically devised. *Hughes v. Pritchard*, 6 C. D. 24; but he does not take real property undisposed of by the Will where there is nothing in the context of the Will to enable the Court to read the words "residuary legatee" as "residuary devisee,"

e. g., where there is no direct gift of real property, and where the testator had none at the date of the Will. *Re Methuen and Blore's Contract*, 16 C. D. 696.

(*f*) *Leighton v. Baillie*, 3 M. & K. 267.

(*g*) *Legge v. Asgill*, 1 Turn. & Russ. 265.

(*h*) *Boya v. Morgan*, 9 Sim. 289. 3 M. & Cr. 661.

(*i*) *Rogers v. Thomas*, 2 Keen, 8.

(*k*) *Dowson v. Gaskoin*, 2 Keen, 14.

(*l*) *Re Pringle*, 17 C. D. 819.

(*m*) *Avison v. Simpson*, Johns. 43.

(*n*) In the goods of *Sharman*, L. R. 1 P. & D. 681.

(*o*) *Re Bassett's Estate*, L. R. 14 Eq. 54.

testator] "what is left, my books and furniture and other things" (*p*); "everything of every kind that I have now or may have at the time of my decease in my apartments at A. or elsewhere" (*q*); "after payment of all my just debts, I give all the remainder of money, goods and debts due to me" (*r*); "one-half of the money of which I am possessed to A. and the remainder equally between B. & C." (*s*); "the whole residue of money, except such things as are undermentioned" (*t*).

What terms of bequest are insufficient to constitute a residuary legatee.

The following bequests have been held *not* to constitute the donees residuary legatees:—

"In case there is any money remaining" (out of proceeds of sale after certain specific legacies) "I should wish it to be given in private charity" (*u*); "three or four thousand pounds or whatever remaining sum or sums" (*v*); "I beg that the remainder of my money and effects may be expended in purchasing a suitable present for my godson D." (*x*); "whatever may remain to my account after payment of my debts and pecuniary legacies" (*y*); "such money, stocks, funds or other securities, not hereafter specially devised, as I may die possessed of" (*z*).

By the Wills Act, 1 Vict. c. 26, sect. 25, "unless a contrary intention shall appear by the Will, such real estate or interest therein, as shall be comprised or intended to be comprised in any devise in such Will contained, which shall fail or be void by reason of the death of the devisee in the

(*p*) In the goods of Cadge, L. R. 1 P. & D. 543.

(*q*) In the goods of Scarborough, 30 L. J. P. & M. 85.

(*r*) In the goods of Bloomfield, 31 L. J. P. & M. 119.

(*s*) *Re Cadogan*, 25 C. D. 154.

(*t*) In the goods of White, 7 P. D. 65.

(*u*) *Ommanney v. Butcher*, 1 Turn. & Russ. 260.

(*v*) *Wrench v. Jutting*, 3 Beav. 521.

(*x*) *Borton v. Dunbar*, 2 Giff. 221. 2 De G. F. & J. 338.

(*y*) *Hastings v. Hane*, 6 Sim. 67.

(*z*) In the goods of Aston, 6 P. D. 203. See the cases collected, *ante*, p. 1045 *et seq.*, as to restricting "goods," "chattels," and other general words, when coupled with other words of a limited signification, to things *eiusdem generis*. As to construction of the words "money," "moneys," &c., see *ante*, p. 1052 *et seq.*

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lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such Will" (a).

Where the residuary legatee is nominated generally, he is entitled, in that character, to whatever may fall into the residue after the making of the Will, by lapse, invalid disposition, or other accident (b); or by acquirement subsequent to the date of the Will (c). "It has been long settled," said Sir William Grant, in *Cambridge v. Rous* (d), "that a residuary bequest of personal estate carries not only every-

Rights of residuary legatee generally:

(a) As to what is a residuary devise within the meaning of this section, see *Re Brown's Trusts*, 1 K. & J. 522, from which it appears that the words in the 25th section of the Act apply to a general residuary devise and not to a devise of the rest of the property in a place where parts of the property are given beforehand to other persons. *Cogswell v. Armstrong*, 2 K. & J. 227. *Green v. Dunn*, 20 Beav. 6. *Springett v. Jennings*, L. R., 6 Ch. 333. A devise of real estate by way of appointment which fails, or is void, falls into the residuary devise under this section, unless a contrary intention appear by the Will. *Freme v. Clement*, 18 C. D. 499.

(b) *Jackson v. Kelly*, 2 Ves. Sen. 285. *Kennell v. Abbott*, 4 Ves. 803. *Cambridge v. Rous*, 8 Ves. 12. *Bird v. Le Fevre*, 15 Ves. 589. *Roberts v. Cooke*, 16 Ves. 451. *Smith v. Fitzgerald*, 3 V. & B. 3. *Leake v. Robinson*, 2 Meriv. 392. *Legge v. Asgill*, 1 Turn. 265, *in notis*. *Andree v. Ward*, 1 Russ. Chanc. Cas. 260. *Reynolds v. Kortright*, 18 Beav. 417. *Bush v. Cowan*, 32 Beav. 228.

(c) *Bland v. Lamb*, 5 Madd. 412. S. C. confirmed on appeal, 2 Jac. & Walk. 399. *Hearne v. Wiggington*, 9 Madd. 119. See *Cox v. Bennett*, L. R. 6 Eq. 422. The nomination of a residuary legatee will not prevent his taking a lapsed bequest by substitution, *i. e.*, in the place of the deceased legatee, when the testator shows his intention that the residuary legatee should so take it, and there is no inconsistency between the characters of a residuary and a particular or substituted legatee to prevent it: In fact, the latter title may be more beneficial than the former upon a deficiency of assets to pay all the debts and legacies; for as residuary legatee, he can claim nothing until all debts and legacies are fully paid; but as a particular or substituted legatee, his right to an equality of payment with the rest is preserved; so that, after rateably abating with them, he is entitled to receive the remainder of the legacy: 1 Rep. Leg. 429, 3rd edit. *Rose v. Rose*, 17 Ves. 347, 352.

(d) 8 Ves. 12, 25.

thing not disposed of, but everything that, in the event, turns out not to be disposed of." So it was observed by Sir John Leach, V.-C., in *Jones v. Mitchell* (e); "The Will as to personal estate, speaks at the time of the death of the testator, and the residuary legatee takes, not only what is undisposed of by the expressions of the Will, but that which becomes undisposed of at the death, by disappointment of the intentions of the Will."

Accordingly, where a testator bequeathed all his personal estate, *except* the money laid out in stocks, mortgages, and bonds, to A.; and as to his money in stock, and on mortgages and bonds, he gave the same to B.; and the gift to B. failed by an event analogous to a lapse; it was held that the property which was intended to be given to B. passed under the residuary bequest to A. (f).

(e) 1 Sim. & Stu. 294.

(f) *Evans v. Jones*, 2 Coll. 516.

Blight v. Hartnoll, 23 C. D. 218.

See also *Thompson v. Whitelock*, 1 De G. & J. 490. The question in such cases is, whether the property is excepted in order to take it away, under all circumstances, and for all purposes, from the person to whom the rest is given, or whether merely for the purpose of giving it to some one else. *Bernard v. Minshull*, Johns. 296, 299. Where a testator makes a residuary gift with regard to a particular fund, the question in all cases will be, whether the testator by the residuary gift gives the whole fund to the residuary legatee subject to the particular gifts, or whether he gives to the residuary legatee the balance of the fund after deducting the particular gifts. In the former case, if a particular legacy lapses, or there is an invalid disposition, the gift that fails will fall into the

particular residue, in the latter case, it will not. See *Champney v. Davy*, 11 C. D. 949. This question may, of course, arise equally whether the testator is dealing with his own property, or with property over which he has merely a power of appointment, and whether that power of appointment is special or general. Of the former construction *Falkner v. Butler*, Amb. 514. *Oke v. Heath*, 1 Ves. Sen. 135. *Re Harries' Trust*, Johns. 199. *Carter v. Taggart*, 16 Sim. 423, are instances: of the latter, *Easum v. Appleford*, 5 My. & Cr. 56. In *Re Jeaffreson's Trusts*, L. R. 2 Eq. 276, the residuary gift was held to apply to the balance, only as to the general fund with which the testatrix was dealing, and to constitute a gift of the balance, subject to particular gifts out of that balance which failed. Where the gift is a gift of the residue subject to particular gifts which fail

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The foundation of this general rule in respect of lapsed legacies is, that the residuary clause is understood to be intended to embrace everything not otherwise effectually given; because the testator is supposed to take the particular legacy away from the residuary legatee only for the sake of the particular legatee; so that upon the failure of the particular intent, the Court gives effect to the general intent (*g*).

When, therefore, from the construction of the Will, the presumption in favour of such general intent is negatived, the rule does not apply, and the lapsed legacy is undisposed of (*h*). Such is the case of a residuary bequest to several as

they will fall into the residue, even though the failure does not arise from the happening or not happening of the event on the happening or not happening of which the Will directs such a gift to fall into the residue. *Re Meredith's Trusts*, 3 C. D. 757.

(*g*) *Easum v. Appleford*, 5 M. & Cr. 61, 62.

(*h*) By the law before the passing of the Wills Act, a general bequest did not operate as an execution of a general power of appointment, unless the intention that it should so operate could be collected from the Will, but now by sect. 27 of that Act it is enacted that: "A bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the Will." The result of this

is, that the onus of proving that the testator did not intend to execute the power is now thrown on those who deny that the residuary bequest in question so operates. The fact of property being specifically appointed does not, if the appointment fails, show an intention that a residuary gift should not operate under sect. 27, as an execution of the power. *Re Spooner's Trusts*, 2 Sim. N. S. 129. *Bernard v. Minshull, Johns*, 276. It will be observed that the section says "any personal estate which he may have power to appoint in any manner he may think proper," and applies therefore only to a general power, that is a power which is general in regard to its objects, not a power that is general as regards the manner of its exercise. *Re Powell's Trusts*, 39 L. J. Ch. 188. In the case of a limited power the residuary bequest must be in such terms as to show an intention to execute the power, and must, of course, be in favour of an object of the power. But, when these conditions can be found in the re-

tenants in common (i): The share of one, dying in the testator's lifetime, does not pass; because, the testator having

siduary bequest, the power will be held to be executed; and this will be so even though the Will contain an appointment which fails by reason of the appointee not being within the power, and the residuary legatee will in such case take the portion of the fund badly appointed. *Re Meredith's Trusts*, 3 C. D. 757. *Re Hunt's Trusts*, 31 C. D. 308. There is a distinction between a general power of appointment and a limited power of appointment amongst a particular class. Where the power of appointment is general, there is a tendency to hold that the appointment, which fails as to the particular benefit intended to be bestowed on the appointee named, makes the property part of the general estate of the appointor; and thus if a person, having a general power of appointment by Will, bequeath the fund, the subject of appointment, to executors in trust, and the trust fails as regards the particular object, the resulting trust will be in favour of the next of kin, or the residuary legatee, as the case may be, of the testator, and not in favour of the persons entitled in default of appointment. *Brickenden v. Williams*, L. R. 7 Eq. 310. *Wilkinson v. Schneider*, L. R. 9 Eq. 423. In *Easum v. Appleford*, 5 My. & Cr. 56, where the resulting trust was held to be in favour of the persons entitled in default of appointment, the ground of decision was that the words of the Will negated the intention to make the property

part of the general estate; the gift being construed as the gift of the balance of the fund after deducting the amount previously given out of it, and not as a gift of the entire fund subject to the previous gift, as in *Re Harries' Trust*, Johns. 199. The question whether the donee of a general power of appointment has by his Will made the property subject to the power his own for all purposes, or has taken it out of the instrument creating the power only for the limited purpose of giving effect to the particular disposition, is a question of intention. The mere appointment of an executor is not sufficient in itself to show an intention to do so. *Re Davies' Trusts*, L. R. 13 Eq. 163. *Re Thurston*, 32 C. D. 508. See also *Re Pinède's Settlement*, 12 C. D. 667. *Re Van Hagan*, 16 C. D. 18. *Re Ickeringill's Estate*, 17 C. D. 151. *Willoughby Osborne v. Holyoake*, 22 C. D. 238. A power of appointment in favour of any person or persons except A. is not a general power within sect. 17, but may, it seems, become so through the death of A. at the time the power is exercised. *Re Byron's Settlement* [1891], 3 Ch. 474. A general bequest will not operate under sect. 27 as an execution of a power to appoint by Will or codicil expressly referring to the power, *Re Phillips*, 41 C. D. 417. *Phillips v. Cayley*, 43 C. D. 222, overruling *Re Marsh*, 38 C. D. 630. Where

(i) See *infra*, p. 1327.

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a general power of appointment of real estate by deed or Will has been completely exercised by deed, a general devise by the Will of the donee of the power subsequent to the deed will not *per se* amount, by virtue of sect. 27, to an exercise of a power of revocation and new appointment: *Pomfret v. Perring*, 5 De G. M. & G. 775. *Palmer v. Newell*, 20 Beav. 32. *Charles v. Burke*, 43 C. D. 223, note. *Re Brace* [1891], 2 Ch. 671. Where there is a general power and a residuary gift dealing with property of the description included in the power, the power will be executed by virtue of sect. 27, although there may be no reference in the residuary gift to the power. *Wilday v. Barnett*, L. R. 6 Eq. 193. So a pecuniary bequest not referring to a general power of appointment over personal estate may operate under sect. 27 as an execution of the power. *Wilday v. Barnett*, L. R. 6 Eq. 193. *Re Wilkinson*, L. R. 4 Ch. 587. So a general bequest contained in a Will prior to the instrument creating the power may operate as an exercise of the power, and the execution of the instrument containing the power and the circumstances under which it was executed cannot be looked at to show a contrary intention: *Boyes v. Cook*, 14 C. D. 53, questioning *Re Ruding's Settlement*, L. R. 14 Eq. 266. And it would appear, notwithstanding the observations of Lord St. Leonards (*Sug. Pow.* 8th ed. p. 306), that, even in the case of a power in a settlement created by the testator himself, it is not necessary that the Will should show an

intention to defeat the settlement, but a residuary bequest, though defeating the settlement, will operate as an execution of the power, unless a contrary intention appear in the Will. See *Re Clark's Estate*, 14 C. D. 422, and the observations therein on *Moss v. Harter*, 2 Sm. & G. 458. But, although a settlement cannot be looked at to find a contrary intention, it may be looked at to see whether the general bequest complies with the power. Thus where a testator in 1858 made a Will containing a general residuary devise; and afterwards executed a settlement, whereby he conveyed to trustees certain freehold property in trust for himself for life, remainder to E. for life, remainder as he by last Will should appoint, and in default for E. in fee, and subsequently in 1862 by a Will commencing "This is my last Will," in pursuance of the power in the settlement, charged the freehold with an annuity and appointed executors, but made no other disposition, and both Wills were admitted to probate, it was held that, having regard to the terms of the power, the testator had indicated an intention, that the Will of 1862 alone should operate as an execution of the power, and that consequently the residuary devise in the Will of 1858 was not a due execution of the power. *Pettinger v. Ambler*, L. R. 1 Eq. 510. Whether a codicil can be read with a Will for the purpose of finding a contrary intention, *quære*, *Re Clark's Estate*, 14 C. D. 422. A

to their number, it would not be consistent with such declared intention to give to the survivor a larger proportion (j). So where a testator gave one-third of the residue to A., and another one-third to B., and as to the other one-third thereof, gave 500*l.* to C., and the remainder thereof to D.; and C. died in the lifetime of the testator; it was held that the 500*l.* belonged to the next of kin, as undisposed of (k).

Again, the testator may, by the terms of the bequest, narrow the title of the residuary legatee, so as to exclude

power to appoint a sum not exceeding a certain amount to be raised and applied as the donee should think fit, may be exercised by a general devise under sect. 27. *Re Jones* 34 C. D. 65. Sect. 27 has, as we have seen, no application to limited powers of appointment, that is to powers of appointment limited as to the objects or class in whose favour they may be exercised. In such cases the question whether a residuary devise or bequest operates as an execution of the power is a question of the intention of the testator to be gathered from the terms of the Will, and it does not seem useful to set out in detail the cases in which the question of intention has been determined, because the question must in each case turn upon the terms of the particular Will and the surrounding circumstances. The following are some of the principal cases which have been decided in late years: *Re Gratwick's Trusts*, L. R. 1 Eq. 177. *Butler v. Gray*, L. R. 5 Ch. 26. *Wildbore v. Gregory*, L. R. 12 Eq. 482. *Re Teape's Trusts*, L. R. 16 Eq. 442. *Thornton v. Thornton*, L. R. 20 Eq. 599. *Re Meredith's Trusts*, 3 C. D. 757. *Ames v.*

Cadogan, 12 C. D. 868. *Re Swinburne*, 27 C. D. 696. *Von Brockdorff v. Malcolm*, 30 C. D. 172. *Re Wait*, 30 C. D. 617. *Re Hunt's Trusts*, 31 C. D. 308. *Re Mills*, 34 C. D. 186. *Re Cotton*, 40 C. D. 41. *Re Williams*, 42 C. D. 93.

(j) *Easum v. Appleford*, 5 M. & Cr. 56, 62.

(k) *Lloyd v. Lloyd*, 4 Beav. 231. See also *Accord. Skrymsher v. Northcote*, 1 Swanst. 566. *Harris v. Davis*, 1 Coll. 416. See further *Master v. Laprimaudaye*, 2 Coll. 443. *Clowes v. Clowes*, 9 Sim. 403. See also *Accord. Lightfoot v. Burstall*, 1 Hemm. & M. 546, where there was a direction that one of the shares of the residue on a certain contingency should sink into the residue, and be held and applied accordingly. See also *Humble v. Shore*, *ibid.* 550, note (a). 7 Hare, 247. *Sykes v. Sykes*, L. R. 3 Ch. 301. *Re Barker's Estate*, 15 C. D. 635. In the cases, however, of *Crawshaw v. Crawshaw*, 14 C. D. 817, and *Re Rhoades*, 29 C. D. 142, where in a Will there was a direction that the respective shares should "fall into the residue," it was held that they were not undisposed of by the testator, but were divisible among the other legatees.

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him from lapsed legacies: As where it appears to be the intention of the testator that the residuary legatee should have only what remained *after the payment of legacies* (l).

Again, the testator may, by the terms of the Will, so circumscribe and confine the residue, as that the residuary legatee, instead of being a general legatee, shall be a specific legatee, and then he shall not be entitled to any benefit accruing from lapses, unless what shall have lapsed constitute a part of the particular residue (m). Thus, in *Cook v. Oakley* (n), A., on board a ship, made his Will, and gave to his mother, if alive, his gold rings, buttons, and chests of clothes, and to his executor, who was on board with him, his red box, arrack, and all things not before bequeathed; and at the time of making his Will he was entitled to a considerable leasehold estate by the death of his father, of his right to which he was ignorant: It was holden, that A.'s executor was legatee of a particular residue, namely, of what the testator had on board the ship; and such legacy excluded him from the general residue: But that as A.'s mother died in his lifetime, his rings, buttons, and chests of clothes lapsed into such particular residue, and devolved on his executor, not as execut but as legatee of such particular residue (o). And even though the word "residue" be employed by the testator, yet if it appears, on the construction of the whole Will, that he meant to use it in a more restricted sense than that of its large and general sense, comprehending whatever of his personal estates in the events which happen turns out to be undisposed of, the Court is bound to construe it in such restricted sense (p).

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legatees partially.

(l) *Davers v. Dewes*, 3 P. Wms. 40. *Atty.-Gen. v. Johnstone*, Amb. 577. *Gibson v. Hale*, 17 Sim. 129. It was said by Lord Eldon, in *Bland v. Lamb*, 2 Jac. & Walk. 406, that very special words are required to take a bequest of the residue out of the general rule.

(m) *Toller*, 343.

(n) 1 P. Wms., 302.

(o) See also 2 *Rop. Leg.* 589, 3rd edit. *De Trafford v. Tempest*, 21 Beav. 564.

(p) *Green v. Pertwee*, 5 Hare, 249. *S. C. sub nom. Greer v. Pertwee*, 15 L. J. Ch. 372. *Jull v. Jacobs*, 3 C. D. 703, 705.

Survivorship
as to residue :

in cases of se-
veral residuary
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joint tenants :

Where the residuary estate is bequeathed to several persons in *joint tenancy*, if one or more of them happen to die in the lifetime of the testator, or after his death, but before the severance of the joint tenancy (*q*) in the residue, their shares will survive to the others (*r*). But if the residue be given to several as *tenants in common*, the shares of the deceased shall not go to the survivors, but shall devolve on the testator's next of kin, according to the Statute of Distributions, as so much of the personal estate remaining undisposed of by the Will, in case the death happened in the lifetime of the testator; or shall go to the personal representatives of the deceased legatee, in case his death took place after that of the testator (*s*).

In *Perkins v. Baynton* (*t*), indeed, Lord Thurlow doubted whether there could be a joint tenancy of a money legacy, and said that there was no case of a residue given to persons, not executors, where they have been considered as joint tenants. But in *Crooke v. De Vanâes* (*u*), Lord Eldon stated, that upon the doubt thus expressed by Lord Thurlow, he, at the time looked at some of the original Wills in Doctors' Commons, where a construction had been put on them, and he made up his mind upon the point, upon which he had never had any doubt since, that a simple bequest of a legacy or a residue of personal property to A. and B., without more, is a joint tenancy; and it is upon the other side to show from some part of the context applying to that bequest, that the words are not to have their legal operation (*x*). Again,

(*q*) As to what amounts to a severance, see *post*, p. 1340.

(*r*) *Webster v. Webster*, 2 P. Wms. 347. *Ante*, p. 1080.

(*s*) *Bagwell v. Dry*, 1 P. Wms. 700. *Page v. Page*, 2 P. Wms. 489. *Painter v. Salisbury*, cited in *Bennet v. Bachelor*, 1 Ves. 67. *Peat v. Chapman*, 1 Ves. Sen. 542. *Ante*, pp. 1080, 1322.

(*t*) 1 Bro. C. C. 118.

(*u*) 9 Ves. 204.

(*x*) So a joint tenancy is created by a bequest, without any words of severance to "children;" *Mence v. Bagster*, 4 De G. & Sm. 162. *Williams v. Hensman*, 1 Johns. & H. 546. *Noble v. Stow*, 29 Beav. 409. *Kenworthy v. Ward*, 11 Hare, 196. *McGregor v. McGregor*, 1 De G. F. & J. 63; or "wife and children;" *Armstrong v. Arm-*

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in *Jackson v. Jackson* (y), the same learned Judge observed, that it is clear that where a residue of a personal estate, consisting of a great variety of particulars, is left to two persons, their executors, administrators, and assigns, the effect is a joint tenancy (z).

But where a money legacy or a residue is given to more persons than one, by any mode of expression which denotes a severance, the legatees will be tenants in common: As where the gift is to A. and B., "share and share alike" (a), or "equally to be divided between them" (b), or "respec-

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strong, L. R. 7 Eq. 518. *Newill v. Newill*, L. R. 7 Ch. 253; or "survivors:" *Jones v. Hall*, 16 Sim. 500. *Leigh v. Mosley*, 14 Beav. 605; or "next of kin:" *Withy v. Mangles*, 10 Cl. & F. 215. *Baker v. Gibson*, 12 Beav. 101. *Secus*, as to "next of kin under the Statute of Distributions," where it is apparent that the testator refers to the statute as defining not only the persons who are, but also the title by which they are to take: *Horn v. Coleman*, 1 Sm. & G. 169. See also *Godkin v. Murphy*, 2 Y. & Coll. 351. *Jenkins v. Gower*, 2 Coll. 537. *Re Greenwood's Trusts*, 3 Giff. 390. *Bullock v. Downes*, 9 H. L. C. 1. *Re Ranking's Settlement*, L. R. 6 Eq. 601. *Ante*, p. 983, note (e).

(y) 9 Ves. 595.

(z) See also *Swaine v. Burton*, 15 Ves. 370, 371. *Cookson v. Bingham*, 17 Beav. 262. *Morgan v. Britten*, L. R. 13 Eq. 28. Before the Married Women's Property Act, 1882, where a bequest was made to a husband and wife, a kind of joint tenancy was created called a tenancy by entireties, that is to say, the husband and wife were treated as one person in law, and, as against other legatees of shares took only

one share between them, and the wife had no equity to a settlement out of that share: *Atcheson v. Atcheson*, 11 Beav. 485. *Alder v. Lawless*, 32 Beav. 72. *Ward v. Ward*, 14 C. D. 506. *Re Bryan*, 14 C. D. 516. Since the Act the husband and wife each take one-half of the joint share, but the tenancy still remains, notwithstanding the statute, a tenancy by entireties, that is to say, the husband and wife are treated as one person, and only take one share. *Re March*, 27 C. D. 166. *Re Jupp*, 39 C. D. 148. A slight indication that the husband and wife shall each take a separate share, is sufficient to prevent the application of the doctrine that they take one share between them. *Dias v. De Livera*, 5 A. C. 123. *Re Dixon*, 42 C. D. 306. See *ante*, p. 961.

(a) *Heathe v. Heathe*, 2 Atk. 122. *Norman v. Fraser*, 3 Hare, 84; or "in equal shares:" *Brown v. Oakshott*, 24 Beav. 254.

(b) *Bryan v. Twigg*, L. R. 3 Eq. 433. L. R. 3 Ch. 183. Where a testator gave one-fourth of his residuary estate to trustees, in trust for his wife for life, and, after her decease, in trust for and to be equally divided amongst all his

tively" (e), or "between them" (d), or "participate" (e). Again, where there is a bequest to A. for life, and after her decease, to her children, when they arrive at the age of twenty-one years, the children who attain twenty-one will necessarily take as tenants in common, though there are no words of severance used in the bequest; because it has been said, it is contrary to the rule of law that persons, who are to take at different times, can take as joint tenants (f).

children who should be then living, and the issue of such of them as should be then dead, such issue taking only the part or share which his, her, or their deceased parent or parents would have been entitled to if living; and two children, and two grandchildren the issue of a deceased child of the testator, were living at the death of the widow; it was held that the two grandchildren took, *as between themselves*, as joint tenants, and not as tenants in common: *Bridge v. Yates*, 12 Sim. 645. See also *Amies v. Skillern*, 14 Sim. 428. *Penny v. Clarke*, 1 D. G. F. & J. 431, 438 *per* Turner, L. J., *Leak v. M'Dowall*, 32 Beav. 28. *Lanphier v. Buck*, 2 Dr. & Sm. 484. *Heasman v. Pearce*, L. R. 11 Eq. 522. L. R. 7 Ch. 275. *Hodges v. Grant*, L. R. 4 Eq. 140.

(c) *Heathe v. Heathe*, 2 Atk. 122. So if there be a bequest to A. for life, with remainder to B. C. and D., with a substitutional gift of their "respective shares," in case of the death of any of them; B. C. & D. take as tenants in common: *Ive v. King*, 16 Beav. 46. See also *Shepherdson v. Dale*, 12 Jur. N. S. 156. But a bequest, in case of the death of any one of several legatees before his or her share shall become payable, "to his

or her children respectively," is a gift to such children as joint tenants: *Re Hodgson's Trusts*, 1 K. & J. 178.

(d) *Lashbrook v. Cock*, 4 Mer. 70. *Richardson v. Richardson*, 14 Sim. 526. *Att.-Gen. v. Fletcher*, L. R. 13 Eq. 128. A gift to two, "with benefit of survivorship," as to a moiety is a tenancy in common: *Paterson v. Rolland*, 28 Beav. 347. See also *Haddelsey v. Adama*, 22 Beav. 266. *Ryves v. Ryves*, L. R. 11 Eq. 539. A gift of a residue to be equally disposed of between five of the testator's children, whom he named, is a gift to them as tenants in common: In the goods of *Pile*, 2 Sw. & Tr. 628. See further as to what are words of severance, *Armstrong v. Armstrong*, L. R. 7 Eq. 518. *Re Wilford's Estate*, 11 C. D. 267.

(e) *Robertson v. Fraser*, L. R. 6 Ch. 696.

(f) *Woodgate v. Unwin*, 4 Sim. 129. This reason is ill-founded (see *Kenworthy v. Ward*, 11 Hare, 196. *M'Gregor v. M'Gregor*, 1 D. G. F. & J. 63.) But the decision itself, may, it should seem, be supported on the ground that all joint tenants must take the same quantity of interest, whereas in that case some of the co-tenants might take vested,

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Where, however, words which, according to the ordinary rule, constitute a tenancy in common, are combined with, or followed by, others which would make a tenancy in common inconsistent with the manifest design or the subsequent bequest of the testator, they may be taken to indicate, not the nature, but the proportion of the interest each party is to take: As where there is a bequest to two persons "respectively in equal shares" of the interest and dividends only of the residue of the testator's estate, and the *corpus* of the residue is not to be divided or possessed until after the decease of the two, and then it is to be divided amongst such of their children only as shall be living at the death of the survivor, *per capita* and not *per stirpes* (g).

A considerable difficulty arises where words of severance are used in the bequest, sufficient to constitute a case of tenancy in common, accompanied by words of survivorship, inconsistent with such a tenancy; as if a residue be bequeathed to two or more equally to be divided between them, and the survivors or survivor of them (h). In *Cripps v. Wolcott* (i), Sir J. Leach, V.-C., said, that he considered it now settled, that in the case of such a bequest, if there be no special intent to be found in the Will, the survivorship is to be referred to the period of division: And that if no

Words of survivorship: to what period they refer.

others contingent interests, *ibid.* Where, however, there is a gift to A. for life, and afterwards to his children, and the vesting of their shares is not made contingent on attaining twenty-one, they take as joint tenants, notwithstanding they came into *esse* at different periods: *Ruck v. Barwise*, 2 Dr. & Sm. 510.

(g) *Pearce v. Edmeades*, 3 Y. & C. 246. See also *Currie v. Gould*, 4 Beav. 117. *McDermott v. Wallace*, 5 Beav. 142. *Vanderplank v. King*, 3 Hare. 1. *Doe v. Royle*, 13 Q. B. 100. *Abrey v. Newman*, 16 Beav. 431. *Beg-*

ley v. Cook, 3 Drew. 662. *Cranswick v. Pearson*, 31 Beav. 626. See also *Edwardes v. Jones*, 33 Beav. 348. *Re White's Trusts*, 1 Johns. 656. *Re Phené's Trusts*, L. R. 5 Eq. 346. *Appleton v. Rowley*, L. R. 8 Eq. 139. *Bryan v. Twigg*, L. R. 3 Ch. 183.

(h) See *Taaffe v. Conmee*, 10 H. L. C. 64, 78, as to the validity of such a limitation, and the distinction between such a survivorship, and that involved in an estate of joint tenancy. See also *Haddelsey v. Adams*, 22 Beav. 266.

(i) 4 Madd. 15.

previous interest be given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy: But, if a previous life estate be given, then the period of division is the death of tenant for life, and the survivors at such death will take the whole legacy (*k*).

(*k*) This rule, though certainly opposed to several previous cases, and regarded by very high authority (see the judgments of Lord Cottenham, in *Pearson v. Casamajor*, 1 Maclean & Rob. App. Cases, 714, and in *Wordsworth v. Wood*, 4 M. & Cr. 645, and of Lord Campbell, S. C. in Dom. Proc. 1 H. L. C. 156) as not settled, has been frequently recognized and acted upon, and is now fully established: See *Dorville v. Wolff*, 15 Sim. 510. *Davies v. Thorne*, 3 De G. & Sm. 347. *Neathway v. Reed*, 3 De G. M. & G. 18. *Spurrell v. Spurrell*, 11 Hare, 54. *Huffam v. Hubbard*, 16 Beav. 579. *McDonald v. Bryce*, *ibid.* 581. *Carver v. Burgess*, 18 Beav. 541; affirmed, 7 De G. M. & G. 96. *Stevenson v. Gullan*, 18 Beav. 590. *Re Pritchard's Trust*, 3 Drew. 163. *Littlejohns v. Household*, 21 Beav. 29. *Howard v. Howard*, *ibid.* 550. *Hind v. Selby*, 22 Beav. 373. *Lill v. Lill*, 23 Beav. 446. *Cambridge v. Rous*, 25 Beav. 415. *Nevill v. Boddam*, 28 Beav. 554. *Hearn v. Baker*, 2 K. & J. 383. *Vorley v. Richardson*, 8 De G. M. & G. 126. *Crawhall's Trusts*, *ibid.* 480. *Knight v. Poole*, 32 Beav. 548. *Drakeford v. Drakeford*, 33 Beav. 43. *Blackmore v. Snee*, 1 De G. & J. 454. *Taaffe v. Connee*, 10 H. L. C. 64. *Lewis v. Templer*, 33 Beav. 625. See also *Gibbs v.*

Tait, 8 Sim. 132. *Taylor v. Beverley*, 1 Coll. 108. *Watson v. England*, 15 Sim. 1. *Turing v. Turing*, 15 Sim. 139. *Belt v. Slack*, 1 Keen, 238. *Eaton v. Barker*, 2 Coll. 124. *Wagstaff v. Crosby*, 2 Coll. 746. *Corneck v. Wadman*, L. R. 7 Eq. 80. *Marriott v. Abell*, L. R. 7 Eq. 478. But although, according to the doctrine of *Cripps v. Wolcott*, survivorship is to be referred to the period of distribution, that is, where the gift is immediate to the death of the testator, so as to make it merely a provision against lapse, yet the doctrine will not apply if the words of the Will show that the survivorship is to be referred to a period other than that of distribution. Thus in *Bowers v. Bowers*, L. R. 5 Ch. 244, the Court of Appeal, reversing the decision of *Malins, V.-C.*, held where there was an immediate gift to four residuary legatees and devisees in equal shares, with benefit of survivorship in case any of them should die without issue, and in case any of them should die leaving children, then the shares whether original or accruing of each so dying to go to such children, that the clause of survivorship and the limitation over to the children of the legatees were not confined to the lifetime of the testator, and intended merely to guard against lapse, and that the

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But although the rule in *Cripps v. Wolcott* is conformable to reason and common sense, yet a testator is not bound to adopt that mode of disposing of his property; and if he express a different intention according to the natural import of the words of his Will, the Court must carry that intention into effect (*l*).

residuary legatees did not upon surviving the testator at once acquire indefeasible interests in their shares: and Lord Hatherley in his judgment repeated a disapproval which he had previously expressed (in *Cooper v. Cooper*, 1 K. & J. 658) of the doctrine laid down in *Clayton v. Low*, 5 B. & Ald. 656, that where a testator mentions all the contingencies, so that the first taker must die under some one or other of the circumstances mentioned, you are to add them together so as to make a certainty, and then treat the case as if the gift over were simply in case he shall happen to die and restrict the happening of that event to the testator's lifetime in order to satisfy the words importing contingency. Nor does the case of *Horne v. Pillans*, 2 M. & K. 15, decide that indefeasible vesting is not without absolute necessity to be suspended beyond the period of distribution; for though the Court no doubt leans to that construction, yet it cannot on that ground depart from the plain natural meaning of the words which the testator has used. See *Corneck v. Wadman*, L. R. 7 Eq. 80, in which case the words "with benefit of survivorship" were held to refer to the period when the shares of the children became absolutely vested and not to the

time of payment; and *Marriott v. Abell*, *ibid.* 478. The rule was formerly thought to be otherwise as to real estate; it being considered that indefinite words of survivorship should be referred to the death of the testator, but it has been expressly decided by the Lords Justices that the rule applies to real as well as personal estate: *Re Gregson's Estate*, 2 De G. J. & Sm. 428, overruling *Doe v. Prigg*, 8 B. & C. 231. As to the period to which the word "then" is to be referred, in a bequest to a class of persons "then living," see *Archer v. Jegon*, 8 Sim. 446. *Gaskell v. Holmes*, 3 Hare, 438. 1 Jarm. 851, note (*m*), 4th edition, and the cases there cited. *Re Eggington's Trusts*, 3 Drewr. 202. *Olney v. Bates*, *ibid.* 319. *Ante*, p. 987, note (*n*). *Heasman v. Pearce*, L. R. 11 Eq. 522, 7 Ch. 660.

(*l*) *White v. Baker*, 2 De G. F. & J. 55. *Wilmot v. Flewitt*, 11 Jur. N. S. 820. *Evans v. Evans*, 25 Beav. 81. Thus the rule may not be applicable where the question is as to the effect of words referring to survivorship in divesting a vested interest, especially in instances of gifts to children after the determination of a previous life estate: See *Bouverie v. Bouverie*, 2 Phill. Ch. C. 349. *Trabe v. Newland*, 5 D. G. M. & G. 236. *Knight v. Knight*, 25 Beav. 111.

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It may be here mentioned, that the word "surviving" has been construed "other," to give effect to the apparent intention (*m*). Thus where a fund is given between a class or number of persons as tenants in common for life, with interests in the nature of remainders to their children respectively, and a valid provision is made that in the event of the death and failure of issue of any of the original takers, the share of the original taker or takers so circumstanced shall go to the survivors or survivor of them, the words "survivors or survivor" may, if the scheme of the Will requires it, be considered as an expression of contrast used for the purpose of distinguishing the takers not so circumstanced, and therefore as meaning "others or other" (*n*):

Evans v. Evans, ubi supra. Berry *v. Briant*, 2 Dr. & Sm. 1. So where there was a gift for life followed by a gift to the surviving children of B. & C., or their heirs and assigns, it was held that the rule did not apply, and that the period of survivorship was the death of the testator: *Re Hopkins' Trusts*, 2 Hemm. & M. 411. But it must be taken as the deliberate doctrine of the Court to apply the rule in every case where no very cogent reasons militate against such a construction, *ibid.* 414.

(*m*) See *ante*, p. 937, note (*t*), where other cases on this subject are set out.

(*n*) The case of *Lucena v. Lucena*, 7 C. D. 255, seems to establish the following propositions:

(i.) That where there is a gift to children in shares, and a gift over to the surviving children of the share or shares of those dying without issue, coupled with a gift over in the case of all the children dying without issue, the word "surviving" will, in the absence

of anything in the Will to show a contrary intention, be construed "other." (ii.) That this construction will obtain even though some of the shares are settled and some not. (iii.) That, if all the shares are settled, the word "surviving" may be construed not as "others," but as meaning those who survive actually in person, or figuratively in issue, taking an interest under the Will; but that, if some shares are settled and some are not, this construction is not admissible. In the absence of a gift over in the event of the death of all the children of the testator taking shares under the Will, the fact that the original shares are all settled by the Will, and that the accruing shares which the survivors take in the share of a child who dies without issue are settled in the same way as the original shares, is not by itself sufficient to show that the word "survivors" is used otherwise than in its proper sense. *Re Benn*, 29 C. D. 839. There are cases which seem to support the contention that a settlement of

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But the word "survivor" must receive its natural construction, and not be read as meaning "other," unless the nature

shares without an ultimate gift over is sufficient, but it has never been decided that it is so, and none of the latter cases tend to recognize it as by itself sufficient, *per* Cotton, L.J., *ibid.* It will be observed that in *Waite v. Littlewood*, L. R. 8 Ch. 70, the case in which Lord Selborne first suggested what may be called the stirpital construction of the word "surviving" or "survivors," there was an ultimate gift over in the event of the death of all the children. *Wake v. Varah*, 2 C. D. 348 is another instance where the ultimate gift over on the death of all the children of the testator without issue led to the word "survivor," in a clause of accrual, being construed "other." In that case the testator left the residue of his estate in equal shares to his three children for their respective lives; there was an accrual clause and an ultimate gift over in the event of the death of all the children without issue: and the stirpital construction of the accrual clause was adopted in favour of the issue of a child of the testator, although that child predeceased the last survivor of the three children. In *Beckwith v. Beckwith*, 46 L. J. Ch. 98, where the Will was very similar but there was no ultimate gift over in the event of the death of all the children, the Court construed "survivor" strictly, and refused to adopt the stirpital construction. The importance of the gift over on failure of issue of all the objects

as justifying the construction of "surviving" or "survivors" otherwise than literally, is dwelt on by Kay, J., in his judgment in *Re Bowman*, 41 C. D. 525, 531, where he says that the decisions seem to him to establish the following propositions: (1.) Where the gift is to A., B., and C., equally for their respective lives, and after the death of any to his children, but if any die without children to the survivors for life with remainder to their children, only children of survivors can take under the gift over. See *Re Horner's Estate*, 19 C. D. 186. *Re Benn*, 29 C. D. 839. (2.) If to similar words there is added a limitation over, if all the tenants for life die without children, then the children of a predeceased tenant for life participate in the share of one who dies without children after their parent. See *Waite v. Littlewood*, L. R. 8 Ch. 70. *Wake v. Varah*, 2 C. D. 348. *Badger v. Gregory*, L. R. 8 Eq. 78. (3.) They also participate, although there is no general gift over, where the limitations are to A., B., and C., equally for their respective lives and after the death of any to his children, and if any die without children to the surviving tenants for life and their respective children, in the same manner as their original shares. See *Hodge v. Foot*, 34 Beav. 349. *Re Walker's Estate*, 12 C. D. 205. It will be seen from the above propositions that the learned Judge does not consider a general gift over on the extinction of the

of the disposition itself, or the context of the Will, renders a departure necessary to effectuate the apparent intention of the testator (o).

Survivorship
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In *Barber v. Barber* (p), a testator by his Will directed, that in the event of the death of his son and daughter under

class an absolute *sine quâ non*. It will be remembered, as is pointed out in this judgment, that although there may be older decisions which seem to show that "survivors" may easily be construed "others," yet the tendency of modern decisions is to adhere as closely as may be to a literal construction, and, only in cases of ambiguity to adopt that possible meaning of words, which is most in conformity with the general scheme of the Will, and avoid the consequence which the testator can hardly have deliberately intended. So again, in the recent case of *King v. Frost*, 15 A. C. 548, Lord Macnaghten says that the construction of the words "survivors and survivor" as "others or other" is not to be adopted, unless it is required to carry out an intention apparent on the face of the Will which would otherwise remain unfulfilled. It will be observed in that case it was sought as an alternative construction to construe "survivor" as "longest liver," and to say that the "longest live:" dying without issue, took under the accruer clause the share which had been given to him for life with remainder to his children in tail, on his own death as the survivor. This construction was based on decisions of Jessel, M. R., in *Madan v. Taylor*, 45 L. J. Ch. 539, of Fry, J., in *Davidson v. Kimpton*,

18 C. D. 213, and of Chitty, J., in *Re Roper's Estate*, 41 C. D. 409, but Lord Macnaghten refused to adopt this construction whereby the longest liver as survivor would on his own death without issue take indefeasibly the share originally intended for him and his children. The view adopted by Lord Macnaghten adverse to the decisions in the above cases seems to have been the view adopted by Kay, J., in *Re Mortimer*, 54 L. J. Ch. 414, and North, J., in *Askew v. Askew*, 57 L. J. Ch. 629, subsequently to the decision of Jessel, M. R., and also the view adopted by Sir W. Page Wood in *Re Corbett's Trusts*, Johns. 591, prior to that decision.

(o) *Crowder v. Stone*, 3 Russ. 217. *Cromek v. Lumb*, 3 Y. & Coll. 565. *Leeming v. Sherratt*, 2 Hare, 14. *Smith v. Osborne*, 6 H. L. C. 375, 393. *Re Horner's Estate*, 19 C. D. 186. *Re Benn*, 29 C. D. 839. "Survivors" has never been read "others" when the gift over is to a separate and distinct class: *De Garagnol v. Liardet*, 32 Beav. 608. When the word "survivor" is applied to a class of persons and individuals of that class are named, its natural meaning is "the longest liver of those who are named:" *Taaffe v. Conmee*, 10 H. L. C. 64.

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twenty-one, the property bequeathed to them should devolve on and become the property of four persons, *each particularly named and described*, to be divided betwixt them in equal proportions, and to their heirs for ever; which last-mentioned four persons he appointed executors, and he afterwards appointed two other executors: One of the four persons, and also both of the after appointed executors, renounced probate, and declined to act: It was not disputed that the bequest made to these four persons was made to them *as executors*: that is, on condition that they took upon themselves that office, and consequently, that the one who had renounced could not claim his share (*q*): But on the one hand, it was insisted that his share was a lapsed legacy, and went to the next of kin of the testator; while, on the other hand, the three other persons named as residuary legatees with him who had renounced, contended that they were entitled to the residue in thirds, including, therefore, the share destined for him: Lord Cottenham decided that they were not so entitled, but that the share had become undisposed of, and belonged to the next of kin: And his Lordship, in giving judgment, made the following observations:

“The question to be decided is, who are the legatees? It is quite clear that, if the legatees had not been appointed executors the gift to them would have created a tenancy in common, and therefore, that, upon the failure of the gift to any one, his share would have been undisposed of, and that the three others could not have claimed. And it is equally clear that, if any other condition had been imposed upon these four tenants in common, upon which their title to the legacy was to depend, and one had refused to perform the condition, his share would have been undisposed of, and that the other three could not have claimed it. The ground upon which the title of the executors who proved is rested, leaves these propositions untouched: for it stands upon this ground, that the gift is to a class, and that the three executors who proved constituted the class: and it was contended that

(*q*) See *ante*, p. 1147.

there was no distinction between a gift to executors as tenants in common, and a gift to certain persons as tenants in common who are afterwards appointed executors.

"This, as all other questions of construction, must depend upon the intention. A gift to a class implies an intention to benefit those who constitute the class, and to exclude all others; but a gift to individuals described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. In a gift to a class you look to the description, and inquire what individuals answer to it; and those who do answer to it are the legatees described. But if the parties to whom the legacy is given be not described as a class, but by their individual names and additions, though together constituting a class, those who may constitute the class at any particular time may not, in any respect, correspond with the description of the individuals named as legatees. If a testator give a legacy to be divided amongst the children of A. at a particular time, those who constitute the class at the time will take; but if the legacy be given to B., C., and D., children of A., as tenants in common, and one die before the testator, the survivors will not take the share of the deceased child. The question must be, was the intention to bequeath to those who might at the time constitute the class, or to certain individuals, who, it was supposed, would constitute it? Such would appear to be the question to be asked, and the point to be ascertained: but the more important inquiry is, whether the authorities justify and support this view of the case.

"In *Page v. Page* (r), decided by Lord King in 1728, and approved by Lord Talbot in 1794, there was the gift of a residue to six persons, to each one-sixth; and they were appointed executors: It was held that the one-sixth of one who died in the lifetime of the testator lapsed for the next of kin. In this case there is a gift to four equally, to be divided betwixt them, *i.e.* to each one-fourth. In *Owen v. Owen* (s),

(r) 2 P. Wms. 489. *Ante*, p. 1326. (s) 1 Atk. 494. *Ante*, p. 1080.

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the testator gave the residue of his estate to his two nieces, to be equally divided between them, and appointed them executrices: One died in the testator's lifetime: And Lord Hardwicke said that he had followed *Page v. Page* in *Holderness v. Reyner*; and that the reasoning of Sir J. Jekyll, in *Hunt v. Berkley* (t), could not be supported; and held that the share intended for the deceased niece lapsed for the benefit of the next of kin, and did not go to the surviving niece.

"In *Knight v. Gould* (u), the gift was of the residue 'to my executors hereinafter named, to pay my debts, legacies, &c., and also to recompense them for their trouble, equally between them;' and three persons were then named executors, one of whom died in the testator's lifetime: And Sir John Leach first, and Lord Brougham, upon appeal, held, that the two survivors were entitled to the whole: The latter relied upon two grounds principally; first, that the persons to take were those who were to perform the duties, and the survivors were such persons; secondly, that the gift was to the executors as a class in terms; for the words 'hereinafter named' were mere surplusage, inasmuch as the result would have been the same if they had been omitted, it being absolutely necessary to name them in order to appoint them. In that case the gift was to executors described as such, in this it is to individuals particularly named and described. In that, the fund given was what should remain after part had been administered. Those who were to take and those who were to administer were considered as identical.

"The result, therefore, of the authorities, supposing them strictly to apply, is in favour of the claim of the next of kin. There is the case of *Page v. Page*, decided by Lord King and approved by Lord Talbot, and in two cases approved and acted upon by Lord Hardwicke; whereas, in support of the claim of the acting executors, there is only the case of *Hunt v. Berkley*, decided, indeed, by a high authority, Sir

(t) Mosely, 47. S. C. 1 Eq. (u) 2 Mylne & Keen, 295. See *ante*, p. 1082.

Joseph Jekyll, but disapproved by Lord Hardwicke, and overruled by every subsequent case in which the point has arisen. It is also to be observed that the case of *Hunt v. Berkley* would not, if it were clearly a right decision, necessarily govern the present case; because, in that case, the residuary legatees and the executors were the same, and the decision must have proceeded upon this, that the testator did, in fact, intend to give the residue to whomsoever of the parties named might be his executors. But it is clear that, if *Page v. Page*, *Holderness v. Reyner*, and *Owen v. Owen*, be right, they necessarily include the present case; the claims of the next of kin being much stronger in this case than in any of those: inasmuch as, in all those cases, those named residuary legatees and executors were the same; so that the question might arise, whether the intention was to give the residue to the individuals, or to the class which they composed: whereas, in the present case, the residuary legatees do not constitute any class to which a name can be given, without including the description of residuary legatees. If the three surviving executors to whom the share of the residue was given are entitled, they must be so entitled as constituting the class intended to be benefited: but what is the class which they so constitute? Not the executors; because there were two other executors named besides the persons intended to be so benefited; and although the two others also declined to prove, so that the three, in fact, are the only acting executors, yet the class of executors, as contemplated by the testator, consisted of six; and there was clearly no intention to give the benefit to such of the six as might act as executors, for that might have given the benefit to the two. This case, therefore, has nothing in common with *Knight v. Gould*, or any other case in which the gift has been construed to be in favour of such as might act as executors. If, then, the class intended to take be not such as might, at the time, be the executors, it must be such of the executors named as might, at the time, be also of the number of the residuary legatees named; but that is only

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another mode of describing the residuary legatees; and, if their situation as residuary legatees be considered, they are only tenants in common of the residue, between whom there can be no survivorship.

"There seems also to be some confusion in terms in considering legatees as constituting, as such, a class for the purpose in question. They have no existence as a class, except under the description in the Will. To such persons a testator may undoubtedly give a right of survivorship *inter se*, by expressly directing it, or by creating a joint-tenancy. The first the testator in this case has not done, and the second he has, in term 3, excluded, by creating a tenancy in common; and he could not have intended that those who proved should take the whole in the event of some not proving, and not in the event of their dying before him. To effectuate a gift to those of the class he has himself constituted, who may be in a condition to take at a particular time, he must have used expressions from which that intention may be fairly deduced. Such an intention cannot be deduced from a gift to four persons by name, between whom the share of the residue is to be divided" (x).

It must here be observed, that where co-executors take a residue in that character, they take as joint-tenants: Therefore if one of them dies after the death of the testator, but before the severance of the joint tenancy in the residue, his share will survive to his co-executors, and his own executors or administrators will be excluded, as well as the next of kin of the testator (y). Thus, in *Baldwyn v. Johnson* (z), where

In case of several executors entitled as such to the residue:

(x) See also *Re Gibson*, 2 Johns. & H. 656, and the *dictum* of Wood, V.-C., as to the case of *Knight v. Gould*, *ante*, p. 1083, note (d). See also *ibid.*, and *ante*, p. 1081, note (u), where the cases are collected as to what is a gift to a class. See further *Gould v. Kemp*, *post*, p. 1340, and *Re Colley's Trusts*, L. R. 1 Eq. 496. Where there is a gift to a class, that

means a gift to such of the class as shall be living at the death of the testator. *Habergham v. Ridehalgh*, L. R. 9 Eq. 395, 400.

(y) *Frewen v. Relfe*, 2 Bro. C. C. 220. *White v. Williams*, 3 V. & B. 72. *S. C. Cooper*, 58. See also the judgment of Lord Brougham, in *Knight v. Gould*, 2 M. & K. 299—303.

(z) 3 Bro. C. C. 455.

two executors divided a part of the testator's property, but lodged a sum in the funds for securing the payment of an annuity; it was holden, that as to this they were joint-tenants, and that it should survive upon the death of one to the other (a). So in *Griffiths v. Hamilton* (b), all the executors died except two, Hoare and Griffiths: Hoare alone proved and died: After his death Griffiths proved: And he was declared entitled, as surviving executor, to all the testator's personal estate not reduced into possession and divided before the death of Hoare.

what is a
severance of
the joint
tenancy.

The question as to what shall amount to a severance of the joint-tenancy, was much considered in the case of *Gould v. Kemp* (c). There a testatrix bequeathed the residue of her property "to my executors, hereinafter named, to enable them to pay my debts, legacies, funeral, and testamentary charges, and also to recompense them for their trouble, equally between them. I do nominate, constitute, and appoint my said trustees, James Kemp, James Kemp the younger, and John Prior Ward, to be executors of this my Will:" James Kemp the elder died in the lifetime of the testatrix; and it was held, that as the gift was to the three, as a class, in their official character, the whole residue vested in the two survivors (d): James Kemp the younger and Ward proved the Will, and took on them the office of executors: Some years afterwards, but before any severance of the residuary property had been made, a letter was written and delivered by Kemp to Ward, who at the time was confined to his bed by sickness, engaging to secure to his family, in any way he might desire by his Will, a moiety of the property bequeathed to them by the Will of their testatrix: And it was held by Sir John Leach, M. R., and afterwards by

(a) But in *Partridge v. Pawlet*, 1 Atk. 467, Lord Hardwicke laid it down as a rule, that if two tenants in common put out money as joint executors, it shall not survive, but shall go respectively to those per-

sons who are the proper representatives of each.

(b) 12 Ves. 298.

(c) 2 M. & K. 304.

(d) See *ante*, p. 1083.

Lord Brougham, on appeal, that this letter amounted to a severance of the joint-tenancy.

Again, where leasehold property was given by Will to two sisters as joint tenants and they mutually agreed to bequeath it in trust for each other for life and for their nieces after the death of the survivor, and, one sister having died, the survivor made a Will giving the property in a different manner, it was held that the agreement between the sisters, carried out by the making of the Will, severed the joint tenancy and that the property must be administered on the footing of a tenancy in common (e).

The several receipts by joint-tenants of a portion of the trust fund does not destroy the joint tenancy as to the remainder of the fund (f). Nor does the employment by them of the estates bequeathed in their partnership trade (g). Nor is the marriage of one of them being a daughter a severance, unless the marriage divests the property from the wife and vests it in the husband (h).

What is not a severance of the joint tenancy.

(e) *Re Wilford's Estate*, 11 C. D. 267.

(f) *Leak v. McDowall*, 32 Beav. 28.

(g) *Brown v. Oakshott*, 24 Beav. 254. See further as to what amounts to a severance of joint tenancy, *Williams v. Hensman*, 1 Johns. & H. 546. *Caldwell v. Fellowes*, L. R. 9 Eq. 410. *Baillie v. Treharne*, 17 C. D. 388.

(h) *Re Butler*, 38 C. D. 286 (overruling on this point *Baillie v. Treharne*, 17 C. D. 388). From which case it appears that by

the common law marriage effects a severance only with regard to the chattels personal in possession of the wife, not with regard to chattels real, or choses in action. See also *Re Barton's Will*, 10 Hare, 12, and *Armstrong v. Armstrong*, L. R. 7 Eq. 518. But since the passing of the Married Women's Property Act, 1882, marriage, it would seem, no longer operates as a severance of the wife's interest as joint tenant except in case of property of a married woman not affected by that Act.

SECTION II.

Of the Right of the Executor to the Residue, in case there is no Residuary Legatee.

If the testator neither makes any disposition of the residue, nor appoints an executor, the residue belongs clearly to the next of kin: But if the testator appointing an executor makes no disposition of the residue, a question arises whether it shall belong to such executor or to the next of kin: And this is an inquiry which has given rise to much litigation and difficult discussion: But since the statute 1 Will. IV. c. 40, this subject has been freed from the great variety of distinctions which were formerly established with respect to it.

Rule at law
prior to 1830.

At law, it was the rule, from the earliest period, that the whole personal estate devolved on the executor: and if, after payment of the funeral expenses, testamentary charges, debts, and legacies, there should be any surplus, it should vest in him beneficially (i).

Rule in equity.

In equity, *primâ facie*, the rule was the same as at law (k). But the rule was controlled in equity, in all cases where a necessary implication or strong presumption appeared, that the testator meant to give only the office of executor, and not the beneficial interest in the residue: In all such cases, the executor was considered a trustee for the next of kin of the testator; or in cases where no next of kin can be found, a trustee for the Crown (l).

Such being the state of the jurisdiction of the Courts

(i) Atty-Gen. v. Hooker, 2 P. Wms. 340. Southcot v. Watson, 3 Atk. 228. Urquhart v. King, 7 Ves. 225.

(k) See Lowndes on Legacies, 249, 250.

(l) Middleton v. Spicer, 1 Bro. C. C. 201. Taylor v. Haygarth,

14 Sim. 8, 12. Russell v. Clowes, 2 Coll. 648. Cradock v. Owen, 2 Sm. & G. 241. The law is not altered by stat. 1 Will. 4, c. 40, s. 2: Johnstone v. Hamilton, 11 Jur. N. S. 77, *coram* Stuart, V.-C.

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of Equity in cutting down the right of the executor, the Act of 1 Wm. IV. chap. 40, was passed, which, after reciting that "testators by their Wills frequently appoint executors, without making any express disposition of the residue of their personal estate; and whereas executors so appointed become by law entitled to the whole residue of such personal estate; and Courts of Equity have so far followed the law, as to hold such executors to be entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein, in which case they are held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions, if the testator had died intestate (*m*); and whereas it is desirable that the law should be extended in that respect," proceeds to enact, "that when any person shall die, after the first day of September next after the passing of this Act, having by his or her Will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by Courts of Equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the Will or any codicil thereto, that the person or persons so appointed executor or executors, was or were intended to take such residue beneficially" (*n*).

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(*m*) See *Stewart v. Stewart*, 15 C. D. 539, 543, where Jessel, M. R., discusses the effect of the statute.

(*n*) It has been contended that this Act provides only for the case in which the property is vested in the executor *by virtue of his appointment*, and that it does not apply to a case where he takes it by virtue of an express gift: But in *Love v. Gaze*, 8 Beav. 472, a testator appointed A. & B. his

executors, and he gave them all his personal estate, "that is to say, for you to pay all as follows:" He then gave several legacies, and afterwards said, "I wish all this to be paid in six months after my death:" And it was held by Lord Langdale, under this statute, that the executors did not take the unexhausted residue beneficially, but in trust for the next of kin; as the intention that they should take

not to affect rights of executors where there is not any person entitled to the residue.

And by the second section it is further provided and enacted, "That nothing herein contained shall affect or prejudice any right to which any executor, if this Act had not been passed, would have been entitled, in cases where there is not any person who would be entitled to the testator's estate under the Statute of Distributions, in respect of any residue not expressly disposed of" (o).

It is necessary, however, with relation to questions which may yet arise respecting Wills of persons who have died previously to September 1st, 1830, and respecting Wills to which the statute does not apply by reason of the residue being expressly disposed of (p), or by reason of the deceased having left no next of kin (q), to review briefly the grounds on which the Courts of Equity had proceeded, until the time of the passing of the above Act, in deciding either that the executor was entitled to the residue beneficially, or that he was merely a trustee for the next of kin.

What is sufficient in cases

For this purpose it is necessary to consider what circum-

beneficially did not appear by the Will. *Saltmarsh v. Barrett*, 29 Beav. 474. 3 De G. & F. 279. The statute was meant to cast on the executor the burthen of proving, from the testamentary instrument, a distinct intention that he should take the residue beneficially: *Juler v. Juler*, 29 Beav. 37. *Williams v. Arkle*, L. R. 7 H. L. 606. For instances where it has been held that such an intention did not sufficiently appear, see *Juler v. Juler*, 29 Beav. 34; and where it has been held that it did sufficiently appear, see *Harrison v. Harrison*, 2 Hemm. & M. 237. *Shepherd v. Nottidge*, 2 Johns. & H. 766.

(o) The statute, it should seem, has made no alteration in the law except in cases where the deceased has left next of kin: *Taylor v.*

Haygarth, 14 Sim. 8. *Russell v. Clowes*, 2 Coll. 648. *Re Bacon's Will*, 31 C. D. 460, 463. See also *Chester v. Chester*, L. R. 12 Eq. 444. If, therefore, there are no next of kin, and no intention is disclosed on the face of the Will that the executors shall be excluded from taking beneficially, they will be entitled as against the Crown: *Russell v. Clowes*, 2 Coll. 648. And the question, in such case, to be determined is exactly the same as if the testator had died before the passing of the Act, and had left next of kin: *Read v. Stedman*, 26 Beav. 495. *Dacre v. Patrickson*, 1 Dr. & Sm. 182.

(p) See *Saltmarsh v. Barrett*, 29 Beav. 474. 3 De Gex, F. & J. 279.

(q) See *supra*, note (o).

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(u) Robi C. C. 589. Ves. 257, p v. Mapp, 3 Ch. C. 793 of the V.-C. 15 Sim. 56 Sir W. Gra 15 Ves. 409. v. Stedman

stances have been held sufficient to raise that presumption, which, according to the rule above laid down, must exist, in cases not within the Statute, in order to preclude the executor from taking the residue beneficially.

not within the Act, to raise a presumption against the executor's title :

In the first place, where the executor is expressly appointed *in trust* (*r*), or the residue is bequeathed to him *in trust* (*s*), though no trusts are declared (*t*), or though the trusts declared do not exhaust the whole property (*u*), he shall be a trustee for the rest of kin : But it may be otherwise, where he is made trustee of some particular fund, and not the whole residue (*x*).

the words "in trust" :

The rule is the same where the character of trustee is plainly affixed to him, though not by express words : As where there is a direction to the executor to "keep a proper account" (*y*) : or where the testator appoints him, entreating him to take the office (*z*), or directs that the executor shall be saved harmless from all expenses attending the execution of the Will (*a*) ; or declares that the whole of the property shall pass by the Will "according to law" (*b*) ; or appoints the executor "to see my Will put in force" (*c*).

character of trustee plainly affixed :

(*r*) Pratt v. Sladden, 14 Ves. 198. Dawson v. Clark, 18 Ves. 254. Vezey v. Jamson, 1 Sim. & Stu. 69.

(*s*) Graydon v. Hicks, 2 Atk. 18. Pratt v. Sladden, 14 Ves. 198.

(*t*) Dawson v. Clark, 15 Ves. 414, by Sir W. Grant, 18 Ves. 254, by Lord Eldon. Vezey v. Jamson, 1 Sim. & Stu. 69. Taylor v. Haygarth, 14 Sim. 8, 12.

(*u*) Robinson v. Taylor, 2 Bro. C. C. 589. Dawson v. Clark, 18 Ves. 257, per Lord Eldon. Ellecock v. Mapp, 3 H. L. C. 492. 2 Phill. Ch. C. 793 (overruling the decree of the V.-C. in Mapp v. Ellecock, 15 Sim. 568, and the opinion of Sir W. Grant in Dawson v. Clark, 15 Ves. 409, 2 V. & B. 399). Read v. Stedman, 26 Beav. 495. So

where the trust fails under the Mortmain Act : Daere v. Patrickson, 1 Drew. 782. Johnstone v. Hamilton, 11 Jur. N. S. 777.

(*x*) Batteley v. Windle, 2 Bro. C. C. 31. Griffiths v. Hamilton, 12 Ves. 298. Pratt v. Sladden, 14 Ves. 198. Russell v. Clowes, 2 Coll. 648.

(*y*) Gladding v. Yapp, 5 Madd. 56.

(*z*) Lord North v. Purdon, 2 Ves. Sen. 495. Seley v. Wood, 10 Ves. 71. Langham v. Sanford, 17 Ves. 451. Giraud v. Hanbury, 3 Meriv. 150.

(*a*) Dean v. Dalton, 2 Bro. C. C. 634. Saltmarsh v. Barrett, 29 Beav. 474. 3 De Gex, F. & J. 279.

(*b*) Cranley v. Hale, 14 Ves. 307.

(*c*) Braddon v. Farrand, 4 Rus.

So a presumption against the executor may arise from the condition of the party appointed, as where the testator names a mercantile firm to be his executors (*d*); or the person who shall for the time being fill a certain office, as that of ambassador from a particular country (*e*).

If the character of trustee is affixed by the Will to one of several executors, they are all trustees; for there is no instance of making one a trustee, and the others not (*f*).

legacy given
to a sole
executor :

Again, it has been long settled that an express legacy, however small, to a sole executor, will raise the necessary presumption against him (*g*); notwithstanding legacies are also given to the next of kin (*h*); and so will a legacy which is given to him as one of a class, as a legacy to the children of A., of which the executor is one (*i*); and notwithstanding the legacy is specific (*k*). Nor will it make any difference that the appointment to the office and the gift of the legacy are in different parts of the Will; though it may be questionable whether the presumption arises, when a legacy is given by the Will, and the executor appointed by a codicil (*l*).

The presumption, however, will not be raised against the executor by a particular legacy to him for life, *with remainder over* (*m*), or by an exceptive bequest to him out of a subject

Chanc. Cas. 87. *Barrs v. Fewkes*, 2 H. & M. 60. The question in these cases is, whether such words merely import the motive of the gift, or whether they express the very object of the bequest, *ibid.* 66.

(*d*) *De Mazar v. Pybus*, 4 Ves. 644.

(*e*) *Urquhart v. King*, 7 Ves. 225. *Griffiths v. Hamilton*, 12 Ves. 309.

(*f*) *White v. Evans*, 4 Ves. 21. *Milnes v. Slater*, 8 Ves. 295. *Sadler v. Turner*, 8 Ves. 617.

(*g*) *Farrington v. Knightly*, 1 P. Wms. 545. *Southcot v. Watson*,

3 Atk. 226. *Cradock v. Owen*, 2 Sm. & G. 241. But not a legacy to his wife: *Fruer v. Bouquet*, 21 Beav. 33.

(*h*) *Andrew v. Clark*, 2 Ves. Sen. 162. *Kennedy v. Stainsby*, 1 Ves. 66, note.

(*i*) *Abbott v. Abbott*, 6 Ves. 343.

(*k*) 2 Rop. Leg. 643, 3rd edit. *Randall v. Bookey*, 2 Vern. 425. *Southcot v. Watson*, 3 Atk. 226. *Martin v. Rebow*, 1 Bro. C. C. 154.

(*l*) *Langham v. Sanford*, 2 Meriv. 21.

(*m*) *Granville v. Beaufort*, 1 P. Wms. 114: *Secus*, where there is

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bequeathed to another (*n*). But a gift of a reversionary interest will have that effect (*o*), unless, perhaps, it be contingent (*p*).

Again, the presumption will not arise, where the executor legatee is an infant (*q*).

Moreover, a legacy to *one of several* executors will not raise the presumption against him (*r*); unless it be given to him *for his care and trouble* (*s*): Nor will the presumption be otherwise raised by unequal legacies to all the executors (*t*): But where *equal* legacies are given to them all, the presumption is as strong as in the case of a legacy to a sole executor (*u*). If a legacy be given to one of several executors *for his care and trouble*, it makes all the executors trustees (*x*).

legacy given
to one of
several
executors :

Where the residuary bequest lapses, the executor is not entitled (*y*); nor where it is void (*z*): Nor where the design of the testator to dispose of the residue, although not carried into effect, is evident: As where he bequeaths the residue in such manner as he shall appoint, and never makes any appointment (*a*): or where he leaves a blank for the name of

ineffectual or
inchoate resi-
duary clauses :

no ulterior disposition: *Zouch v. Lambert*, 4 Bro. C. C. 326: or where the gift is of the *residue* for life: *Joslin v. Brewet*, Bunb. 112. *Dicks v. Lambert*, 4 Ves. 725.

(*n*) *Griffiths v. Rogers*, Prec. Chanc. 231. 2 Rep. Leg. 646, 3rd edit.

(*o*) *Seley v. Wood*, 10 Ves. 71. *Oldman v. Slater*, 3 Sim. 84.

(*p*) *Lynn v. Beaves*, 1 Turn. & Russ. 63.

(*q*) *Williams v. Jones*, 10 Ves. 77.

(*r*) *Buffar v. Bradford*, 2 Atk. 222. *Griffiths v. Hamilton*, 12 Ves. 298.

(*s*) *White v. Evans*, 4 Ves. 21. *May v. Lewin*, 2 P. Wms. 159, *in notis*. See *Dawson v. Thorne*, 3

Russ. Chanc. Cas. 235, 239.

(*t*) *Blinkhorne v. Feast*, 2 Ves. Sen. 27, 29. *Bowker v. Hunter*, 1 Bro. C. C. 328. *Oliver v. Frewen*, 1 Bro. C. C. 590. *Griffiths v. Hamilton*, 12 Ves. 309. *Russell v. Clowes*, 2 Coll. 648.

(*u*) *Ommanney v. Butcher*, 1 Turn. & Russ. 260, 269. See also *Clennell v. Lewthwaite*, 2 Ves. 471, by Lord Alvanley. *Taylor v. Haygarth*, 14 Sim. 8, 12. *Saltmarsh v. Barrett*, 29 Beav. 474. 3 De Gex, F. & J. 279.

(*x*) See *supra*.

(*y*) *Bennet v. Batchelor*, 3 Bro. C. C. 28.

(*z*) *Atty.-Gen. v. Tomkins*, Amb. 216.

(*a*) *Davers v. Dewes*, 3 P. Wms.

the residuary legatee (*b*): or where he professes to dispose of the residue, but does not (*c*): or where, by an unexecuted codicil, he refers to the Will as not having disposed of the residue, and sketches out a disposition of it, which he leaves imperfect (*d*). So the presumption will be raised against the executor where the testator partially obliterates the residuary clause, leaving nothing but the introductory words (*e*): or where he professes to dispose of *part* only of his personal estate (*f*).

when parol
evidence
admissible.

It remains to consider briefly the subject of the admissibility of parol evidence with reference to this question. Such evidence is not admissible in the first instance, on behalf of the next of kin, to raise the presumption for the exclusion of the executor (*g*). But when such presumption is raised from the words of the Will, parol evidence is admissible, on behalf of the executor, for the purpose of rebutting such presumption (*h*); and such evidence may

40. *Mordaunt v. Hussey*, 4 Ves. 117. *Dawson v. Clark*, 15 Ves. 414, by Sir Wm. Grant.

(*b*) *Bishop of Cloyne v. Young*, 2 Ves. Sen. 91. *North (Lord) v. Purdon*, 2 Ves. Sen. 495. *Dawson v. Clark*, 15 Ves. 414. In *Re Bacon's Will*, 31 C. D. 460, where the blanks left by the testatrix were on a printed form from which it appeared conceivable that she might have left them there purposely in the belief that by so doing she would entitle the executor to the residue, parol evidence was held admissible to rebut the presumption against the executor.

(*c*) *Oldham v. Carleton*, 2 Cox, 399.

(*d*) *Nourse v. Finch*, 1 Ves. 344. S. C. 2 Ves. 78. But merely leaving a blank between the end of the Will and the signature is not sufficient to ex-

clude the executor: *White v. Williams*, 3 Ves. & B. 72.

(*e*) *Mence v. Mence*, 18 Ves. 348.

(*f*) *Urquhart v. King*, 7 Ves. 225.

(*g*) *White v. Williams*, 3 V. & B. 72. *Langham v. Sanford*, 2 Meriv. 17.

(*h*) *Clennell v. Lewthwaite*, 2 Ves. 474. *Langham v. Sanford*, 17 Ves. 442, 443. *Lynn v. Beaver*, 1 Turn. & R. 66. *Bishop of Cloyne v. Young*, 2 Ves. Sen. 95. It will be observed that parol evidence is not admissible in cases where it is conclusively apparent on the Will itself that the executor was meant to be a trustee only (*per* Lord Eldon in *Langham v. Sanford*, 2 Mer. 6, 17), as distinguished from the case where there is a mere presumption against the executor from the words of the

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then be opposed by similar evidence on behalf of the next of kin (*i*).

If, however, the Will conveys upon the face of it an unequivocal indication of an intention to clothe the executor with a fiduciary character only, as where he is expressly appointed *in trust* (*k*); or a legacy is expressly given to him for his care and trouble (*l*), parol evidence is not admissible to support the claim; for that would be to allow parol evidence to contradict the Will (*m*).

In cases within the operation of the statute 1 Wm. IV., c. 40 (*n*), parol evidence is, in all cases, inadmissible to show that the testator intended his executors to take beneficially; for the Act required that the intention should appear by the Will (*o*).

Not admissible in cases within the statute 11 Geo. IV. & 1 W. IV. c. 40.

Sometimes where there is a gift of the residue to a trustee Trust for next

Will, *c. g.*, the presumption arising from a particular legacy to the executor. The case of an imperfect Will manifesting an inchoate intention to appoint a residuary legatee seems to be on the border line; it may, or may not, be conclusive to show an intention that the executor was meant to be a trustee only: and in *Re Bacon's Will*, 31 C. D. 460, where a testatrix made her Will on a printed form, and after giving certain legacies gave all her estate real and personal unto — to and for — own use absolutely, and then appointed C. W. C. to pay all her debts, &c., and to be the executor of her Will, Kay, J., held that it was quite conceivable that the testatrix believed that the effect of the blanks would be to entitle the executor to the residue, and that the effect of the blanks under the circumstances was only to raise a presumption against the executor of a resulting trust for

the next of kin, and that parol evidence was admissible to rebut that presumption. No allegation is necessary to put in issue that he is entitled by the effect of parol evidence, that being included in the allegation that he is entitled as executor: *Lynn v. Beaver*, 1 Turn. & R. 66.

(*i*) *Bishop of Cloyne v. Young*, 2 Ves. Sen. 91, 95.

(*k*) *Gladding v. Yapp*, 5 Madd. 59.

(*l*) *Langham v. Sanford*, 17 Ves. 443. *Whitaker v. Tatham*, 7 Bing. 628: but see *Williams v. Jones*, 10 Ves. 77, as to one of several executors.

(*m*) *Langham v. Sanford*, 17 Ves. 443. *Hall v. Hill*, 1 Dr. & W. 115, per Sugden, C. of Ireland. *Barrs v. Fewkes*, 11 Jur. N. S. 669.

(*n*) *Ante*, p. 1342.

(*o*) *Love v. Gaze*, 8 Beav. 472. See also *Briggs v. Penny*, 3 De G. & Sm. 525.

of kin where trust expressed on face of Will insufficiently declared.

Trusts not appearing on face of Will, but communicated to and accepted by legatee, enforced as binding on his conscience.

other than the executor, the gift fails because the trusts are insufficiently declared, in such a case the trustee can take no beneficial interest, neither can any one claim successfully as a *cestui que trust*, and the result is that the residue will have to be distributed as upon an intestacy under the Statute of Distributions. If it is expressed on the face of the Will that the legatee is a trustee, but the trusts are not thereby declared, no trust afterwards declared by a paper not executed as a Will can be binding: in such a case the legatee will be a trustee for those entitled under the Statute of Distributions (*p*).

There are cases where no trust appears on the face of the Will, but the testator has been induced to make the Will or, having made it, has been induced not to revoke it by a promise on the part of the legatee to deal with the property in a specified manner: in these cases the Court treats the trust as binding on the conscience of the donee (*q*). The communication to the trustee of the object of the trust may be after the date of the Will (*r*), but it is essential, in order to make the trust binding, that it shall be communicated to the legatee in the testator's lifetime, and that he should accept that particular trust (*s*). Vice-Chancellor Hall, in his judgment in *Re Fleetwood* (*t*), refuses to accept *Att-Gen. v. Dillon* (*u*), and *McCormick v. Grogan* (*x*), as establishing contrary to the authorities mentioned in his judgment, that where the trust is referred to on the face of the Will, the Court will not give effect to the intended trust, although there is conclusive evidence upon which the Court would have given effect to the intended trust had the Will been altogether silent as to the trust. The judgment of the Vice-Chancellor is difficult to reconcile with the cases cited in note (*p*), but whether or not the principle, which led Courts of

(*p*) *Johnson v. Ball*, 5 De G. & Sm. 85. *Briggs v. Penny*, 3 Mac. & G. 546. *Singleton v. Tomlinson*, 3 A. C. 404.

(*q*) *McCormick v. Grogan*, L. R. 4 H. L. 82. See *ante*, pp. 329, 330.

(*r*) *Moss v. Cooper*, 1 J. & H. 352.

(*s*) *Re Boyes*, 26 C. D. 531.

(*t*) 15 C. D. 594.

(*u*) 13 Ir. Ch. Rep. 127.

(*x*) L. R. 4 H. L. 82.

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Equity to hold that the Statute of Frauds and the Statute of Wills were not to be used as instruments of fraud, applies to cases where the Will shews some trust was intended, as well as to those where this does not appear, it seems clear that in either case the trust must be definite, communicated to the legatee, and accepted by him. The judgment in the case of *Riordan v. Banon* (y) assumes that a Court of Equity will enforce the trust in favour of the person for whose benefit the legatee accepted the trust, even though the legatee make no claim to take the property beneficially; for although no doubt the fraud would be of a different kind, if the legatee could by means of it retain the benefit of the legacy for himself, yet it would also be a fraud, though the result would be to defeat the expressed intention for the benefit of the heir, next of kin, or residuary donees. In *Re Fleetwood* (z), Vice-Chancellor Hall held that one of the witnesses to the Will being interested under the parol trust such interest failed, but if the trust was enforced not under the Will but to prevent the Wills Act being used for fraud, the decision would seem difficult to support.

Parol trusts not enforced in favour of witness to Will.

It may be mentioned, in conclusion of this subject, that where there is no gift of the undisposed of residue, a testator cannot, by negative words, exclude one of his next of kin from participating in it. Thus, where a testator, by his Will, cut off his widow and one of his daughters from any part of his property, and directed that they should not receive any benefit therefrom, *but he made no disposition of his property*; it was held that the widow and daughter were, nevertheless, entitled to their share in the undisposed of residue, under the Statute of Distributions (a).

If the residue be undisposed of, it must be divided amongst all the next of kin, notwithstanding the testator declares by his Will that one of them shall have none of his property.

(y) 10 Ir. Eq. Rep. 649.

(z) 15 C. D. 594.

(a) *Johnson v. Johnson*, 4 Beav.

318. But see *Bund v. Green*, 12 C. D. 819.

BOOK THE FOURTH.

OF DISTRIBUTION.

THE office of an administrator, as far as it concerns the collecting of the effects, the making of an inventory, and the payment of debts, is altogether the same as that of an executor: But as there is no Will (unless the administration be *cum testamento annexo*), to direct the subsequent disposition of the property, at this point they separate, and must pursue different courses (a).

CHAPTER THE FIRST.

OF DISTRIBUTION UNDER THE STATUTE.

AFTER the Ordinary was divested of the power of administering an intestate's effects, and compelled, in the manner mentioned in the preceding part of this Treatise (b), to delegate such authority to the relations of the deceased, the Spiritual Court attempted to enforce a distribution, and took bonds of the administrator for that purpose: But such bonds were prohibited by the Temporal Courts, and declared to be void in point of law, on the ground, that by the grant of administration, the ecclesiastical authority was executed, and ought to interfere no further (c). Thus the administrator was entitled, exclusively, to enjoy the residue of the testator's effects, after payment of the debts and funeral expenses (d).

(a) Toller, 369.

(b) *Ante*, p. 341.(c) *Edwards v. Freeman*, 2 P. Wms. 441, by Sir Joseph Jekyll. *Hughes v. Hughes*, 1 Lev. 233. S. C. Carter, 125. 2 Black. Comm.

515. Toller, 370.

(d) *Carter v. Crawley*, Sir T. Raym. 500. *Edwards v. Freeman*, 2 P. Wms. 441. 2 Black. Comm. 515. Bac. Abr. Errors, (I).

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The hardships of this privilege upon those of kin to the intestate in equal degree with the administrator was the occasion of making the Statute of Distributions, 22 & 23 Car. II. c. 10 (e). That statute, after empowering the Ordinary, on the granting of administration, to take a bond of the administrator, with two or more sureties, conditioned as before mentioned in a preceding part of this Work (f), proceeds, in section 3, to enact as follows, "And also that the said Ordinaries and Judges respectively shall and may and are enabled to proceed and call such administrators to account for and touching the goods of any person dying intestate; and, upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear, (after all debts, funeral, and just expenses of every sort first allowed and deducted,) amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks, *pro suo cuique jure*, according to the laws in such cases, and the rules and limitation hereafter set down; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same by the due course of his Majesty's ecclesiastical laws; saving to every one, supposing him or themselves aggrieved, their right of appeal, as was always in such cases used."

It has already appeared (g), that by reason of the Court of Probate Act, s. 23, that Court (whose jurisdiction was substituted for that of the Ordinary and other Ecclesiastical Judges) could not entertain a suit for the distribution of residue. But the Court of Equity compelled the administrator to apply it according to the statute. And now although the Probate Division probably has jurisdiction to

22 & 23 Car. 2,
c. 10.
Statute of
Distributions:

Sect. 3.
Ordinaries to
have power to
call adminis-
trators to ac-
count, and to
make distri-
bution, &c.

(e) *Petit v. Smith*, 1 P. Wms. 411, by Lord Holt. There are two objects of that statute: one that the residue shall be forthcoming, and another that it shall be duly divi-

ded: *By Bayley, B., in the Archbishop of Canterbury v. Robertson*, 1 Cr. & M. 529.

(f) *Ante*, p. 452, *et seq.*

(g) *Ante*, p. 238.

entertain an administration action, yet it would probably refuse to do so, since by sects. 33, 34 of the Judicature Act, 1873, all causes and matters for the administration of the estates of deceased persons are assigned to the Chancery Division.

Sect. 4.
Customs of
London and
York saved.

By section 4, it is provided, "That this Act or anything herein contained shall not in any way prejudice or hinder the customs observed within the city of London, or within the province of York, or other places having known and received customs peculiar to them, but that the same customs may be observed as formerly: anything herein contained to the contrary notwithstanding."

Sect. 5.
How and to
whom the sur-
plusage is to
be distributed :

And by section 5, it is further enacted, "That all Ordinaries, and every other person (*h*), who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following: that is to say, one-third part of the said surplusage to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made: And in case any child, other than the heir-at-law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share, which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any

Advancement
by portion :

(*h*) The word "person" here evidently means judge: See Arch-
bishop of Canterbury v. Tappen, 8 B. & C. 158, by Lord Tenterden.

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land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated: but the heir-at-law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate."

Heir-at-law to have an equal part.

And by section 6, "In case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate who are in equal degree, and those who legally represent them" (i).

Sect. 6.
If no children.

And by section 7, it is provided, "That there be no representations admitted among collaterals after brothers' and sisters' children; and in case there be no wife, then all the said estate to be distributed equally to and amongst the children: and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever."

Sect. 7.
If no wife or if no wife or child.

And by section 8, it is likewise enacted, "To the end that a due regard be had to creditors, that no such distribution of the goods of any person dying intestate be made till after one year be fully expired after the intestate's death, and that such and every one to whom any distribution and share shall be allotted, shall give bond with sufficient sureties in the said Courts, that if any debt or debts, truly owing by the intestate, shall be afterwards sued for, and recovered or otherwise duly made to appear, that then and in every such case he or she shall respectively refund and pay back to the administrator his or her rateable part of that debt or debts, and of the costs of suit and charges of the administrator by reason of such debt, out of the part and share so as aforesaid allotted to him

Sect. 8.
No distribution till after a year:
If debts afterwards appear, then all to refund proportionably.

(i) As to the modification of Estates Act, 1890, 53 & 54 Vict. c. 29, see *post*, p. 1359.



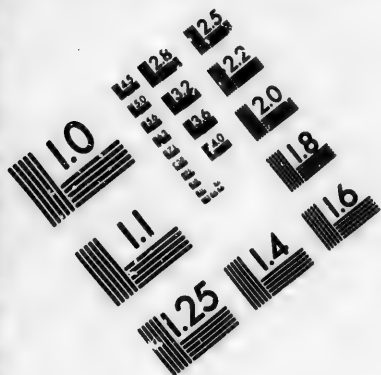
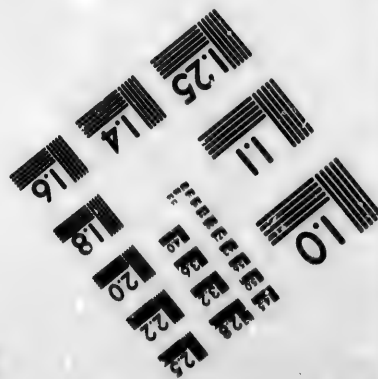
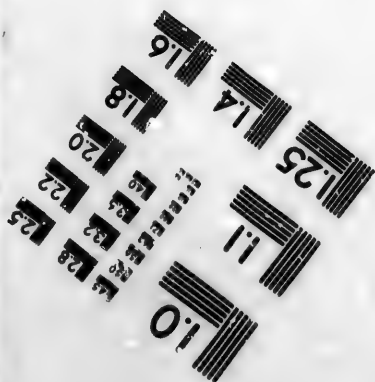
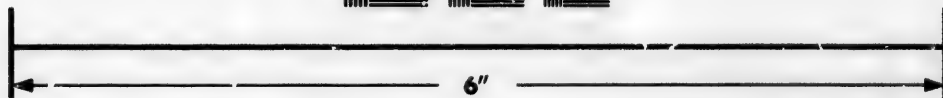
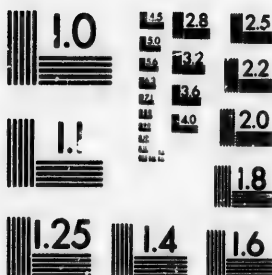


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or her, thereby to enable the said administrator to pay and satisfy the debt or debts so discovered after the distribution made as aforesaid."

Sect. 9.
Act not to extend to administration *cum testamento annexo*.

Finally, by section 9, it is enacted, "That in all cases where the Ordinary hath used heretofore to grant administration *cum testamento annexo*, he shall continue so to do, and the Will of the deceased in such testament expressed shall be performed and observed in such manner as it should have been if this Act had never been made."

It is obvious to observe how near a resemblance this Statute of Distributions bears to the ancient English law, *de rationabili parte bonorum*; which Sir Edward Coke, though he doubted the generality of its restraint on the power of bequeathing by Will, held to be universally binding, in point of conscience at least, on the administrator or executor, in case of either a total or partial intestacy (*j*). It also bears some resemblance to the Roman law of succession, *ab intestato*, which, and because the Act was also penned by an eminent civilian (*k*), has occasioned a notion that the Parliament of England copied it from the Roman Prætor; though it is little more than a restoration, with some refinements and regulations, of our old constitutional law; which prevailed as an established right and custom, from the time of King Canute downwards, many centuries before Justinian's laws were known or heard of in the Western parts of Europe (*l*).

Lord Hardwicke, in the case of *Stanley v. Stanley* (*m*), took occasion to observe, that this statute was very incorrectly penned.

Agreement as to distributive share.

Where a party, entitled to a distributive share of the personal estate of an intestate, makes an agreement relating to the distribution, under a supposition that the estate is of a

(*j*) 2 Inst. 32, 33. 2 Black. Comm. 516.

(*k*) Sir Walter Welker: See R. v. Raines, 1 Lord Raym. 574, by

Lord Holt.

(*l*) 2 Black. Comm. 516.

(*m*) 1 Atk. 457.

certain value, and it turns out to be greater than was known at the time of the agreement, a Court of Equity will set it aside (n): for it is a general principle of equity, that agreements, relative to real or personal estate, if founded on mistake, will be for that reason set aside (o).

In the investigation of the rights of the several parties entitled under this statute, it is proposed to consider, First, The rights of a husband, with respect to the personal property of his deceased wife: Secondly, The rights of a widow, with respect to the effects of her husband: Thirdly, The rights of the children, and lineal descendants of the deceased: Fourthly, The rights of the next of kin.

SECTION I.

Of the Rights of the Husband and his Representatives, with respect to the Personal Property of his intestate Wife.

It has been shown, in a former part of this Treatise, that the husband is entitled to the grant of administration of his wife's effects; and consequently, before the Statute of Distributions, he was entitled, as all administrators were, to the exclusive enjoyment of the residue: Doubts, however, arose, whether the husband's right was not superseded by the force of that statute; and whether he was not thereby bound to distribute her personal estate among her next of kin: To obviate which, it is provided by the 29 Car. II. c. 3, s. 25 (the Statute of Frauds), that neither the Statute of Distributions or anything therein contained "shall be construed to extend to the estates of *feme covert*s that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover

Husband's
rights as
administrator
to his wife:

(n) *Cocking v. Pratt*, 1 Ves. Sen. 400.

(o) See *Pooley v. Ray*, 1 P. Wms. 355. *Bingham v. Bingham*,

1 Ves. Sen. 126. *Leonard v. Leonard*, 2 Ball & Beat. 183. *Stewart v. Stewart*, 1 Rob. App. Cas. 431.

and enjoy the same, as they might have done before the making of the said Act" (*p*).

rights of the husband's representatives, if he dies without taking out administration to her:

In case the wife dies intestate, and afterwards the husband dies, without having taken out administration to her, the Ecclesiastical Court, until a late period, considered itself bound by the statute 21 Hen. VIII. c. 5, to grant administration to the next of kin of the wife, and not to the representative of the husband (*q*). But such administrator was regarded, in equity, with respect to the residue, as a trustee for the representatives of the husband (*r*): For the husband surviving the wife, her whole estate vested in him at the time of her death, and no person could possibly be entitled to the rights of his wife but himself; so that her whole property belonged to him (*s*). And the practice of the Prerogative Court of Canterbury, on this head, was altered in Sir John Nicholl's time; and the rule established was, that the administration shall be granted to the representatives of the husband, unless it can be shown that the next of kin of the wife are entitled to the beneficial interest (*t*).

or without having fully administered:

So in a case where the husband takes out administration to his wife, and dies without having administered to all her estate, the Ecclesiastical Courts, for a long period, thought themselves obliged to commit administration *de bonis non* of the wife, if required, to the next of kin of the wife at the time of her death (*u*): Still the beneficial interest in her effects has always been held to be in the representatives of her husband (*v*).

It may be a question, what shall constitute the legal relations of husband and wife, so as to confer the rights

(*p*) See *ante*, pp. 754-759, as to the extent of the husband's rights as his wife's administrator. See also *ante*, pp. 612, 613.

(*q*) See *ante*, p. 349.

(*r*) *Cart v. Rees*, 1 P. Wms. 381, (cited in *Squib v. Wyn.*) *Humphrey v. Bullen*, 1 Atk. 458. S. C.

11 Vin. Abr. 28. *Elliott v. Collier*, 3 Atk. 526. S. C. 1 Ves. Sen. 15. 1 Wils. 168.

(*s*) *Elliott v. Collier*, 3 Atk. 527.

(*t*) See *ante*, p. 350.

(*u*) *Ante*, pp. 412, 413.

(*v*) *Humphrey v. Bullen*, 1 Atk. 458.

above discussed: This subject has already been considered, incidentally to the investigation of the husband's right to the administration (*w*).

SECTION II.

Of the Rights of a Widow, in the Distribution of the Effects of her intestate Husband, under the Statute.

The Statute of Distributions, it will be observed, provides, that if the intestate leaves children, as well as a widow, one-third shall go to the widow, and the residue among the children. If there be no children or lineal descendants of children subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred. But the Statute of Distributions, 22 & 23 Car. II. c. 10, has been materially modified in favour of the widow of an intestate dying without issue by the Intestates' Estates Act, 1890, 53 & 54 Vict. c. 29, an Act to amend the law by making better provision for the widows of certain intestates in the distribution of such intestate's property. This Act provides: Sect. 1. The real and personal estates of every man who shall die intestate (*x*) after the 1st of September, 1890, leaving a widow but no issue shall, in all cases where the net value of such real and personal estates shall not exceed 500*l.*, belong to his widow absolutely and exclusively.

Intestate's estate not exceeding 500*l.* to belong to widow where no issue.

Sect. 2. Where the net value of the real and personal estates, in the preceding section mentioned, shall exceed the sum of 500*l.*, the widow of such intestate shall be entitled to 500*l.*, part thereof absolutely and exclusively, and shall have a charge upon the whole of such real and personal estates for such 500*l.*, with interest thereon from the date of the death of the intestate at 4 per cent. per annum until payment.

Intestate's estate exceeding 500*l.*, widow to have a charge for 500*l.*

Sect. 3. As between the real and personal representatives of such intestate, such charge shall be borne and paid in proportion to the values of the real and personal estates respectively.

How charge be borne as between realty and personalty.

(*w*) *Ante*, pp. 346-352.

(*z*) The Act only applies to the case of a man dying wholly intestate: it does not, like the *Statute*

of Distributions, apply to cases of partial intestacy. *Re Twigg's Estate*, [1892] 1 Ch. 597.

Above provision to be in addition to share of residue.

Sect. 4. The provision for the widow, intended to be made by this Act, shall be in addition and without prejudice to her interest and share in the residue of the real and personal estates of such intestate remaining after payment of the sum of 500*l.*, in the same way as if such residue had been the whole of such intestate's real and personal estates and this Act had not been passed.

How realty to be valued.

Sect. 5. The net value of such real estates as aforesaid shall, for the purposes of this Act, be estimated in the case of a fee simple upon the basis of twenty years' purchase of the annual value by the year at the date of the death of the intestate, as determined by law for the purposes of property tax, less the gross amount of any mortgage or other principal sum charged thereon, and less the value of any annuity or other periodical payment chargeable thereon, to be valued according to the tables and rules in the schedule annexed to the Statute 16 & 17 Vict. c. 51, and in the case of an estate for a life or lives according to the said tables and rules.

How personalty to be valued.

Sect. 6. The net value of such personal estates as aforesaid shall be ascertained by deducting from the gross value thereof all debts, funeral, and testamentary expenses (*y*) of the intestate, and all other lawful liabilities and charges to which the said personal estate shall be subject.

Where an intestate leaves a widow, but no next of kin, the widow is not entitled to the whole of the personal estate; but one moiety belongs to her, and the other to the Crown (*z*).

Widow's claim may be barred by settlement.

The widow's title, however, under the statute, may be barred by a settlement before marriage (*a*), excluding her from her distributive share of her husband's personal estate; and even in the case of a female infant, she may be barred of her right by such a settlement, made

(*y*) The phrase "testamentary expenses" is not strictly applicable to an intestacy: taking the Act as a whole it appears to be a slip of draftsmanship, and as meaning the expenses of obtaining letters of administration and of administra-

tion generally. *Re Twigg's Estate*, [1892] 1 Ch. 579, 582, *per* Chitty, J.

(*z*) *Cave v. Roberts*, 8 Sim. 214.

(*a*) See *Slatter v. Slatter*, 1 Younge & Coll. 28, as to the effect of a separation deed executed by the wife after marriage.

before marriage, with the approbation of her parents or guardians (b).

Where the settlement is expressed to be "as and for her jointure, in full lieu, bar and satisfaction of any dower or thirds which she could or might claim at common law out of all or any of the estates real, *personal*, or freehold, of her intended husband," the widow will be excluded from her share under the statute; for the words "common law" must be construed as equivalent to the terms "according to the general law" (c).

In such cases, whether the husband die intestate, or dispose of his personal estate by Will, which disposition fails by lapse, the wife will be equally excluded from her distributive share.

But it is otherwise when the husband *by Will* makes a provision for his wife, stating it to be in lieu and in bar of all her claims on his personal estate, and then subjects his personalty to a disposition which lapses, or is void, so that the latter fund is subject to distribution; for then notwithstanding the words of the Will, the widow is entitled to a share under the statute (d): The principle of this distinction is, that where a woman has before marriage agreed to accept

Provision by Will for widow, in lieu of her thirds, does not bar her claim under a *quasi* intestacy.

(b) Lord Buckinghamshire v. Drury, 3 Bro. C. C. 492. 4 Bro. C. C. 506, note. 2 Roper on Husb. & Wife, 26, 2nd edit.

(c) Gurly v. Gurly, 8 Cl. & F. 743. See also Druce v. Denison, 6 Ves. 385. But where the husband, on his marriage, settles on the wife a rent-charge for her jointure, and in lieu of dower and thirds at common law, she is not thereby precluded from her distributive share in his undisposed-of personal estate; because the rent-charge must be regarded as intended to be in lieu only of any claim she might have on his lands: Colleton v. Garth, 6 Sim. 19. The

word "thirds," however, is not confined to real estate, but is a general expression which may signify, according to the context and scope of the instrument, the interest of a widow in any property, whether real or personal, of her deceased husband; and in construing the instrument the Court considers, *inter alia*, the fund out of which the provision for the wife was made: Thompson v. Watts, 2 Johns. & H. 291.

(d) Pickering v. Stamford, 3 Ves. 332. Garthshore v. Chalie, 10 Ves. 17, 18. 2 Rop. Husb. & Wife, 23, 2nd edit.

a consideration for her widow's share, she is bound by her compact, whether her husband die testate or intestate; but where there is no such contract, but the provision in bar of the distributive share arises upon the husband's Will, it is presumed that the motive for the widow's exclusion originated in a particular design or purpose of the testator, viz., for the benefit of the person in favour of whom the property was bequeathed by him; so that if the purpose be disappointed, there is no reason why the bar or exclusion should continue (e).

In what case a widow cannot claim both her distributive share and money due under a covenant for her provision:

It is necessary to consider the right of the widow under the Statute of Distributions, with relation to the existence of a covenant or agreement, on the part of the husband, to settle or to leave, or that his executors shall pay, to his widow, a portion of his personal estate.

It is a general rule, that if the husband covenants to *leave*, or that his executor shall *pay*, to his widow a sum of money, or part of his personal estate, and he dies intestate, so that she becomes entitled to a portion of his personal property under the statute, such distributive share shall be a performance of the covenant, and she cannot claim both (f). The principle seems to be, that the husband, looking forward to the event of his death, when his wife will have an interest in his property by the provision of the law, declines for that reason to give her any interest in it in his lifetime,

(e) 2 Rep. *Husb. & Wife*, 23, 2nd edition. Lord Alvanley found this principle recognized by Lord Cowper, in *Sympton v. Hornsby*, which he stated from the Registrar's Book: *Pickering v. Stamford*, 3 Ves. 335. But this principle cannot be applied to a case where, on the face of the Will there is an intestacy, with language excluding the widow in absolute and comprehensive terms from any further share: *Lett v. Randall*, 3 Sm. & G. 83.

(f) *Blandy v. Widmore*, 1 P. Wms. 324. *Lee v. Cox and D'Aranda*, 1 Ves. Sen. 1. *Garbshore v. Chalie*, 10 Ves. 1. It will make no difference that the money under the covenant is to be paid at a determinate period within the year after the testator's death, whereas in strictness the distributive share is not payable until the end of that year; for this difference shall not be permitted to repel the legal presumption: *ibid.* 13.

considering that his covenant will be as effectually performed by what the law provides for her, as if the provisions were made by himself (g).

If the widow's distributive share is *less* than the amount of her provision under her husband's covenant, such share will be regarded as a partial performance; so that if the money covenanted to be paid by the husband's executors be 1,000*l.*, and the widow's distributive share amount only to 500*l.*, such share will nevertheless be a part performance of the covenant; viz., to the extent of 500*l.* (h).

In the case of *Goldsmid v. Goldsmid* (i), Sir Thomas Plumer, M. R., decided, that if the widow takes a distributive share of her husband's personal estate, not under an actual but a *quasi* intestacy, such share will be a performance of his covenant that his executors shall pay to her a sum of money at his death if she survived him: In that case the husband by marriage articles covenanted, that if he died in the lifetime of his wife, his executors should, within three months after his decease, pay to her 3,000*l.*: By his Will he gave all his property to his executors, in trust after payment of his debts, at the expiration of three years from his decease, to divide it in such ways, shares and proportions, as to them should appear right: On his death, during the life of his wife, the executors having died or renounced, the property became divisible according to the Statute of Distributions: And the widow's distributive share, exceeding 3,000*l.*, was held a performance of the covenant in the marriage articles (k).

If the husband's covenant be entire, and the provision therein expressed to be secured to the wife is such as the covenant in *part* might be held to be performed by the widow's distributive share under the statute, according to the preceding cases, and the remaining part could not be

in what cases
she may claim
both;

(g) *Garthshore v. Chalie*, 10 Ves.
1, 16.

(h) *Ibid.* 16.

(i) 1 Swanst. 211.

(k) The authority of this decision is doubted in 2 Rep. Husb. & Wife, 50, 2nd edit.

so considered, then, since the covenant is entire, the Court will not split it, and hold a performance and a non-performance at the same time (l): Thus, if the husband covenanted with trustees that his heirs, executors, &c., should pay to them 6,000*l.*, within a certain period after his death, upon trust as to 1,500*l.*, part of the sum, for his widow *absolutely*, if she survived him; and as to the remaining sum of 4,500*l.*, to pay the interest of it to her during her life, or widowhood; since the last sum, not being given absolutely to the widow, cannot be considered satisfied by her distributive share, neither shall the 1,500*l.* be so regarded (m).

Again, if the covenant by the husband be so framed as to require the money to be settled during his life, so that there was a breach of it before his death, and a *debt* may be considered as incurred to the widow, in such case the rule above laid down does not apply. Thus, in *Oliver v. Brickland* (n), the husband covenanted to pay for the benefit of his wife a sum of money within two years after the marriage, and that if he died, his executors should pay it: After surviving the two years, he died intestate, and his widow's distributive share was larger than the sum covenanted to be settled upon her: But Sir Joseph Jekyll decided, that it should not be taken in satisfaction of such debt, but that the widow should have both.

In *Lang v. Lang* (o), Henry Lang, a domiciled Englishman, married a lady at the Mauritius, where the French law is in force: By their settlement (which was in the French language and form) they declared that they intended to marry according to the laws of England, the benefit of which they reserved to themselves the power of claiming: And it was stipulated that Henry Lang should invest, in certain

(l) 2 Rep. *Husb. & Wife*, 51, 2nd edit.

(m) *Couch v. Stratton*, 4 Ves. 391. On the authority of this case, a similar question was reluctantly decided accordingly, by Wigram,

V.-C., in *Salisbury v. Salisbury*, 6 Hare, 526.

(n) Cited in *Lee v. Cox* and *D'Aranda*, 3 Atk. 420. 1 Ves. Sen. 1.

(o) 8 Sim. 451.

securities, 4,000*l.* (the property of the lady, which he acknowledged he had received from her), and that she should receive the income, on her sole receipts, for her maintenance and personal wants, and that on her dying in Henry Lang's lifetime without leaving issue by him, the capital should belong to him; There was also a proviso that the fund should go to the children of the marriage in the event of there being any, or to their issue, if they should die under twenty-one, leaving issue; and if Henry Lang did not invest the 4,000*l.* in his lifetime, she was to be at liberty to take it out of his assets on his death: Henry Lang died intestate in his wife's lifetime: He never received the 4,000*l.*, nor invested a sum to that amount: And Sir L. Shadwell, V.-C., held that his widow was entitled to be paid the 4,000*l.* out of his assets, and also to receive her distributive share of the residue: His Honor thought that if the wife had filed a bill (living the husband), to compel him to make the investment, the Court would have considered that the husband had entered into a contract which was to be fulfilled in his lifetime, and would have compelled him to produce the 4,000*l.*, and to make the investment: If that were the right conclusion, such cases as *Blandy v. Widmore* and *Lee v. Cox* and *D'Aranda (p)* had no application to the subject: because those cases decide only that, where the husband has bound himself to fulfil some obligation by the payment of money at the time of his death (whether it be at the time of his death, or within six months after, makes no difference), that obligation is satisfied, if, by dying intestate, he allows the law to confer a benefit on the covenantee equivalent to that which he had bound himself to confer: Those cases had no reference to the subject, there being in the present case an obligation, on the husband, to produce the sum in question: and, in his Honor's view, it was the same thing as if there had been a covenant with a trustee to make a settlement of that sum in the manner provided for: and then, if the husband had died intestate, the trustee

would have taken, from his assets, what was sufficient for the purpose, and the wife would have been at liberty to take her share of the residue under the Statute of Distributions.

SECTION III.

Of the Rights of the Children and their Representatives to Distribution under the Statute.

After the allotment of a third to the widow, the Statute, as we have seen, directs a distribution of the residue by equal portions to and amongst the children of the intestate, and "such persons as legally represent such children in case any of the said children be then dead." In case there be no wife, then, by section 7, all the estate is to be distributed to and amongst the children (*q*).

What is meant by the "legal representatives" of the children.

By the words "such as legally represent such children," their lineal representatives to the remotest degree are admitted (*r*). But the term must be understood of descendants, and not next of kin (*s*); as for example, if a son of the intestate is dead, leaving a widow and child, the widow shall take nothing, and the child the whole of the father's share; yet the widow, though not strictly one of the next of kin, is in the same sense as the child, a legal representative of the personal estate of the father (*t*).

To attain a clear apprehension of the subject of this section, three sorts of cases may be supposed: First, where none of the intestate's children are dead; Secondly, where the

(*q*) A child legitimate by the law of its father's domicile, but illegitimate according to English law, is entitled to a share as one of the next of kin in the personal estate of an intestate dying domiciled in England under the Statute of Distributions. *Re Goodman's Trusts*, 17 C. D. 266 (reversing the decision of Jessel, M. R., 14 C. D.

619).

(*r*) *Carter v. Crawley*, Sir T. Raymond, 500.

(*s*) *Bridge v. Abbott*, 3 Bro. C. C. 226, by Lord Alvanley. *Evans v. Charles*, 1 Anstr. 132, by Eyre, C. B.

(*t*) *Price v. Strange*, 6 Madd. 161, 162.

intestate's children are all dead, all of them having left children; Thirdly, where some of the intestate's children are living, and some dead, and such as are dead have each of them left children (*u*).

On the first hypothesis, that is to say, where none of the intestate's children are dead, it is sufficiently obvious, that after the wife has had the third allotted to her, the remaining two-thirds shall, pursuant to the statute, be equally divided among all the children of the intestate; as in this case they all claim in their own right (*v*).

1. Where none of the intestate's children are dead:

A brother or sister of the half-blood shall be equally half-blood: entitled to a share with one of the whole blood; inasmuch as they are both equally near of kin to the intestate (*x*).

A posthumous child has also the same rights; for a child in *ventre sa mère* at the time of the father's death, being a person *in rerum natura*, is, by the rules of the common and the civil law, to all intents and purposes a child, as much as if born in the father's lifetime (*y*), and consequently is entitled under the statute.

posthumous child:

If the intestate leave only one child, such case is not to be considered as omitted by the statute: therefore, in case the intestate also leave a wife, she shall only have a third part, and the other two-thirds shall go to such child (*z*). And where the intestate leaves an only child and no widow, although, literally speaking, there can be no distribution, yet such only child shall be entitled to the whole personal estate (*a*).

an only child.

Secondly, where the intestate's children are all dead, all of them having left children. It is said by Toller that if a father

2. Where all the intestate's children are

(*u*) Toller, 374.

(*v*) Toller, 374.

(*x*) *Smith v. Tracey*, 1 Mod. 209. Toller, 374.

(*y*) *Wallis v. Hodson*, 2 Atk. 117. *Burnet v. Mann*, 1 Ves. Sen. 156. Toller, 374. But such a child is only to be treated as a born child where such construction is neces-

sary for the benefit of that child: *Blasson v. Blasson*, 2 De G. J. & Sm. 665.

(*z*) *Brown v. Farndell*, Carth. 52. Bac. Abr. tit. Exors. I. 5.

(*a*) *Davers v. Dewes*, 3 P. Wms. 49, note (D). *Palmer v. Gerrard*, Prec. Chan. 21.

dead, all
having left
children.

have three children, John, Mary, and Henry, and they all die before the father, John, leaving, for instance, two children, Mary three, and Henry four, and afterwards the father die intestate, in that case all his grandchildren shall have an equal share: for as his children are all dead, their children shall take as next of kin (b): and that such also would be the case with respect to the great-grandchildren of the intestate, if both his children and grandchildren had all died before him (c).

In these instances, the parties would be said to take *per capita*, or, in other words, equal shares in their own right (d).

3. Where
some of the
intestate's
children are
dead, having
left children.

Thirdly, where some of the intestate's children are living, and some dead, and such as are dead have each of them left children. In this case, the children of the deceased children take *per stirpes*, that is to say, not in their own right, but by representation. Thus, for example, if a father have three

(b) *Walsh v. Walsh*, 1 Eq. Ca. Abr. 249, pl. 7. *Bowers v. Littlewood*, 1 P. Wms. 595, by Lord Parker. *Davers v. Dewes*, 4 P. Wms. 50, by Lord King. Bac. Abr. Exors. I. 3.

(c) *Toller*, 374. But see *contra*, *Re Ross's Trust*, L. R. 13 Eq. Cas. 286, where Wickens, V.-C., held that the proposition in the text was not good law, for that the Statute of Distributions deals separately with the case of descendants and with the case of next of kin not descendants; and that if there are descendants, but no children living to share the estate, it is to be divided into as many shares as there are children who have left living descendants, and that the descendants of each such child are to take as representing the child, and of course only the child's share, that is, to say, that wherever

there are descendants the division will be *per stirpes* and not *per capita*. North, J., took the same view in *Re Natt*, 37 C. D. 517. The question depends on the construction of the statute. The view of these learned judges necessitates the application of the 5th section of the statute to a case where the intestate leaves no living children, but only legal representatives of such children, and the reading of the word "child" in the 7th section as meaning "child living either in person or in its descendants." This view also seems to involve reading the word "and" in the 2nd paragraph of the 5th section, where it follows the words "amongst the children of such persons dying intestate," as meaning "or."

(d) 2 Black. Comm. 517.

children, John, Mary, and Henry, and John die, leaving four children, and Mary die, leaving two, and Henry alone survive the father; on the death of the father intestate, one-third shall be allotted to Henry, one-third to John's four children, and the remaining third to Mary's two children; for these grandchildren are entitled as representing their respective parents (e).

The end and intent of the statute was to make the provisions for all the children of the intestate equal, as near as could be estimated (f). Accordingly, the 5th section of the statute proceeds to provide, that no child of the intestate, except his heir-at-law, who shall have any estate in land by the settlement of the intestate, or who shall be advanced by the intestate in his lifetime by pecuniary portion, equal to the distributive shares of the other children, shall participate with them in the surplus; but if the estate so given to such child by way of advancement be not equivalent to their shares, then that such part of the surplus as will make it so shall be allotted to him or her (g).

This just and equitable provision has been also said to be derived from the *collatio bonorum* of the imperial law; which it certainly resembles in some points, though it differs widely in others: But it may not be amiss to observe, that, with regard to goods and chattels, this was part of the ancient custom of London, of the province of York, and of the sister kingdom of Scotland; and with regard to the lands descending in co-parcenary, that it has always been, and still is, the common law of England, under the name of *hotchpot* (h).

(e) Bac. Abr. tit. Exors. I. 3. Toller, 374. Under the decisions of Wickens, V.-C., and North, J., above cited, there would be no difference between the second and third cases, descendants of deceased children taking *per stirpes* in either case.

(f) Edwards v. Freeman, 2 P.

Wms. 439, 440, by Sir Joseph Jekyll.

(g) 2 Black. Comm. 516.

(h) 2 Black. Comm. 517. "It seemeth," says Littleton, sect. 267, "that this word 'Hotchpot,' is in English a pudding; for in a pudding is not commonly put one thing alone, but one thing with

Advancement :
Exclusion of
such children
as have any
land by settle-
ment or have
been advanced
by portion :

This provision applies only to the distribution of the estates of intestate *fathers*: And therefore if a mother being a widow, advances a child, and dies intestate, leaving many children, the child advanced shall not bring what he received from his mother into hotchpot: This was decided by Lord King, C., on the principle, that the statute was grounded on the custom of London, which never affected a widow's personal estate, and that the Act seems to include those alone within the clause of hotchpot who are capable of having a wife as well as children, which must be husbands only (i).

The statute takes nothing away that has been given to any of the children, however unequal that may have been: How much soever it may exceed the remainder of the personal estate left by the intestate at his death the child may, if he pleases, keep it all; if he be not contented, but would have more, then he must bring into hotchpot what he has before received: This manifestly seems to be the intention of the Act, grounded upon the most just rule of equity, equality (k).

The provision in the statute applies only to the case of actual intestacy; and where there is an executor, and consequently a complete Will, though the executor may be declared a trustee for the next of kin, they take as if the residue had been actually given to them: Therefore a child advanced by his father in his life, or provided for in the Will, cannot be called on to bring his share into hotchpot (l).

If a child, who has received any advancement from his father, shall die in his father's lifetime, leaving children, such

other things together:" 2 Black. Comm. 190. See *Fox v. Fox*, L. R. 11 Eq. 142. *Hewitt v. Jardine*, L. R. 14 Eq. 58. *Limpus v. Arnold*, 25 Q. B. D. 300, as to the effect of a hotchpot clause in a Will.

(i) *Holt v. Frederick*, 2 P. Wms. 357. *Bennet v. Bennet*, 10 C. D.

474.

(k) By Lord Raymond, in *Edwards v. Freeman*, 2 P. Wms. 443.

(l) By Sir W. Grant, in *Walton v. Walton*, 14 Ves. 324. *Edwards v. Freeman*, 2 P. Wms. 440, 446. See *Stewart v. Stewart*, 15 C. D. 539, 543.

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children shall not be admitted to their father's distributive share, unless they bring in his advancement; since, as his representatives, they can have no better claim than he would have had, if living (*m*).

A child advanced in part shall bring in his advancement only among the other children; for no benefit shall accrue from it to the widow (*n*).

It will be convenient to consider this subject further, 1. With respect to children who have any land by settlement of the intestate. 2. With respect to children who have been advanced by pecuniary portions.

The statute extends not only to land, freehold and copyhold, settled on a younger child by the father, but also to charges upon land for such child (*o*): So if a father settle a rent out of his lands on a younger child, this is within the statute (*p*): and so is a reversion settled on any child but the heir (*q*).

Land claimed by marriage settlement has been held an advancement within the statute: but land devised by the father to a younger child is not to be so considered: for a provision to be brought into hotchpot must be such as is made by an act in the intestate's lifetime, and not by Will (*r*).

In respect to Borough-English lands, which descend to the youngest son, it was once held that he should allow for them, on the ground that the statute intended merely to provide for the heir of the family, that is, the heir by the common law, and not one who is heir only by custom in some particular places (*s*). But that decision has been overruled, and it is now

(*m*) *Proud v. Turner*, 2 P. Wms. 360.

(*n*) *Kircudbright v. Kircudbright*, 8 Ves. 51, 64. So too if a Will contains a hotchpot clause, *primd facie* the widow cannot claim any benefit thereunder against the children: *Stewart v. Stewart*, 15 C. D. 539. See also *Meinertzen v. Walters*, L. R. 7

Ch. 670.

(*o*) By Sir Joseph Jekyll, *Edwards v. Freeman*, 2 P. Wms. 441.

(*p*) *Ibid.*

(*q*) *Ibid.* 442.

(*r*) By Sir J. Jekyll, *ibid.* 440. *Twisden v. Twisden*, 9 Ves. 425, 462, by Lord Eldon.

(*s*) By Sir J. Jekyll, M. R., in *Pratt v. Pratt*, 2 Stra. 935.

1. Children who have land by settlement:

settled, that such youngest son shall have an equal share of the distribution with the other children, without regard to this species of estate; for although the exception in the statute extend only to the eldest son, yet no law exists to oblige the heir in Borough-English to bring in his lands: The statute contains no such requisition: It speaks merely of such estate as a child hath by settlement, or by advancement of the intestate in his lifetime (*t*).

Money laid out by the intestate on repairs of houses, which had been given, but not conveyed, by him to his eldest son, and which had therefore descended on him as heir-at-law, has been held not to be an advancement to be brought into hotch-pot under the statute: though it would have been otherwise if the father in his lifetime had irrevocably parted with the estate by a conveyance to the son, and afterwards given him a sum of money to ameliorate it (*u*).

2. Children who have been advanced by pecuniary portions:

2. With regard to children who have been advanced by pecuniary portion. By the provisions of the statute, although the heir-at-law shall not abate in respect of the land which came to him by descent, or otherwise from the intestate, yet if he hath had any advancement from his father out of his personal estate, he shall abate for it in the same manner as the other children (*x*): And were it merely the use of furniture for his life, it shall be regarded as an advancement *pro tanto* (*y*). Co-heiresses shall also, it seems, bring in such advancement, not being land (*z*), as they may have respectively received from their father, before they shall be entitled to their distributive share; agreeably to the principle of the Act, and to the object of a just and impartial father to promote an equality among his children (*a*).

(*t*) By Lord Talbot in *Lutwyche v. Lutwyche*, Cas. temp. Talb. 279. As to whether a coparcener is bound to bring land into hotch-pot, see *Dillon v. Coppin*, 4 M. & Cr. 647.

(*u*) *Smith v. Smith*, 5 Ves. 721.

(*x*) *Pratt v. Pratt*, Fitzgib. 285. Com. Dig. Admon. (H.). 4 Burn,

E. L. 397, 8th edit. *Smith v. Smith*, 5 Ves. 721.

(*y*) *Pratt v. Pratt*, Fitzgib. 285. Com. Dig. Admon. (H.). *Kircudbright v. Kircudbright*, 8 Ves. 51.

(*z*) See *Dillon v. Coppin*, 4 M. & Cr. 647.

(*a*) 4 Burn, E. L. 397, 8th edit. Toller, 378.

It remains to consider what is, and what is not, to be regarded as an advancement out of the personal estate of the father, so as to exclude a child from a distributive share of the whole or part of the residue.

what is considered an advancement out of the personal estate :

A provision made for a child by a settlement, whether voluntary, or for a good consideration, as that of marriage, is such an advancement (*b*).

It is not requisite, to constitute an advancement, that the provision should take place in the father's lifetime (*c*). If by deed he settle an annuity, to commence after his death, on one of his children, it is an advancement (*d*). So a portion secured to the child, although *in futuro*, is an advancement (*e*). Thus a portion for a daughter, to be raised out of land, on her attaining the age of eighteen, or the day of her marriage, was held to be an advancement to her when she married, although she was under that age, and unmarried, at the time of the intestate's death (*f*).

A portion, which was at first contingent, shall clearly be considered an advancement, when the contingency has happened (*g*). And it seems that a portion, even while contingent, being capable of valuation, may be brought into hotchpot (*h*): or the Court may order, that in case the contingency shall happen, the portion shall be so distributed as to make the rest of the children equal with the child on whom it was settled (*i*): But the contingency must be so limited as necessarily to arise within a reasonable time; as in the case stated above, where the portion was secured to the daughter, on her attaining the age of eighteen, or on her marriage (*k*).

Where a father makes a provision for a son on his marriage, all the limitations in such settlement to the wife and children of such son must be considered as part of that

(*b*) *Edwards v. Freeman*, 2 P. Wms. 440, 441. *Phiney v. Phiney*, 2 Vern. 638.

(*c*) *Edwards v. Freeman*, 2 P. Wms. 445.

(*d*) *Ibid.* 442. *Swinb. Pt. 3*, s. 18, pl. 25.

(*e*) *Ibid.* 445.

(*f*) *Edwards v. Freeman*, 2 P. Wms. 435.

(*g*) *Ibid.* 442.

(*h*) *Ibid.* 442, 449. *Toller*, 377.

(*i*) *Ibid.* 446. *Toller*, 378.

(*k*) *Edwards v. Freeman*, 2 P. Wms. 440, 445, 449. *Toller*, 378.

advancement; and it is not the son's estate for life only that ought to be valued, and brought into hotchpot (*l*).

With respect to the sort of benefit which shall constitute such advancement, it has been held, that if a father buy for a son an advowson, or any other ecclesiastical benefice, or if he buy him any office, civil or military, these are to be considered as advancements, either partial or complete, according to the comparative value of the estate to be distributed (*m*). And although the office be only at will, as a gentleman pensioner's place (*n*), or a commission in the army (*o*), it is to be regarded in the same light.

An annuity is an advancement to be brought into hotchpot (*p*), or rather may be so, for an annuity is not an advancement if given by way of maintenance of an infant (*q*), viz., the value at the date of the grant; or, if it has ceased, the payments received, at the option of the child (*r*).

In a case where a father lent the sum of 10,000*l.* to his son, to assist him in forming a partnership in the business of a sugar-refiner, and took his promissory note for the repayment of that sum on demand: It appeared, that it was in consequence of the urgent desire of the intestate that the son engaged in the business; and that finding it was a losing concern he became desirous of retiring from it, but that the father urged him to continue it; that at the earnest entreaty of the intestate, he, with much reluctance, continued the business, and sustained heavy losses in it: The father on his deathbed caused the promissory note to be burned, and died intestate: Sir John Leach, M.R., held, that, although the circumstances under which the note had been destroyed amounted to an equitable release of the debt, yet that the sum which remained due upon it must be considered an

(*l*) *Weyland v. Weyland*, 2 Atk. 635. See *Dillon v. Coppin*, 4 M. & Cr. 647, 669.

(*m*) *Hender v. Rose*, 3 P. Wms. 317, note to *Pusey v. Desbouverie*.

(*n*) *Norton v. Norton*, 3 P. Wms. 317, note.

(*o*) *Kircudbright v. Kircud-*

bright, 8 Ves. 63. *Boyd v. Boyd*, L. R. 4 Eq. 305. *Taylor v. Taylor*, L. R. 20 Eq. 155.

(*p*) *Swinb. Pt. 3*, s. 18, pl. 29.

(*q*) *Hatfield v. Minet*, 8 C. D. 136.

(*r*) *Kircudbright v. Kircud-*
bright, 8 Ves. 51.

advancement to the son (s). Any sum of considerable amount paid out of the common fund of a family to or for the benefit of a child is an advancement within the meaning of the Statute of Distributions. Thus a premium upon the occasion of a son being articled to an attorney (t) : a sum paid for the purchase of a commission in the army for a son (u) : sums paid by a father to a son to enable him to pay his debts (x) : the payment of the admission fee to one of the Inns of Court in the case of a son intended for the Bar (y) : the price of the outfit of a son entering the army (z) : the price of plant and machinery and other payments to start a child in business (a) : have been held to be advancements.

On the other hand, small inconsiderable sums of money given to a child by the father, or mere trivial presents he may make to a child, as of a gold watch, or wedding clothes, shall not be deemed an advancement (b) : nor shall money expended

what shall not constitute an advancement.

(s) *Gilbert v. Wetherell*, 2 Sim. & Stu. 254. In the case of *Smith v. Conder*, 9 C. D. 170, where a testator, who died in 1874, by his will in 1864 gave the residue of his property to trustees to divide amongst his six children equally, and directed that the sums of money advanced to them in his lifetime should be brought into hotchpot, Hall, V.-C., held that a letter written by the testator to one of his sons in 1873, whereby he stated that if he would give the testator a promissory note for a sum mentioned less than the amount advanced to the son he would write off the balance, was inadmissible in evidence, inasmuch as it was not sought thereby to rebut a presumption but to displace an express declaration contained in a testamentary instrument by declarations not testamentary. But it is submitted that the letter, together with the promissory note, was evidence of satisfaction of the ad-

vance. The note was not, as in *Gilbert v. Wetherell*, given with the advance.

(t) *Boyd v. Boyd*, L. R. 4 Eq. 305.

(u) *Ibid.* *Taylor v. Taylor*, L. R. 20 Eq. 155.

(x) *Boyd v. Boyd*, L. R. 4 Eq. 305. *Auster v. Powell*, 31 Beav. 583. 1 De G. J. & S. 99. *Re Blockley*, 29 C. D. 250. This however was held by Jessel, M. P., not to be an advancement : *Taylor v. Taylor*, *ubi supra*.

(y) *Taylor v. Taylor*, *ubi supra*.

(z) *Taylor v. Taylor*, *ubi supra*. But *quere* : *Boyd v. Boyd*, L. R. 4 Eq. 305.

(a) *Taylor v. Taylor*, *ubi supra*.

(b) 3 P. Wms. 317, note to *Pusey v. Desbouverie*. *Elliott v. Collier*, 1 Ves. Sen. 16. S. C. 3 Atk. 528 : nor, says Swinburne, money in his purse to spend among his equals, or buy him suits of apparel, or books, or armour for the service of his country : *Swinb. Pt. 3, s. 18, pl. 30*.

by the father for the maintenance of a child, nor given to bind him an apprentice, nor laid out in his education at school, at the university, or on his travels (c).

It is presumed, indeed, that a distinction must be made when a considerable sum of money is advanced by the father with the child as a premium for instruction, and not merely as a compensation for maintenance, and that the former sum is in strictness liable to be brought into hotchpot (d). In allusion to this distinction, it is conceived that Lord Hardwicke expressed himself in *Morris v. Burroughs* (e): "I should think," said his Lordship, "that if a father should give money to put a son out apprentice, or advance him in life by setting him up in trade, &c., that would have the same effect," i.e. will be a satisfaction of the custom, or must be brought into hotchpot, as the case may happen to be.

It has already been stated, that a provision which a father may make for his child by Will, in a case where the testator dies intestate as to part of his personal estate, shall not be brought into hotchpot (f). Such a provision as shall be construed an advancement must result from a complete act of the intestate in his lifetime (g), by which he divested himself of all property in the subject: though, as it has just appeared, it is not requisite that it should take effect in possession till after his death (h). Still less shall property given

(c) Swinb. Pt. 3, s. 18, pl. 19. Bac. Abr. tit. Exors. (K.) See also *Taylor v. Taylor*, L. R. Eq. 20, 155: where Sir G. Jessel, M. R., was of opinion that nothing was an advancement unless given on marriage or to establish the child in life, and accordingly he there held that (1) payment of a fee to a special pleader in the case of a son intended for the Bar; (2) price of outfit and passage money of an officer and his wife on going out to India with his regiment; (3) payment of debts incurred by an officer in the army; (4) assisting a clergyman in paying his house-

keeping and other expenses, were not advancements. This view, which limits the term advancement, was dissented from by Pearson, J., in *Re Blockley*, 29 C. D. 250, and seems also to be at variance with that of Sir W. Page Wood, V.-C., in *Boyd v. Boyd*, L. R. 4 Eq. 305.

(d) 2 Rep. Husb. & Wife, 12.

(e) 1 Atk. 403.

(f) *Ante*, p. 1370. *Walton v. Walton*, 14 Ves. 324.

(g) *Edwards v. Freeman*, 2 P. Wins. 440. *Toller*, 380.

(h) *Ante*, p. 1373. *Toller*, 380.

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or bequeathed to the child by any other person be so denominated (i) : and least of all shall a fortune of his own acquisition, however great (k).

SECTION IV.

The Rights of the Next of Kin of the Intestate under the Statute of Distributions.

The 6th section of the statute provides, that in case there be no children or legal representatives of them, in existence, a moiety of the intestate's estates shall be allotted to his widow, and the residue shall be distributed equally among his next of kin in equal degree, and their representatives (l) ; and by the 7th section, in case there be neither wife nor children, then all the estate shall be distributed among the next of kin, in equal degree ; but the same section enacts, that there shall be no representations admitted among collaterals after brothers' and sisters' children.

The next of kin referred to by the statute, are to be ascertained by the same rules of consanguinity, as those which determine who are entitled to letters of administration (m). These rules have been already considered in a former part of this Treatise (n) ; but it may be convenient to repeat in this place some of their results.

Who are the
next of kin :

When a child dies intestate, without wife or child, leaving a father, the latter is entitled as the next of kin, in the first degree, to the whole of the personal estate of the intestate, exclusive of all others (o).

right of the
father :

If a man dies intestate, without a child, but leaving a

(i) Swinb. Pt. 3, s. 18, pl. 18.
Bac. Abr. tit. Exors. (K.) Toller,
380.

(k) Swinb. Pt. 3, s. 18, pl. 18.
Bac. Abr. tit. Exors. (K.)

(l) But see the Intestates' Estates
Act, 1890, ante, p. 1359.

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(m) Lloyd v. Tench, 2 Ves. Sen.
214. 2 Black. Comm. 515. Tol-
ler, 381. 4 Burn, E. L. 280, 8th
edit.

(n) Ante, p. 355 et seq.

(o) Blackborough v. Davis, 1 P.
Wms. 51. Ante, p. 359.

widow, and a father, then the personal estate shall go in moieties between the wife and father (*p*).

right of the
mother :
1 Jac. II.
c. 17 :

the brothers
and sisters
shall share
with the
mother :

So with respect to the mother; before the statute of 1 Jac. II. c. 17, if a child had died intestate, without a wife, child, or father, his mother was entitled, as his next of kin, in the first degree to his whole personal estate: But by that statute, sect. 7, it is enacted, "that if after the death of a father, any of his children shall die intestate, without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her." The principle of this provision is, that otherwise the mother might marry, and transfer all to another husband (*q*).

they shall
share with the
mother,
although the
widow :

This statute as well as the Statute of Distributions, was described by Lord Hardwicke as very incorrectly penned (*r*): and several questions have arisen upon the construction of this section of it. In *Keilway v. Keilway* (*s*), the intestate left no child, but a wife, a mother, three brothers and sisters, and two nieces, the children of a deceased brother: It was insisted, on the part of the mother, that the case was not within the statute of 1 Jac. II. c. 17, s. 7, because here the intestate left a wife; whereas the statute was only meant to operate where the mother, before the making of it, would have gone off with the whole personal estate, and it was urged, on her behalf, that the words of the statute "without wife or children," must be understood "without wife and children;" for it could not possibly be intended in the disjunctive, *i.e.*, that in *either* case the brothers and sisters should share with their mother, inasmuch as if, after the death of the father, the child should die *without wife*, but leaving *children*, they would clearly take the whole, to the exclusion of the intestate's brothers and sisters: But Lord

(*p*) *Keilway v. Keilway*, Gilb. Wms. 49, by Lord Holt.
Eq. Cas. 190, *per curiam*. See the
effect of the Intestates' Estates Act,
ante, p. 1359, in such a case.
(*q*) *Blackborough v. Davis*, 1 P.
(*r*) *Stanley v. Stanley*, 1 Atk. 457.
(*s*) 2 P. Wms. 344. S. C. Gilb.
Eq. Cas. 189. 2 Stra. 710. 2 Eq.
Cas. Abr. 441, 442.

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Chancellor King decreed that the wife of the intestate should have one moiety, and his mother should come in for no more than her share of the other moiety with the intestate's brothers and sisters, and the two nieces, the representatives of the deceased brother: And his Lordship laid down, that the intention of the statute was, in prejudice of the mother, that in every case where, before the statute, she would have had the whole, the deceased child's brothers and sisters should come in equally with the mother as to the whole; and where, before the statute, the mother would have been entitled to the half, the deceased child's brothers and sisters should now come in for a share of that moiety.

In *Stanley v. Stanley* (t), the intestate left a wife, a mother, and several nephews and nieces, the children of a deceased brother: Besides raising the objections taken in the above case of *Keilway v. Keilway*, it was insisted, on the part of the mother, that the words of the statute of James are in the conjunctive, "every brother and sister and the representatives of them," and therefore that the statute cannot operate in a case where there is *no brother or sister* of the intestate living: But Lord Hardwicke, C., held the contrary; and after recognizing *Keilway v. Keilway*, as far as it applied, decreed, that the personal estate should be divided into four equal parts, two-fourth parts to be allotted to the widow, one-fourth part to the mother, and the remaining fourth to be equally divided among the nephews and nieces: And his Lordship said, that the word *and* in the statute, immediately preceding the words *the representatives*, must be construed in the disjunctive.

In the last case a further objection was raised, that if it should be held, that the nephews and nieces were entitled by representation, it might be carried to the fourth or fifth generation, which would create great confusion and fractions; for there was nothing to restrain it in this Act, as there was in the Statute of Distributions: But Lord

though there be no brother of the intestate living, yet if there be nephews, &c., they shall share with their grandmother;

the representatives of the brothers and sisters of the intestate shall not share with his mother, beyond the brothers' and sisters' children;

(t) 1 Atk. 455.

Hardwicke said, that the proviso in the statute of James was to be incorporated into the statute of Charles, which expressly says that representation shall not be carried beyond brothers' and sisters' children; agreeably to the rule, that statutes made *in pari materia* shall be construed into one another.

brothers and sisters of the half-blood shall share with their mother.

In *Jessopp v. Watson* (u), a widow, having an only daughter by her deceased husband, married a second husband, and had two sons by the latter marriage: Afterwards her daughter by the former marriage died intestate, without ever having married: And the question was, whether her mother was entitled exclusively to her daughter's personal estate, or whether the brothers of the half-blood, her children by the second marriage, were entitled to share with her: And Sir John Leach, M.R., held, that by force of the statute of James, the brothers were entitled to a share with their mother (x).

In what case the mother shall take the whole.

If the intestate left neither wife, nor child, nor father, and there be neither brother or sister, nor nephew or niece, the case is without the statute, and the whole of such intestate's effects shall devolve, as before the statute, to his mother (y).

Of the mother-in-law.

It is clear that the mother-in-law or step-mother of an intestate, not being of his blood, can claim nothing under the Statute of Distributions (z).

Right of

If the intestate left neither children nor parents, but his

(u) 1 M. & K. 665.

(x) The same point appears to have been determined by Lord Hardwicke in *Burnet v. Mann*, 1 Ves. Sen. 156, *post*, p. 1383; though it is inaccurately stated by Vesey, that the claim of the posthumous brother of the half-blood was there made, *under the Statute of Distributions*: but in *Jessopp v. Watson*, Mr. Seaton, who was of counsel in the cause, stated that he had examined the case of

Burnet v. Mann, in the Registrar's Book, from which it appeared that the claim was made under the statute 1 Jac. II. c. 17, s. 7; and that the decision in that case was, consequently, an express decision in point.

(y) *Jackson v. Prudhomme*, MS. 11 Vintr Abr. 196, tit. Exors. (Z. 12.)

(z) *Rutland v. Rutland*, 2 P. Wms. 216.

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nearest surviving relations be brothers and sisters, and a grandfather or grandmother, then, since they are all in the second degree of kindred, in strictness they ought all to share the personal estate of the intestate equally under the statute. But in the year 1686, in the case of *Lord Winchelsea v. Norcliffe* (a), Lord Chancellor Jeffreys decided that a grandmother should have no share with brothers and sisters of the intestate. And it was again decided, in 1708, by the Barons of the Exchequer in the case of *Poole v. Wishaw* (b), by the unanimous opinion of the Court, after hearing civilians, that a grandmother had no right to share in distribution with a brother. This decision was followed by a similar one, as to a grandmother, in the case of *Norbury v. Richards*, before Fortescue, M. R. (c). And the same point was afterwards determined by Lord Hardwicke, in *Evelyn v. Evelyn* (d), on the authority of the two preceding cases, as well as the prevailing usage since the Statute of Distributions: And his Lordship observed, that if it was *res integra*, he should think there was just ground to prefer the brother: That the words of the statute must be taken together, amongst the next of kin, "*pro suo cuique jure*," according to the laws in such cases; and that if, by settled determinations, an equality or preference had been given, it was confirmed by the statute: And by our law it had been established, previously to the statute, that between brother and brother there was only one degree (e): That, besides, it would be a great inconvenience to carry the portions of

brothers and sisters:
preferred to grandfather, &c.

(a) 2 Freem. 95.

(b) Cited *per curiam* in *Evelyn v. Evelyn*, 3 Atk. 763, and in *Thomas v. Ketteriche*, 1 Ves. Sen. 333.

(c) Cited in 3 Atk. 763.

(d) 3 Atk. 762.

(e) See *Collingwood v. Pace*, 1 Vent. 424, by Hale, C. B. *Blackborough v. Davis*, 1 P. Wms. 50. *Buaisieres v. Albert*, 2 Cas. temp.

Lee, 53, by Sir George Lee. It is enough in law to say, *frater et hæres*, or, *soror et hæres*: 1 Salk. 38. See stat. 3 & 4 Will. IV. c. 106, s. 5, by which it is enacted that no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or a sister shall be traced through the parent.

children to a grandfather, who must be supposed to have been provided for, and may very probably be in a dying condition, and not want it; and it would be contrary to the very nature of provisions among children, as every child may very properly be said to have a *spes accrescendi*.

Grandfather preferred to uncle :

Nevertheless, if the intestate leaves no nearer kindred than a grandfather or grandmother, and uncles or aunts, the grandfather or grandmother, being in the second degree, will be entitled to the whole personal estate, exclusive of the uncles or aunts, who are only in the third degree (*f*).

great grandfather shall share with uncle :

Hence, also, great-grandfathers or great-grandmothers, being in the third degree, are entitled to a distributive share with uncles and aunts (*g*).

grandfather by mother's side.

Where the intestate leaves a grandfather by the father's side, and a grandmother by the mother's side, his next of kin, they shall take in equal moieties, as being in equal degree; for here dignity of blood is not material (*h*).

Uncles and nephews.

Aunts and nieces, uncles and nephews, being all in the third degree, are all equally entitled (*i*). Hence, where the intestate left two aunts, and a nephew and niece, children of a deceased brother, Lord Hardwicke ordered the surplus to be divided into four parts equally among them, holding that as they were all in equal degree, the children were to take in their own right, and not by representation; but that if their father had been living he would have been entitled to the whole (*k*).

Half-blood.

Brothers and sisters of the half-blood are entitled to an equal share of the intestate's estate with the brothers and

(*f*) *Mentney v. Petty*, Prec. Chanc. 593. *Blackborough v. Davis*, 1 P. Wms. 41. *Woodroff v. Winkworth*, Prec. Chanc. 527. (*g*) *Lloyd v. Tench*, 2 Ves. Sen. 215. *Ante*, p. 360. (*h*) *Moor v. Barham*, cited in *Blackborough v. Davis*, 1 P. Wms.

53. (*i*) *Buissieres v. Albert*, 2 Cas. temp. Lee, 51.

(*k*) *Durant v. Prestwood*, 1 Atk. 454. *S. P. Lloyd v. Tench*, 2 Ves. Sen. 213. *Buissieres v. Albert*, 2 Cas. temp. Lee, 51.

sisters of the whole blood, although there are some precedents of judgments given, since the statute, allowing the half-blood to have but a half share (l). However, since the decision of the House of Lords, in the case of *Watts v. Crooke* (m), affirming, on appeal, a decree in Chancery, the law has been settled in favour of the full title of the half-blood (n). And this shall extend to a posthumous brother of the half-blood: In *Burnet v. Mann* (o), Lord Hardwicke said he could not distinguish this from the case of a brother *in ventre sa mère* of the whole blood, who was clearly entitled (p): If, indeed, it were to go to the children born at any distance of time, so as to cause an inconvenience by suspending the distribution, or to cause a taking back again, it might be an objection: But that cannot happen, because the child must be *in rerum naturâ* at the death of the intestate brother, whose estate is in question; so that, at the utmost, it cannot be carried beyond the year in which a distribution is to be made.

Affinity or relationship by marriage, except in the instance of the wife of the intestate, gives no title to a share of his property under the statute: Therefore, if the intestate had a son and daughter, and they both die, the former leaving a wife, and the latter a husband; upon the intestate's death afterwards, such husband and wife have neither of them any claim on the estate (q).

The 7th section of the Statute of Distributions provides that there shall be no representations admitted among collaterals after brothers' and sisters' children. This provision must be construed to mean brothers and sisters of the intestate, and not as admitting representation, when the distribution happens to fall among brothers and sisters, who are remotely related to the intestate: for the intestate is the subject of

Relatives by marriage not entitled.

Representation among collaterals.

(l) Show. P. C. 108.

(m) *Ibid.*

(n) See *ante*, p. 359.

(o) 1 Ves. Sen. 166. See *ante*,

p. 1380, note (x).

(p) See *Wallis v. Hodson*, *Barnard Chanc. Cas.* 272.

(q) *Toller*, 386.

the Act; it is his estate, his wife, his children, and for the same reason his brothers' and sisters' children; for he is equally correlative to all (*r*). Therefore, if the intestate should leave an uncle, and the son of another uncle deceased, the latter shall have no distributive share (*s*). So if the next of kin of the intestate should be nephews and nieces, a child of a deceased nephew or niece will not be admitted to share in the distribution. Again, it has been held, that if the brother of the intestate left a grandson, and a sister left a child, the grandson shall not have distribution with the son or daughter of the sister (*t*). Thus, although, as it has already appeared, lineal representatives *ad infinitum*, shall share in the distribution of an intestate's personal estate, yet among collaterals, except only in the instance of the intestate's brothers' and sisters' children, proximity of blood shall alone give a title to it (*u*).

When
brothers' and
sisters'
children take
per capita.

If the intestate's brothers and sisters were, at the time of his decease, all dead, and having left children, such children shall all take *per capita* (*x*). Therefore, if an intestate leave a deceased brother's only son, and ten children of a deceased sister, the ten children of the deceased sister shall take ten parts in eleven with the son of the deceased brother (*y*). But in the event of some of the intestate's brothers and sisters being alive and some dead, and such as are dead having left children, such children take *per stirpes*, by way of representation (*z*). Therefore, if an intestate left a brother alive, and ten children of a deceased sister, such ten children will take one moiety of the personal estate, and their uncle the other (*a*).

(*r*) Carter v. Crawley, Sir T. Raym. 496. Caldicot v. Smith, 2 Show. 286.

(*s*) Beeton v. Darkin, 2 Vern. 168. Bowers v. Littlewood, 1 P. Wms. 195.

(*t*) Pett v. Pett, 1 Salk. 250.

(*u*) Toller, 384.

(*x*) Walsh v. Walsh, Prec. Chanc.

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(*y*) Bowers v. Littlewood, 1 P. Wms. 595. Janson v. Bury, Bunb. 157.

(*z*) Lloyd v. Tench, 2 Ves. Sen. 215. Buissieres v. Albert, 2 Cas. temp. Lee, 51.

(*a*) So in the case of a bequest it has been held, that if a testator

If a bastard, or any other person having no kindred, die intestate without wife or child, his effects, subject to

An intestate bastard: or person without kin.

directs his executors to pay and divide the residue of his personal estate "unto and amongst my own next of kin under the Statute of Distributions," brothers and deceased brother's children take *per stirpes*: *Lewis v. Morris*, 19 Beav. 34. See also *Mattison v. Tanfield*, 3 Beav. 131. *Martin v. Glover*, 1 Coll. 269. So where there was a gift "to and amongst the next legal representatives of A. and B., share and share alike;" their next of kin, according to the statute, were held entitled *per stirpes*: *Booth v. Vicars*, 1 Coll. 6. *Ante*, p. 1001. (But see *Richardson v. Richardson*, 14 Sim. 526.) *Smith v. Palmer*, 7 Hare, 225. And it has been thought that the same distinction, as to taking *per capita* or *per stirpes*, will prevail, when a bequest is made to "relations," or "family," without mentioning the proportions in which the fund is to be divided; in which case it has been said, the Statute of Distributions will regulate the manner as well as the number in which the legatees, i.e. the next of kin, are to take. But this has been denied of late (see *ante*, p. 979, note (l)). And at all events, such a mode of division will not be adopted, when a contrary intention of the testator is apparent, as where the bequest is to relations *to be equally divided* amongst them; for there the division shall be *per capita*, although the state of the family is such as would require a distribution *per stirpes*, under the statute: *Thomas v. Hole*, Cas. temp. Talb. 251.

Heron v. Stokes, 2 Dr. & W. 89. So if there be a bequest of a fund *to be equally divided* amongst the testator's next of kin, both maternal and paternal, it is divisible between the two classes *per capita* and not *per stirpes*: *Dugdale v. Dugdale*, 11 Beav. 402. Again, if there is a bequest to "A. and to the children of B., *to be equally divided*," they take *per capita*: *Dowling v. Smith*, 3 Beav. 541. See also *Butler v. Stratton*, 3 Bro. C. C. 367. *Lenden v. Blackmore*, 10 Sim. 626. *Rickabe v. Garwood*, 8 Beav. 579. *Baker v. Baker*, 6 Hare, 269. *Pattison v. Pattison*, 19 Beav. 638. *Tyndale v. Wilkinson*, 23 Beav. 74. *Armistage v. Williams*, 27 Beav. 346. *Re Davies' Will*, 29 Beav. 93. *Rook v. Atty.-Gen.*, 31 Beav. 313. *Robinson v. Shepherd*, 32 Beav. 665. *Gibson v. Fisher*, L. R. 5 Eq. 51. *Payne v. Webb*, L. R. 19 Eq. 26. But these and similar words may be controlled by the context: *Brett v. Horton*, 4 Beav. 239. *Re Campbell's Trusts*, 31 C. D. 685. 33 C. D. 98. So where a fund is directed to be paid on a particular event, in such cases as the following, namely,—where a fund is to be divided "between the families of my brother L. and my sister E."—where one-fourth of a residue is to be paid to the younger children of N., and one other fourth paid to or amongst the younger children of S.—where a legacy is to be paid between and amongst the children of P. and the children of R.—in these and similar in-

his debts, belong to the king, as *ultimus hæres* (b); not in a

stances, it has been held that the distribution is to be *per capita*, and not *per stirpes*: *Abrey v. Newman*, 16 Beav. 433, by Romilly, M. R., citing *Barnes v. Patch*, 8 Ves. 604. *Lincoln v. Pelham*, 10 Ves. 166. *Rickabe v. Garwood*, *ubi supra*. *Malcolm v. Martin*, 3 Bro. C. C. 50. *Pearce v. Edmeades*, 3 Y. & Coll. 246. Again, if a bequest is made to "issue" as purchasers, or to "descendants," all those who answer the description will take *per capita*: *Davenport v. Hanbury*, 3 Ves. 257. *Leigh v. Norbury*, 13 Ves. 340. *Head v. Randall*, 2 Y. & Coll. C. C. 231. *Evans v. Jones*, 2 Coll. 216. *Ante*, p. 976: But in this case also, they will take *per stirpes*, if the testator's intention to that effect appears from other expressions in the Will: *Rowland v. Gorsuch*, 2 Cox, 187. A distinction has been taken between a gift to several, with remainder to their children, and a gift to several, with a substitutionary gift to their children: Where there was a bequest of a fund to be equally divided between A. and wife and B. and wife for their lives, after which, to be equally divided between the children of A. and B., it was held, that the children all took *per capita*: *Abrey v. Newman*, 16 Beav. 431. See also *Swabey v. Goldie*, 1 C. D. 380. But where there was a bequest to A. for life, after which "equally amongst her sisters or their children living at her decease," it was held, that such of the children as were entitled took *per stirpes*: *Congreve v. Palmer*, 16 Beav. 435. See also *Flinn*

v. Jenkins, 1 Coll. 365. *Arrow v. Mellish*, 1 De G. & Sm. 355. *Shand v. Kidd*, 19 Beav. 310. *Begley v. Cook*, 3 Drew. 662. See also *Re Hutchinson's Trusts*, 21 C. D. 811, where the gift was in trust for "A. B. for life, and after his decease for his issue, and on failure of his issue to F. H. S. and R. S., share and share alike, and after the decease of the said F. H. S. and R. S. to their children, share and share alike, and to their heirs for ever," in which case the fund was held divisible *per stirpes*, i.e. in moieties between the representatives of F. H. S. and the children of R. S. Even where the division is by the terms of the Will to be *per stirpes*, a question may arise how far back you are to go to discover the stocks which are intended by the testator. *Gibson v. Fisher*, L. R. 5 Eq. 51, seems to have decided that where a gift was *per stirpes*, the *stirpes* must be found at the earliest possible point. In so holding, Romilly, M. R., refused to follow the decision in *Robinson v. Shepherd*, 4 D. J. & G. 129. But in *Re Wilson*, 24 C. D. 664, it was held, following *Robinson v. Shepherd*, that where a gift is to the descendants or issue "of A. and B. *per stirpes*, it seems that you must look to the number of families or *stirpes* descended from A. or B. and existing at the testator's death, and divide the fund primarily into a corresponding number of parts.

(b) *Megit v. Johnson*, Dougl. 548, by Lord Mansfield. *Taylor v. Haygarth*, 14 Sim. 8. But, if he leave a widow and no children,

fiduciary character, but beneficially (c); who, with the exception of a small part, usually grants them by letters patent or otherwise: and then such grantee seems of course entitled to the administration, and consequently to the sole enjoyment of the property (d).

SECTION V.

Of Distribution when the Intestate was domiciled abroad.

Hitherto it has been assumed that the intestate was, at the time of his death, domiciled in a place where the Statute of Distributions is the law of the land.

The rule is, that the distribution of the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death without any regard whatsoever to the place either of the birth or the death, or the situation of the property at that time (c). It is not, however, correct to say, that with respect to the distribution of personal property, the law of England gives way to the law of a foreign country; but that it is part of the law of England, that personal property

Distribution shall be according to the country of domicile:

the Crown only gets one moiety; the other belongs to the widow. *Cave v. Roberts*, 8 Sim. 214. See *ante*, p. 370.

(c) *Kane v. Reynolds*, 4 De G. M. & G. 571, by Lord Cranworth. *Atty.-Gen. v. Kohler*, 9 H. L. C. 654. See *ante*, p. 370.

(d) *Ante*, pp. 371-373. *Toller*, 386. 2 Black. Comm. 505, 506.

(e) *Enohin v. Wylie*, 10 H. L. C. 1, 13. *Dogliani v. Crispin*, L. R. 1 H. L. 301. *Re Trufort*, 36 C. D. 600. However, "the law of the country" must not always be understood to mean the general law as applicable to the subjects thereof, but in some instances the particular law applicable to the case of foreigners dying domiciled

therein: *Collier v. Rivaz*, 2 Curt. 855. *Ante*, p. 304. *Maltass v. Maltass*, 1 Robert. 67, 72. *Ante*, p. 304. As to the conclusiveness of the judgments of the courts of domicile in the courts of a foreign country, see *ante*, pp. 305, 306. As to the sense in which the English law adopts the law of the domicile, see *Lynch v. Government of Paraguay*, L. R. 2 P. & D. 268. The rule is, that the law adopts the law of the domicile as it stands at the time of the death, and it does not undertake to adopt and give effect to all retrospective changes that the legislative authority of the foreign country may make in that law: *Ibid*.

should be distributed according to the *jus domicilii* (f). If, therefore, a man die domiciled in this country, and administration be taken out to him here, debts due to him, or other of his personal effects, in Scotland or abroad, shall be distributed according to the law of England: for the *lex loci rei sitæ* is not to be recognized (g). On the other hand, if a man domiciled abroad die intestate, his whole property here is distributable according to the laws of the country where he was so domiciled (h): If it were otherwise, as it

(f) *E. v. Abbott, C. J., in Doe v. Vardill, 5 B. & C. 451, 452.* The rule as to the law of domicile has never been extended to real property: *Doe v. Vardill, 5 B. & C. 451.* S. C. in *Dom. Proc. 2 Cl. & F. 571.* S. C. *nomine Birtwhistle v. Vardill, 7 Cl. & F. 895.* But the rule laid down in the above case, viz., that a child born out of wedlock, although legitimated by the subsequent marriage of his parents, cannot inherit real property in England, relates only to the case of descent upon an intestacy, and does not affect the case of a devise of real estate to "children." *Re Grey's Trusts, [1892] 3 Ch. 88.* As we have already seen (*ante*, p. 1366, note (g)), a child legitimate by the law of its father's domicile, but illegitimate according to English law, is entitled to a share as one of the next of kin in the personal estate of an intestate dying domiciled in England, under the Statute of Distributions. *Re Goodman's Trusts, 17 C. D. 266* (reversing the decision of *Jessel, M. R., 14 C. D. 619*).

(g) *Thorne v. Watkins, 2 Ves. Sen. 35.* *Re Ewin, 1 Crompt. & Jerv. 156*, by Bayley, B.

(h) But it must be remembered, that as the validity of a testamentary disposition of an English

leasehold is governed by the law of England, and not by the law of the testator's domicile (*Freke v. Lord Carbery, L. R. 16 Eq. 461*), so leaseholds in England devolve, in the case of intestacy, upon the person entitled according to the English Statute of Distributions. *Duncan v. Lawson, 41 C. D. 394.* See also *In the goods of Gentili, Ir. Rep. 9 Eq. 541*, in the judgment in which Warren, J., refers to *Freke v. Lord Carbery* as a distinct authority that the succession to chattels real depends upon the *lex loci*. See also *De Fogassieras v. Duport, 11 L. R. Ir. 123.* See further *Leslie v. Baillie, 2 Y. & Coll. Ch. C. 91*, in which case a testator who died, and whose Will was proved, in England, bequeathed a legacy to a married woman, whose domicile, as well as that of her husband, was in Scotland: The husband died a few months after the testator, without having received the legacy: After his death the executors of the testator, with knowledge of the before-mentioned circumstances, of the domicile, paid the legacy to the widow: It was proved that, according to the Scotch law, the payment should have been made to the husband's personal representatives: Nevertheless, it was held by Knight

was observed by Lord Hardwicke, in *Thorne v. Watkins* (i), it would destroy the credit of the public funds; for no foreigner would put into them, if, because a title must be made up by administration or probate of the Probate Court of England, the property was to be distributed differently from the laws of his own country.

Hence, it appears, that a different doctrine prevails with respect to the distribution of the personal estate of a deceased, when in the hands of an executor or administrator, from that which is established with respect to the grant of probate or administration, by which he is empowered to possess himself of such estate: for, with regard to the latter, the *situs* of the property, as it has appeared in an earlier part of this Treatise, regulates the jurisdiction (k).

It must, however, be borne in mind, that (as there has already been occasion to point out (l)), although the right to succession is to be regulated according to the law of the country where the deceased was domiciled, yet the *administration of the estate* must be in the country in which possession of it is taken and held under lawful authority. In performing this duty, the Court in which the estate is administered will be guided by the law of the domicile, and must ascertain for itself what the rights of the parties are under that law (m).

Although right to succession regulated by law of domicile of deceased, yet the administration of the estate must be in the country where possession of it is taken.

Bruce, V.-C., that in the absence of proof that the executors knew the Scotch law on the subject, the payment to the widow was a good payment.

(i) 2 Ves. Sen. 37.

(k) See *Accord. per* Wood, V.-C., in *Campbell v. Beaufoy*, Johns. 326.

(l) *Ante*, pp. 367, 368.

(m) *Preston v. Lord Melville*, 8 Cl. & F. 1. *Ante*, p. 305. *Ibid.* note (f). See *Accord. per* Lord Cranworth, in *Enohin v. Wylie*, 10 H. L. C. 19. *Ewing v. Orr-Ewing*, 9 App. Cas. 34. 10 App. Cas. 453. See also the *Carron Iron Company v. Maclaren*, 5 H. L. C. 456, *per* Lord St. Leonards.

But it has been held (following the dicta of Lord Westbury in *Enohin v. Wylie*, *ubi supra*) that the legal personal representative constituted by the forum of domicile of a deceased person is entitled to receive the personal estate of the deceased got in through any letters of administration, wherever they may be, and the next of kin cannot make any claim against the estate except through the intervention of such legal personal representative. *Eames v. Hacon*, 16 C. D. 407. Affirmed on appeal, 18 C. D. 347. Where the Probate Division of the High Court of Justice had granted a general probate

Lord Westbury, in *Enohin v. Wylie* (*n*), says: "I hold it to be now put beyond all possibility of question that the administration of the personal estates of the deceased belongs to the Court of the country where the deceased was domiciled at his death. All questions of testacy and intestacy belong to the judge of the domicile. In short, the Court of the domicile is the *forum concursus* to which the legatees under the will of a testator or the parties entitled to the distribution of the estate of an intestate are required to resort." But, as Mr. Justice Stirling points out in his judgment in *Re Trufort* (*o*), this statement of the law by Lord Westbury has not, in its entirety, met with complete acceptance, and in particular, it has been more than once criticized by Lord Selborne, whose views are perhaps most fully stated in the case of *Ewing v. Orr-Ewing* (*p*), where he says: "So far as relates to domicile it has always appeared to me to be clear that the domicile of a deceased testator or intestate cannot in principle furnish any governing or necessary rule except for the purpose of determining the succession to moveable estate. For that purpose recourse must be had not always or necessarily to the Courts but always, and necessarily, to the law of the domicile. The succession being once ascertained, the rights resulting therefrom belong to, and follow, the person of the living successor, and not the dead predecessor. It has never been held that the forum in which such rights may be vindicated depends upon the domicile either of the plaintiff or defendant in any action or suit, and if the domicile of the living man, whose rights and liabilities are in question, is for that purpose immaterial, I am unable to understand how the place in which those rights are to be protected or those liabilities enforced can necessarily depend on the domicile of the deceased. . . . The duty of administration is to be discharged

of a Will of a Scotch testator, the Chancery Division made the ordinary decree for the administration of the personal estate of the testator without limiting it to the English assets, and notwithstanding the opposition of a majority of

the executors: *Stirling-Maxwell v. Cartwright*, 9 C. D. 173. 11 C. D. 522.

(*n*) 10 H. L. C. 1.

(*o*) 36 C. D. 600.

(*p*) 10 A. C. 453, 502.

by the Courts of this country, though in the performance of that duty they will be guided by the law of domicil." Lord Cranworth, in *Dogliani v. Crispin* (q), says: "No principle can be better established than that the administration of the personal estate of a deceased person belongs exclusively to the country in which he is domiciled at his death. The Courts of that country must decide who is entitled, and from their decision there can be no appeal. It does not always happen, as is the case here, that the claim of the party litigating in our Courts has been actually raised and decided in the Courts of the country of the domicil. It is therefore often matter of necessity that our Courts should receive evidence from learned foreigners as to what the law of domicil is. Such evidence is, in general, far from satisfactory, but it often happens that no better evidence can be obtained, and then the Courts here must ascertain, from the conflicting testimony, as well as they can, what the law is on which they must act. But here we are left in no doubt. The title of the respondent has been fully adjudicated upon by the Courts of his domicil after long and careful consideration, and by their decision we are bound." Mr. Justice Stirling, in his judgment in *Re Trufort*, after citing the above quoted passages from the judgments of Lord Westbury, Lord Selborne and Lord Cranworth, says, that the rule to be extracted from these cases appears to be this, that although the parties claiming to be entitled to the estate of a deceased person may not be bound to resort to the tribunals of the country in which he was domiciled, and although the Courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and may in such a case be bound to ascertain as best they can who, according to the law of the domicil are entitled to the estate, yet where the title has been adjudicated upon by the Courts of the domicil such adjudication is binding upon and must be followed by the Courts of this country (r); even

(q) L. R. 1 H. L. 301, 314.

Cas. 453. *Dogliani v. Crispin*,

(r) *Enoch v. Wylie*, 10 H. L. C.

L. R. 1 H. L. 301. *Re Trufort*,

1. *Ewing v. Orr-Ewing*, 10 App.

36 C. D. 600.

if the judgment of the foreign Court has by default of the party complaining of the judgment proceeded on a mistake as to the English law (*s*); or the whole of the facts were not before the foreign tribunal (*t*); for the Courts of this country do not sit to hear appeals from foreign tribunals, and if the decision of the foreign tribunal is wrong recourse must be had to the mode of appeal provided in the foreign country (*u*).

rules for ascer-
taining the
domicil.

It remains to ascertain, what shall constitute a domicil with respect to the proper application of the above rule (*x*).

A man's domicil is, *primâ facie*, the place of his residence: but this may be rebutted by showing that such residence is either constrained from the necessity of his affairs, or transitory (*y*). On this subject, the following propositions may be stated as deducible from the adjudged cases:

(*s*) *Castrique v. Imrie*, L. R. 4 H. L. 414. *Godard v. Gray*, L. R. 6 Q. B. 139.

(*t*) *De Cosse Brissac v. Rathbone*, 6 H. & N. 301.

(*u*) *Bank of Australasia v. Nias*, 16 Q. B. 717. See *ante*, Pt. I. Bk. IV. Ch. II. Sect. VI.

(*x*) On this subject generally, see the erudite and valuable Treatise on the Law of Domicil, by Dr. Robert Phillimore.

(*y*) *Bempde v. Johnstone*, 3 Ves. 201, 202, by Lord Loughborough. With respect to the effect of *time* in constituting a domicil, see the judgment of Sir Wm. Scott in *The Case of the Harmony*, 2 Rob. Adm. Rep. 324, and *The Case of the Ann*, 1 Dods, Adm. Rep. 221. See further, as to what shall constitute a domicil, *Stanley v. Bernes*, 3 Hagg. 373. *Moore v. Darell*, 4 Hagg. 346. *Re Bruce*, 2 Cr. & Jerv. 436. *Tidewell v. Bowyer*, 7 Sim. 64. *Maltass v. Maltass*, 1 Robert. 67.

Whicker v. Hume, 13 Beav. 366. 7 H. L. C. 124. *Heath v. Samson*, 14 Beav. 441. *Anderson v. Laneuville*, 9 Moo. P. C. 325. *Bremer v. Freeman*, 10 Moo. P. C. 306. S. C. Dea. & Sw. 192. Atty-Gen. v. Kent, 1 Hurl. & C. 12. Atty-Gen. v. Rowe, *ibid.* 31. President of the United States v. Drummond, 33 Beav. 449. Atty-Gen. v. Fitzgerald, 3 Drew. 610. See also the definition of domicil stated by Lord Wensleydale, in *Whicker v. Hume*, 7 H. L. C. 164, *viz.*, "Habitation [by a man] in a place with the intention of remaining there for ever, unless some circumstances should occur to alter his intention." It is always material in determining what is a man's domicil, to consider where his wife and children live and have their permanent place of residence, and where his establishment is kept up. *Platt v. Atty-Gen. of New South Wales*, 3 A. C. 336.

1. Though a man may have two domicils for some purposes, he can have only one for the purpose of succession (2).

2. The original domicil, or, as it is called, the *forum originis*, or the domicil of origin, is to prevail, until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil, and taking another as his sole domicil (a).

By the expression *forum originis*, or domicil of origin, here used, is not meant the domicil of birth: for the mere accident of birth in any particular place cannot in any degree affect the domicil: If the son of an Englishman is born upon a journey in foreign parts, his domicil would follow that of

(2) *Somerville v. Somerville*, 5 Ves. 750, 786. *Forbes v. Forbes*, Kay, 341. *Crookenden v. Fuller*, 1 Sw. & Tr. 441. With respect to contemporary domicils, the following distinction is recognized by foreign jurists, and seems to have met with the concurrence of Lord Alvanley, in the above case of *Somerville v. Somerville*, 5 Ves. 750, 789, viz., that a person not under an obligation of duty to live in the capital in a permanent manner, as a nobleman or gentleman, having a mansion-house, his residence in the country, and resorting to the metropolis for any particular purpose, or for the general purpose of residing in the metropolis, shall be considered domiciled in the country: on the other hand, a merchant, whose business lies in the metropolis, shall be considered as having his domicile there, and not at his country residence. See also *Forbes v. Forbes*, Kay, 341. *Aitchison v. Dixon*, L. R. 10 Eq. 589, 595. See also S. C. as to a domicil being gained by the permanent residence of a man's wife.

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(a) *Somerville v. Somerville*, 5 Ves. 750, 787. *Re Bruce*, 2 Cr. & Jerv. 436. 445, *per* Bayley, B. *De Bonneval v. De Bonneval*, 1 Curt. 856. *Atty.-Gen. v. Dunn*, 6 Mees. & W. 511. *Dalhousie v. M'Douall*, 7 Cl. & F. 817. *Munro v. Munro*, *ibid.* 842. *Brown v. Smith*, 15 Beav. 444. A change of domicil must be a residence *sine animo revertendi*; a temporary residence for purposes of health, travel, or business, does not change the domicil. Also every presumption is to be made in favour of the original domicil. No change can occur without an actual residence in a new place. No new domicil can be obtained without a clear intention of abandoning the old. *Lauderdale Peerage Case*, 10 A. C. 692. Again, in *Bell v. Kennedy*, L. R. 1 Sc. App. 307, 310, Lord Cairns says, "the law is clear beyond all doubt with regard to the domicil of birth, that the personal *status* indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal *status* of another domicil is acquired." *Per* Lord Chelms-

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his father. The domicile of origin is that arising from a man's birth and connexions (b).

It appears from the terms of the proposition under consideration, that such a domicile cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto*, and necessarily remains until a subsequent domicile be acquired (c); unless the party die *in itinere* towards an intended domicile (d).

ford, "it is for the parties who rely on a change of domicile to prove that such change took place," *ibid.* 319.

(b) *Somerville v. Somerville*, 5 Ves. 787. *Forbes v. Forbes*, Kay, 341.

(c) *De Bonneval v. De Bonneval*, 1 Curt. 857. *Atty.-Gen. v. Dunn*, 6 Mees. & W. 511. *Bell v. Kennedy*, L. R. 1 Sc. App. 307. The acquisition of a domicile does not simply depend upon the residence of the party; the fact of residence must be accompanied by an intention of permanently residing in the new domicile, and of abandoning the former: *De Bonneval v. De Bonneval*, Curt. 863, 864. *Re Patience*, 29 C. D. 976. Accordingly, in *Aikman v. Aikman*, 3 Macq. 877, Lord Wensleydale, laid down that "every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence *with the intention of abandoning his domicile of origin*." This is contrary to the doctrine advanced in *Story's Conflict of Laws*, c. 3, s. 46, where it is said, that "if a person has actually removed to another place with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is to be deemed his place of

domicile, notwithstanding he may entertain a floating intention to return (to his native country) at some future period." But Lord Wensleydale's statement of the law has been adopted by the highest authorities, and it appears to be now settled, that in order to acquire a new domicile a man must intend "*quatenus in illo exuere patriam*:" *Moorhouse v. Lord*, 10 H. L. C. 272. S. C. *nomine Lord v. Colvin*, 4 Drewr. 366. The expression "*exuere patriam*" is unfortunate, since the question of domicile is a question of residence and not of citizenship. *Haldane v. Eckford*, L. R. 8 Eq. 631, *per James, V.-C.* The presumption of law is against the intention to abandon the domicile of origin, and that although the length of residence in a foreign country *per se* according to time and circumstances raises a presumption of intention to abandon the domicile of origin and to acquire a new domicile, still such presumption may be rebutted by facts showing that there was no such intention. A change of domicile is not to be *inferred* from the fact of a lengthened residence in a foreign country. To constitute a change of

(d) See next page.

3. The proposition last stated is equally true of an acquired as of an original domicile. The domicile of origin having been abandoned and a new domicile acquired, the new domicile may be abandoned and a third domicile acquired (*e*): But an acquired domicile cannot be lost by mere abandonment, but continues until the intention of another change of domicile is carried into execution (*f*). Again, the domicile of origin

domicil it must be *animo et facto*. *Hodgson v. De Beauchesne*, 12 Moo. P. C. 285. *Re Capdevielle*, 2 H. & C. 985. Atty.-Gen. *v. Blucher de Wahlstatt*, 3 H. & C. 374. *Jopp v. Wood*, 34 Beav. 88; affirmed by the Lords Justices, L. J. 34 (N. S.) Ch. 21. *Whicker v. Hume*, 7 H. L. C. 159, by Lord Cranworth. See also *Crookenden v. Fuller*, 1 Sw. & Tr. 441. *King v. Foxwell*, 3 C. D. 518. If the *animus* and *factum* are both satisfactorily proved, the permanent residence abroad will operate as a change of domicile, notwithstanding such residence was occasioned by mere preference of climate, or by the opinion that the habits of the country may be better suited to the health than those of the country which has been quitted: *Hoskins v. Matthews*, 8 De G. M. & G. 13. *Brunel v. Brunel*, L. R. 12 Eq. 298. *Haldane v. Eckford*, L. R. 8 Eq. 631. *Stevenson v. Masson*, L. R. 17 Eq. 78. *Urquhart v. Butterfield*, 37 C. D. 357. It should be observed that a man cannot retain his original domicile by a mere declaration of his intention to do so, if he so acts as to change it: *Re Steer*, 3 H. & N. 594. *Doucet v. Geoghegan*, 9 C. D. 441. The intention required to effect a change of domicile (as distinguished from the acts em-

bodying it) is an intention to settle in a new country as a permanent home, and this is sufficient without any intention to change the civil status, and, *semble*, even if an intention not to change the civil status be proved. *Douglas v. Douglas*, L. R. 12 Eq. 617. As to the value of conversations and declarations as evidence of a change of domicile, see *Crookenden v. Fuller*, 1 Sw. & Tr. 441, 450.

(*d*) *Munroe v. Douglas*, 5 Madd. 405. *Forbes v. Forbes, Kay*, 341. But see as to this last qualification of the doctrine, *Story's Conflict of Laws*, Ch. xii. s. 481, a. p. 707, note (2), 2nd edition. See also *In the goods of Bianchi*, 3 Sw. & Tr. 16. *In the goods of Raffel*, *ibid.* 49.

(*e*) *De Bonneval v. De Bonneval*, 1 Curt. 864.

(*f*) *Munroe v. Douglas*, 5 Madd. 379. *Stanley v. Bernes*, 3 Hagg. 373. *Craigie v. Lewin*, 3 Curt. 435. *Commissioners of Charitable Donations v. Devereux*, 13 Sim. 14. *Udny v. Udny*, L. R. 1 Sc. App. 441. *Bradford v. Young*, 29 C. D. 617. *Re Marrett*, 36 C. D. 400. In *Udny v. Udny* many important doctrines were laid down by several members of the House, which it is deemed desirable should be introduced into this work, and

does not revive until an acquired domicile has been abandoned, *animo et facto (g)*.

they will, therefore, be found below.

By Lord Westbury :—Every individual has, at his birth, become the subject of some particular country by the tie of national allegiance, which fixes his *political status*, and becomes subject to the Law of the Domicil which determines his civil status. To suppose that for a change of domicile, there must be a change of national allegiance, is to confound the political with the civil *status*, and to destroy the distinction between *patriam* and *domicilium*. [See also *Brunel v. Brunel*, L. R. 12 Eq. 298.]

By the Lord Chancellor (Lord Hatherley) :—A man may change his domicile as often as he pleases but not his allegiance. *Exuere patriam* is beyond his power: [Dictum of Lord Kingsdown in *Moorhouse v. Lord*, qualified].

Per Lord Westbury :—It is a settled principle that no man shall be without a domicile, and to secure this end the law attributes to every individual as soon as he is born, the domicile of the father, if the child is legitimate, or the domicile of the mother, if the child be illegitimate. This is called the domicile of origin, and is involuntary. It is the creation of law—not of the party. It may be extinguished by an act of law, as, for example, by sentence of death or exile for life, which puts an end to the *status civilis* of the criminal. But it cannot be destroyed by the will and act of the party.

Domicils of choice and origin distinguished.

Domicil of choice is the creation of the party. Whica a domicile is acquired, the domicile of origin is in abeyance; but it is not absolutely extinguished or obliterated. When a domicile of choice is abandoned, the domicile of origin revives—a special intention to revert to it being unnecessary. [*King v. Foxwell*, 3 C. D. 518.]

Per Lord Chelmsford :—Story says, that the moment a foreign domicile is abandoned, the native domicile is re-acquired. The word “re-acquired” is an inaccurate expression. The meaning is, that the abandonment of an acquired domicile *ipso facto* restores the domicile of origin. If, after having acquired a domicile of origin, a man abandons it and travels in search of another domicile of choice, the domicile of origin comes instantly into action, and continues until a second domicile of choice has been acquired.

Per Lord Westbury :—A natural-born Englishman may domicile himself in Holland, but if he breaks up his establishment there and quits Holland, declaring that he never will return, it is absurd to suppose that his Dutch domicile clings to him until he has set up his tabernacle elsewhere.

Legitimation per subsequens matrimonium.

By the Lord Chancellor (Lord Hatherley) :—The status of the child, with respect to its capacity

As an example of what shall constitute an acquired domicile, it may be mentioned that a residence in India, for the purpose of following a profession there in the service of the East India Company, creates a new domicile (*h*).

to be legitimated by the subsequent marriage of its parents, depends wholly on the *status* of the putative father, not on that of the mother. According to English law, where at the time of the bastard's birth, the father has his domicile in England, no subsequent change of domicile can render practicable the bastard's legitimation.

It may here further be observed, on the subject of Domicil, that if a man, at the time he attains his majority, is of unsound mind, or remains in that state continuously up to the time of his death, the incapacity of minority, never having been followed by adult capacity, will continue to confer upon the father the right of choice in the matter of domicile for his son, and a change of domicile by the father will usually produce a similar change of domicile as regards the lunatic son. It has been also held, that the mere residence as a consular officer in a foreign country gives rise to no inference of a domicile in that country. But if one already domiciled and resident in such country accept an office in the consular service of another country, he does not thereby destroy his domicile: *Sharpe v. Crispin*, L. R. 1 P. & D. 611. *Urquhart v. Butterfield*, 37 C. D. 357.

(*g*) *Craigie v. Lewin*, 3 Curt. 435: In that case a native Scotchman, having by employment in the

East India Company's service, acquired a domicile in India, it was held that by his return to Scotland, *animo manendi*, his original domicile did not revive, the party still holding his commission and being liable to be called upon to return to India, and intending to return if called on so to do.

(*h*) *Munroe v. Douglas*, 5 Madd. 404. *Bruce v. Bruce*, 6 Bro. P. C. 566, Toml. Edit. *Craigie v. Lewin*, 3 Curt. 435. This has been so held as to an officer in the Indian army, where the duties of his appointment necessarily require residence in India for an indefinite period, (notwithstanding he has property in the country which was his domicile of origin): *Forbes v. Forbes*, Kay, 341. But it is otherwise as to an officer in the Queen's army: *Atty.-Gen. v. Napier*, 6 Exch. 217. See also *Brown v. Smith*, 15 Beav. 444. *Hodgson v. De Beauchesne*, 12 Moo. P. C. 285. And the rule that a British subject does not by entering into and remaining in the military service of the Crown abandon the domicile which he had when he entered into the service applies to an acquired domicile as well as to the domicile of origin. *Re Macreight*, 30 C. D. 165. See further as to the acquisition of an Anglo-Indian domicile, *Hodgson v. De Beauchesne*, 12 Moo. P. C. 285. *Moorhouse v. Lord*, 10 H. L. C. 272. *Jopp v. Wood*, 34 L. J. (N. S.) Ch. 212. *Allardice v.*

4. A new domicile cannot be acquired by a party's own act during pupilage, nor until the party is *sui juris* (i). Accordingly a married woman, though living apart from her husband, has no power to change her domicile (k).

5. By marriage, the domicile of the husband becomes that of the wife (l), and she retains it after the death of her husband (m).

6. After the death of the father, children remaining under the care of the mother follow the domicile which she may acquire, and do not retain that which their father had at his death until they are capable of gaining one by acts of their own (n).

Onslow, 33 L. J. (N. S.) Ch. 434. *Ex parte* Cunningham, *Re* Mitchell, 13 Q. B. D. 418. An Anglo-Indian is not, for all purposes, an English domicile: *Forbes v. Forbes*, Kay, 341. But British subjects resident in Chinese territory cannot acquire in China a domicile similar to that existing in India, and commonly known as Anglo-Indian. *Re Tootal's Trusts*, 23 C. D. 532; nor does permanent abode at Cairo under British protection attract to a man an Anglo-Egyptian domicile. *Abdul-Messih v. Farra*, 13 App. Cas. 431. A peer of the British parliament is not incapacitated from acquiring a domicile of choice in a foreign country by reason of his obligation to attend the House of Peers when required. *Hamilton v. Dallas*, 1 C. D. 257.

(i) *Somerville v. Somerville*, 5 Ves. 787, by Lord Alvanley. *Forbes v. Forbes*, Kay, 341.

(k) *Re Daly's Settlement*, 25 Beav. 456. So where a Scotch Court pronounced a decree of di-

vorice in the case of an English marriage, where there was no Scotch domicile, it was held that the decree had no effect either as a divorce *a vinculo* or a *mensâ et thoro*, so as to render the wife capable of acquiring a domicile different from her husband's: *Robins v. Dolphin*, 1 Sw. & Tr. 37. S. C. *nomine* *Dolphin v. Robins*, 7 H. L. C. 390. Whether a wife who is legally divorced *a mensâ et thoro* may acquire a domicile of her own, is not clear: *ibid.* 416, by Lord Cranworth.

(l) *Warrender v. Warrender*, 2 Cl. & Fin. 488. *Dalhousie v. M'Donnell*, 7 Cl. & Fin. 817. *Whitcomb v. Whitcomb*, 2 Curt. 351. See the Count de Wall's case, 6 Moo. P. C. 216.

(m) See Phillimore on the Law of Domicil, Ch. VI. No. XLI, *et seq.* *Gout v. Zimmerman*, 5 Notes of Cas. 440.

(n) *Pottinger v. Wightman*, 3 Mer. 67. *Johnstone v. Beattie*, 10 Cl. & F. 66, 138, *per* Lord Lyndhurst, C., and Lord Campbell, *Accord.*

The rule is, however, it appears, subject to the condition that the domicile shall not have been changed for the fraudulent purpose of obtaining an advantage by altering the rule of succession: And it should seem, by the opinion of an eminent foreign jurist (*o*), that such fraud will be presumed, if no reasonable motive can be assigned for the change.

It must be mentioned, before leaving this subject, that in the case of *Curling v. Thornton* (*p*), Sir John Nicholl expressed a doubt whether a British subject is entitled so far *exuere patriam*, as to select a foreign domicile in such complete derogation of his British, as to render his property in this country liable to distribution according to any foreign law. And in the subsequent case of *Stanley v. Bernes* (*g*), the same learned judge said, that there was no case in which the property of a British subject, dying intestate in a foreign country, had been held distributable according to the law of such foreign country. But this doubt must be considered as settled by the decision of the Delegates in the latter case (*r*), and it is now fully established, with reference to the present subject, that a natural-born British subject may acquire a foreign domicile: and further, that the *animus revertendi*, and claim to be considered, and treatment as, a British subject will not suffice to preserve his original domicile (*s*).

A domicile in India, is, in legal effect, a domicile in the province of Canterbury; and the law of England is therefore

But it is only during the mother's widowhood that she can change the domicile of her infant. See Story's Conflict, s. 506, note (1). Whether a mere guardian, not being a parent, can change the domicile of his ward, in respect of the right of succession to his estate, is a disputed point. See Story's Conflict, s. 505, *et seq.* Phillimore,

Ch. VII.

(*o*) Pothier, in the introductory chapter to his Treatise on the Custom of Orleans.

(*p*) 2 Ald. 17.

(*q*) 3 Hagg. 441.

(*r*) See *ante*, p. 303.

(*s*) 3 Hagg. 373, Moore v. Darell, 4 Hagg. 346.

to be applied to the distribution of the property of intestates there domiciled (*t*). At all events the laws of England and India are now the same as regards the validity of Wills; For shortly after the passing of the new Statute of Wills (1 Vict. c. 26), an Act was passed by the Legislature in India, assimilating the law of India in respect of Wills to that of England (*u*).

24 & 25 Vict. c. 121. No British subject dying in a foreign country to be deemed to have acquired a domicile unless resident there for one year immediately preceding his or her death, &c.; and for all purposes of testate or intestate succession shall retain the domicile possessed at the time of going to reside in such foreign country.

By stat. 24 & 25 Vict. c. 121, s. 1: "Whenever her Majesty shall by convention (*x*) with any foreign state agree that provisions to the effect of the enactments herein contained shall be applicable to the subjects of her Majesty and of such foreign state respectively, it shall be lawful for her Majesty by any order in council to direct, and it is hereby enacted, that from and after the publication of such order in the *London Gazette* no *British* subject resident at the time of his or her death in the foreign country named in such order shall be deemed under any circumstances to have acquired a domicile in such country, unless such *British* subject shall have been resident in such country for one year immediately preceding his or her decease, and shall also have made and deposited in a public office of such foreign country (such office to be named in the order in council), a declaration in writing of his or her intention to become domiciled in such foreign country: and every *British* subject dying resident in such foreign country, but without having so resided and made such declaration as aforesaid, shall be deemed for all purposes of testate or intestate succession as to movables to retain the domicile he or she possessed at the time of his or her going to reside in such foreign country as aforesaid."

Sect. 2. No foreign subject dying in Great Britain or Ireland to

Sect. 2. "After any such convention as aforesaid shall have been entered into by her Majesty with any foreign state, it shall be lawful for her Majesty by order in council to direct,

(*t*) *Ante*, p. 1397, note (*h*), where the question of Anglo-Indian domicil is discussed.

(*u*) See *Craigie v. Lewin*, 3 Curt. 441.

(*x*) As no convention with any foreign state has as yet been entered into, this statute is inoperative.

and from and after the publication of such order in the *London Gazette* it shall be and is hereby enacted, that no subject of any such foreign country, who at the time of his or her death shall be resident in any part of Great Britain or Ireland shall be deemed under any circumstances to have acquired a domicile therein, unless such foreign subject shall have been resident within Great Britain or Ireland for one year immediately preceding his or her decease, and shall also have signed and deposited with her Majesty's Secretary of State for the Home Department, a declaration in writing of his or her desire to become and be domiciled in England, Scotland or Ireland, and that the law of the place of such domicile shall regulate his or her moveable succession."

be deemed to have acquired a domicile unless resident therein for one year immediately preceding his or her death, &c.

SECTION VI.

Of the payment of the Residue.

The subject of the duties of an administrator, with respect to the payment of the residue of an intestate's estate, has been in a great measure anticipated by the discussion of the duties of an executor with regard to the payment of the residue under a testamentary disposition of it.

For example, there has already been occasion to consider the subject with respect to the right of retainer by the administrator, in part or full satisfaction of a debt due to the intestate from the party entitled in distribution (y): Again the law with respect to the payment of a residue, where a party entitled to a distributive share is an infant (z); or a married woman (a), has been considered in a previous part of this Treatise, incidentally to the subject of the payment of legacies.

Although the 8th section of the statute enacts, that no dis-

If a person entitled to

(y) *Ante*, p. 1171, *et seq.*

(a) *Ante*, p. 1265, *et seq.*

(z) *Ante*, p. 1261, *et seq.*

distribution
die within the
year, his exe-
cutor, &c.,
may claim.

tribution of an intestate's effects shall be made until one year be expired after his death, yet if a person entitled to a distributive share shall die within the year, such interest shall be considered as vested in him, and shall go to his personal representative : for this proviso makes no suspension or condition precedent to the interest of the parties, but was inserted merely with a view to creditors (b) : The statute also is in the nature of a Will framed by the Legislature for all such persons as die without having made one for themselves ; and, by consequence, the parties entitled in distribution resemble a residuary legatee ; and it has been always held, that if such legatee dies before the amount of the surplus is ascertained, still his representative shall have the whole residue, and not the representative of the first testator (c).

(b) *Brown v. Farndell*, Carth. 51, 52. (c) *Bac. Abr. Exors. I. 4.*

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CHAPTER THE SECOND.

OF DISTRIBUTION UNDER THE CUSTOMS OF LONDON AND
YORK, &c.

THE fourth section of the Statute of Distributions provides, that the Act shall not in any way prejudice the customs of the city of London, or the province of York, or other places, but that they should be observed as formerly.

So, that, although by subsequent statutes, mentioned in an earlier part of this Work (a), the restraint on testamentary dispositions in those places has been removed, and the customs may be thereby controlled at the pleasure of a testator: yet if a man died intestate, before December 31, 1856, the customs remained in the same force, with respect to the distribution of his personal estate, as if no statutes had ever passed.

But by stat. 19 & 20 Vict. c. 94, the 4th section of the Statute of Distributions is repealed, save only with respect to the distribution of the personal estate of persons who may have died on or before December 31, 1856, "and the special customs respecting the distribution of the personal estates of intestates observed in the city of London, or in relation to the citizens and freemen of such city, and in the province of York, and certain other places, shall, with reference to all persons dying on or after January 1st, 1857, wholly cease and determine, and the distribution of the personal estates of all persons so dying shall take place as if such customs had never existed, and as if the rules for the distribution of the personal estates of intestates generally prevalent in the province of Canterbury had prevailed throughout England

19 & 20 Vict.
c. 94. Customs of London and York abolished, as to the estates of persons who have died on or after Jan. 1, 1857.

(a) *Ante*, p. 2.

and Wales, any law or statute to the contrary notwithstanding." It has been deemed advisable to omit in the present edition of this Work any discussion in detail of distribution as it existed under the customs of London and York, &c., which were abolished by the above Act. As, however, these customs remain in force and affect the distribution of the estates of persons who have died before January 1st, 1857, the reader is referred to the former editions of this Work [Pt. III. Bk. IV. Ch. 2] where the nature and incidents of the customs which have been abolished are investigated at length.

BOOK THE FIFTH.

OF THE STAMP DUTIES ON LEGACIES AND SUCCESSIONS TO
PERSONAL ESTATES.

THE stamp duties imposed on legacies, and successions to personal estate upon intestacies, are mainly regulated by the statutes 55 Geo. III., c. 184, as modified by the statutes 43 Vict. c. 14, and 44 & 45 Vict. c. 12. It is provided by 55 Geo. III., c. 184, as follows:—

Where the Testator, Testatrix, or Intestate, shall have died after the 5th day of April, 1805 (a).

For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards (b) given by any Will or testamentary instru-

(a) For the duties payable when the testator or intestate died on or before April 5th, 1805, see Schedule, Part III. of 55 Geo. III. c. 184, and former editions of this Work.

(b) The exemption from duty of legacies or residues under the amount or value of 20*l.* has been abolished by sect. 42 of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), which provides that: "Subject to the relief from legacy duty given by sect. 13 of the Customs and Inland Revenue Act, 1880, every pecuniary legacy or residue or share of residue under the will or intestacy of a person dying on or after the 1st day of June, 1881, although not of an

amount or value of twenty pounds, shall be chargeable to the duties imposed by the said Act of the 55th year of King George the Third, chapter 184, as modified by this Act." The sect. 13 of the Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), referred to, provides that where the whole personal estate does not amount to 100*l.* no legacy duty shall be charged on any part of it, and by implication from sect. 27 of the Act of 1881, all estates of or under the value of 100*l.* are now free from probate duty. And further, by sect. 36 of the Act of 1881 (44 & 45 Vict. c. 12), the payment of the sum of thirty shillings for the fixed duty on the affidavit or

ment, of any person, who shall have died after the 5th day of April, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate (c), or out of any moneys to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof. and which shall be paid, delivered, retained, satisfied, or discharged, after the 31st day of August, 1815 :

Also, for the clear residue (when devolving to one person) and for every share of the clear residue (when devolving to two or more persons), of the personal or moveable estate, of any person, who shall have died after the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy ; where such residue, or share of residue, shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815 :

And also for the clear residue (when given to one person) and for every share of the clear residue (when given to two or more persons) of the moneys to arise from the sale, mortgage, or other disposition, of any real or

inventory in conformity with sect. 33 of that Act, shall be deemed to be in full satisfaction of any claim to legacy duty or succession duty in respect of the estate or effects to which such affidavit or inventory relates. The result is that estates under 100*l.* in value pay neither probate duty nor legacy duty, and estates not exceeding 300*l.*, on paying the thirty shillings duty, are free both from legacy and succession duty. All these provisions apply only to the

case of testators or intestates dying on or after June 1st, 1881, with the exception of the provision for relief of estates under 100*l.* from legacy duty, which applies to the estates of persons dying after March 24th, 1880.

(c) But now by sect. 21 (2) of 51 & 52 Vict. c. 8, it is enacted that legacies payable out of or charged upon real estate or the proceeds thereof are not to be chargeable with legacy duty but with succession duty.

heritable estate, directed (d) to be sold, mortgaged, or otherwise disposed of, by any Will or testamentary instrument of any person, who shall have died after the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges first made payable thereout, if any), where such residue, or share of residue, shall amount to 20*l.* or upwards, and where the same shall be paid, retained, or discharged after the 31st day of August, 1815 :

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a child of the deceased, or any descendant of a child of the deceased, or to or for the benefit of the father or mother, or any lineal ancestor of the deceased* ; a duty at and after the rate of one pound per centum on the amount or value thereof (e).

1*l.* per cent.

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the deceased, or any descendant of a brother or sister of the deceased* : a duty at and after the rate of three pounds per centum on the amount or value thereof 3*l.* per cent.

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved to or for the benefit of *a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased* ; a duty

(d) As to the construction of this word, see the cases collected, *post*, pp. 1487, 1488.

(e) But by sect. 41 of the Act of 1881, it is provided that : " In respect of any legacy, residue, or share of residue payable out of, or consisting of any estate or effects according to the value whereof

duty shall have been paid on the affidavit or inventory or account in conformity with this Act, the duty at the rate of one pound per centum imposed by the Act of the 55th year of King George the Third, chapter 184, shall not be payable."

at and after the rate of five pounds per centum on the amount and value thereof

5*l.* per cent.

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased; a duty at and after the rate of six pounds per centum on the amount or value thereof

6*l.* per cent.

And where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved to or for the benefit of any person, in any other degree of collateral consanguinity to the deceased than is above described, or to or for the benefit of any stranger in blood to the deceased; a duty at and after the rate of ten pounds per centum on the amount or value thereof

1 cent.

And all gifts of annuities, or by way of annuity, or of any other partial benefit or interest, out of any such estate or effects as aforesaid, shall be deemed legacies within the intent and meaning of this schedule.

And where any legatee shall take two or more distinct legacies or benefits under any Will or testamentary instrument, which shall together be of the amount or value of 20*l.*, each shall be charged with duty, though each or either may be separately under that amount or value.

EXEMPTIONS.

Legacies, and residues, or shares of residue, of any such estate or effects as aforesaid, given or devolving to or for the benefit of the husband or wife (*f*) of the

(*f*) A legacy, in order to fall within this exception, must be for the absolute benefit of the husband or wife: Therefore bequests by a husband to his wife "for her and her family," or "to maintain her

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deceased, or to or for the benefit of any of the Royal Family.

And all legacies which were exempted from duty by the Act passed in the 39th year of his Majesty's reign, c. 73, for exempting certain specific legacies given to bodies corporate, or other public bodies, from the payment of duty (*g*).

By section 8 of the statute, it is provided, that all the powers and provisions, clauses, regulations, and directions, fines, forfeitures, pains and penalties, contained in the former Acts relating to the repealed duties, shall extend to the duties granted by the present (*h*). It is therefore necessary to recur to the provisions of the earlier statutes.

Powers and provisions of former Acts to extend to 55 Geo. 3, c. 184.

By the statute 20 Geo. III. c. 28, certain stamp duties were imposed for every receipt or other discharge for any legacy left by any Will or other testamentary instrument, or for any share or part of a personal estate divided by force of the Statute of Distributions, or the custom of any province or place: and by section 3, it was enacted, that no such receipt unstamped should be pleaded or given in evidence in any Court.

20 Geo. 3, c. 28.

By the statute 23 Geo. III. c. 58, additional stamp duties were imposed: And by section 8, it was enacted, that the receipts, &c., should be stamped before written upon.

23 Geo. 3, c. 58.

By the statute 29 Geo. III. c. 51, additional duties were imposed, which, as well as the duties imposed by the preceding Acts, were repealed by the statute 36 Geo. III. c. 52.

29 Geo. 3, c. 51.

By these statutes, it will be observed, the duties were imposed merely on the *receipts* for legacies and shares of

and our children," if they are given so as to create a trust as between the widow and children (see the cases collected, *ante*, pp. 989, 990), are liable to the duty in respect of the interests of the children: *Re Harris*, 7 Exch. 344.

See also *Newill v. Newill*, L. R. 7 Ch. 253. *Mackett v. Mackett*, L. R. 14 Eq. 49.

(*g*) See *post*, pp. 1495, 1496.

(*h*) See this section stated *verbatim*, *ante*, p. 534.

residue: But this mode of imposition was found to be disadvantageous to the revenue; inasmuch as, if executors or administrators chose to rely on the good faith of legatees or next of kin, and to run the risk of taking no receipts from them, the duties were altogether evaded (i).

Stat. 36 Geo.
3, c. 52.

To obviate this, the statute 36 Geo. III. c. 52, after repealing the preceding duties, imposes new ones, not upon the receipts, but upon the legacies and shares of residue themselves: And after enacting, by section 27, that no legacy, &c., shall be paid without a receipt, proceeds, by section 28, to lay a penalty on persons paying or receiving legacies, &c., without receipts stamped in pursuance of the Act: But it is provided, by section 41, that the receipt so stamped shall not be required to have a receipt stamp also.

As a due compliance with the provisions of this Act of Parliament is so necessary for the proper performance of the office of executor or administrator; it is judged expedient to insert in this place, *verbatim*, some of its most material enactments.

Duties to be
paid by exe-
cutors or ad-
ministrators,

By section 6, it is enacted, "That the duties hereby imposed shall, in all cases in which it is not hereby otherwise provided, be accounted for, answered, and paid (k) by the

(i) See *Green v. Croft*, 2 H. Black. 33, 34. *Hill v. Atkinson*, 2 Meriv. 53.

(k) By sect. 12 of the Customs and Inland Revenue Act, 1860 (43 Vict. c. 14), it is provided as follows: "When an executor, administrator or trustee shall have given notice in writing to the Commissioners of Inland Revenue for any claim to legacy duty or succession duty in respect of any fund in his hands which he intends to distribute, and shall have delivered to the Commissioners all particulars which they may require in order to ascertain the existence

and extent of any such claim, he shall be at liberty to distribute the fund amongst the parties entitled thereto, after satisfaction of any claims to duty made by the Commissioners, and shall be entitled to receive from them a certificate discharging him from his liability to any duty in respect of the fund. Such certificate shall not in any way affect the liability of any person other than the person in whose favour it is expressed to be given." By 52 & 53 Vict. c. 7, s. 14, it is provided that no person shall under a testamentary document admitted to probate, or under letters of ad-

person or persons having or taken the burthen of the execution of the Will or other testamentary instrument, or the administration of the personal estate of any person deceased upon retainer for his, her, or their own benefit, or for the benefit of any other person or persons, of any legacy or any part of any legacy, or of the residue of any personal estate, or any part of such residue, which he, she, or they shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons; and also upon delivery, payment, or other satisfaction or discharge whatsoever, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue (1), to which any other person or persons shall be entitled; and in case any person or persons, having or taking the burthen of such execution or administration as aforesaid, shall retain for his, her, or their own benefit, or for the benefit of any other person or persons, any legacy, or any part of any legacy, or the residue of any personal estate, or any part of such residue, which such person or persons shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons, and upon which any duty shall be chargeable by virtue of this Act, not having first paid such duty, or shall deliver, pay, or otherwise howsoever satisfy or discharge any legacy, or any part of any legacy, or the residue of any personal estate, or any part thereof, to which any other person or persons shall be entitled, and upon which any duty shall be chargeable by virtue of this Act, having received or deducted the duty so chargeable, then and in every of such

on retaining
or paying
legacies.

If duty be not paid before legacies are retained by executors, or discharged, they having deducted it, the amount to be a debt from them to his Majesty; and if they pay legacies without deducting the duty, it shall be a debt from both parties.

ministration, or under a confirmation, be liable for payment of any legacy or succession duty, or duty imposed by the Act, after six years from the settlement of the account in respect of which the duty is payable, where such account was in all respects a full and true ac-

count. And trustees, executors and administrators, are not to be liable after six years if it be proved to the Commissioners that the account rendered was correct to the best of their knowledge.

(1) See *Att.-Gen. v. Dardier*, 11 Q. B. D. 16, and sect. 22, *post*, p. 1423.

36 Geo. 3,
c. 52.

What shall be
deemed lega-
cies within
the intent of
this Act.

cases, the duty which shall be due and payable upon every such legacy, and part of legacy, and residue, and part of residue respectively, and which shall not have been duly paid and satisfied to his Majesty, his heirs and successors, according to the provisions of this Act, shall be a debt of such person or persons having or taking the burthen of such execution or administration as aforesaid, to his Majesty, his heirs and successors; and in case any such person or persons, so having or taking the burthen of such execution or administration as aforesaid, shall deliver, pay, or otherwise howsoever satisfy or discharge any such legacy or residue, or any part of any such legacy or residue, to or for the benefit of any person or persons entitled thereto, without having received or deducted the duty chargeable thereon (such duty not having been first duly paid to his Majesty, his heirs or successors, according to the provisions herein contained), then and in every such case such duty shall be a debt to his Majesty, his heirs and successors, both of the person or persons who shall make such delivery, payment, satisfaction, or discharge (*m*), and of the person or persons to whom the same shall be made (*n*).

Sect. 7. "That any gift by any Will or testamentary instrument of any person dying after the passing of this Act, which shall, by virtue of such Will or testamentary instrument, have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit (*o*), shall be deemed and taken to be a

(*m*) The Succession Duty Act, 16 & 17 Vict. c. 51, contains no similar provision charging the executors, but makes the duty a charge on the interest of the successor: *Re Higgins*, 31 C. D. 142.

(*n*) But where two legacies, though given in respect of the same portion of the testator's pro-

perty, are distinct and separate, the legatee of the one legacy is not a debtor to the Crown in respect of the duty on the other, nor has the Crown any lien on the subject of the one legacy in respect of duty on the subject of the other: *Atty.-Gen. v. Giles*, 5 H. & N. 255.

(*o*) See *Re Cholmondeley*, 1 C. & M. 140, *post*, p. 1482. *Platt v.*

legacy within the intent and meaning of this Act, whether the same shall be given by way of annuity or in any other form, and whether the same shall be charged only on such personal estate, or charged also on real estate of the testator or testatrix who shall give the same; except so far as the same shall be paid or satisfied out of such real estate, in a due execution of the Will or testamentary instrument by which the same shall be given: and every gift which shall have effect as a donation *mortis causa*, shall also be deemed a legacy within the intent and meaning of this Act."

Sect. 8. "That the value of any legacy given by way of annuity (*p*), whether payable annually or otherwise, for any life or lives, or for years determinable on any life or lives, or for years or other period of time, shall be calculated, and the duty chargeable thereon shall be charged, according to the tables in the schedule hereunto annexed (*q*): And the duty chargeable on such annuity shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing the payment of the first year's annuity, and the three others of such payments of duty shall be made in like manner successively, before or on completing the respective payments of the three succeeding years' annuity respectively; and the value of any such annuity, if determinable upon any contingency besides the death of any person or persons, shall be calculated without regard to such contingency: provided always, That if any such annuity

The value of annuities, and the duty, to be calculated according to the annexed tables, and the duty paid by instalments, &c.

Routh, 6 M. & W. 756, *post*, p. 1482, and stat. 8 & 9 Vict. c. 76, s. 4, *post*, p. 1482, n. (*p*).

(*p*) See *Crow v. Robinson*, 31 L. J. (N. S.) Ch. 516, as to what are annuities within this section.

(*q*) In the *Atty.-Gen. v. Wynford*, 9 Exch. 746, a question arose on the construction of a Will, whether a legatee took an annuity for his own life only, or for the joint lives of himself and his wife,

which was material, inasmuch as, by these tables, a larger amount of duty was payable in the former case. New tables are given in lieu of these, by the 31st section of the Act (16 & 17 Vict. c. 51), *post*, p. 1465. But it has been held that the new tables apply only to legacies given after the 19th May, 1853 (when the Act came in force): *Re Earl Cornwallis*, 11 Exch. 580.

36 Geo. 3,
c. 52.

shall determine by the death of any person, before four years' payment of such annuity shall become due and payable, then and in such case the duty shall be payable in proportion only to so many of the payments of the said annuity as actually accrued and became due and payable; and in case any such annuity shall at any time determine upon any other contingency than the death of any person or persons, then and in such case, not only all payments of duty which would otherwise become due after the happening of such contingency, if any such would become due, shall cease; but it shall be lawful for the person or persons who shall have paid any duties which shall have previously become due, to apply for and obtain a return of so much of the duty so paid as will reduce the same to the like duty as would have been payable by such person or persons for such annuity, calculated according to the term for which the same shall have endured, which abatement the said commissioners for management of the stamp duties shall settle and determine according to the tables in the schedule hereunto annexed, and shall cause the amount of such abatement to be paid to the person or persons entitled to the same, out of any moneys in their hands arising from the duties imposed by this Act."

The value of annuities payable out of legacies, and the duty, to be calculated according to the annexed tables, and the duty to be charged on the value of such legacies after deducting such annuities, &c.

Sect. 9. "That the value of any legacy given by way of annuity for any life or lives, or for years determinable on any life or lives, or for years or for other period of time, and charged on and made payable out of any other legacy or legacies, shall be calculated, and the duty shall be charged thereon, in the same manner as hereinbefore directed with respect to other annuities; and the duty on the legacy charged with such annuity, if any duty shall be payable for such legacy, shall be calculated on the value of such legacy, after deducting the value of such annuity; and the duty for such annuity shall be paid by the person or persons entitled to the legacy or legacies charged with such annuity, by four equal payments, in the same manner as the same would be payable according to the provisions hereinbefore

contained, if such annuity had been a direct gift to the annuitant, and subject to the like proviso in case such annuity shall determine before four years' payment shall become due; and the payment which shall be made for such duty shall be retained by the person or persons paying the same, out of the first four years' payment of such annuity, if so many shall become due, or out of so many of such payments as shall become due by equal portions."

Sect. 10. "That the duty payable upon any legacy given by direction to purchase with any personal estate of the testator or testatrix, or any part thereof, an annuity of a certain amount for the life or lives of any person or persons, or any other term, shall be calculated upon the sum necessary to purchase such annuity according to the tables before mentioned, and shall be deducted from such sum, and paid as in the case of other pecuniary legacies; and the person or persons paying or satisfying such legacy, and the person or persons for whose benefit the same shall be paid or satisfied shall be discharged, by payment of such duty so calculated as aforesaid, from all other demands in respect of the duty payable on such legacy; and the annuity to be purchased for the benefit of the person or persons entitled to the benefit of such legacy shall be reduced in proportion to the amount of the duty payable thereon as aforesaid, such reduction to be calculated in the same manner as the duty so payable as hereinbefore directed to be calculated; and the purchase of such reduced annuity, together with the payment of such duty, shall satisfy and discharge such legacy as fully as if an annuity had been purchased equal in amount to the annuity so directed to be purchased."

Sect. 11. "If any benefit shall be given by any Will or testamentary instrument, in such terms that the amount or value of such benefit can only be ascertained from time to time, by the actual application for that purpose of the fund

36 Geo. 3,
c. 52.

Duty on legacies given to purchase annuities to be calculated on the sums necessary to purchase them.

Duty on legacies whose value can only be ascertained by application of the allotted fund to be charged on the money as applied (r).

(r) See *Re Wilkinson*, 1 Cr. M. & R. 142, *post*, p. 1493. *Atty.-Gen. v. Fitzgerald*, 13 Sim. 83, *post*, p. 1494.

36 Geo. 3,
c. 52.

allotted for such purpose, or made chargeable therewith; or if the amount or value of any benefit given by any Will or testamentary instrument, cannot, by reason of the form and manner of the gift, be so ascertained that the duty can be charged thereon under any other of the directions herein contained; then and in every such case such duty shall be charged upon the several sums of money or effects which shall be applied from time to time for the purposes directed by such Will or testamentary instrument, as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes or charged with answering the same."

How duty on legacies enjoyed by persons in succession, or having partial interests therein, shall be charged :

Sect. 12. "The duty payable on a legacy or residue, or part of residue, of any personal estate given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall be charged upon and paid out of the legacy or residue, or part of residue so given, as in the case of a legacy to one person; and where any legacy or residue, or part of residue shall be given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates of duty, so that one rate of duty cannot be immediately charged thereon, all persons who, under or in consequence of any such bequest, shall be entitled for life only, or any other temporary interest, shall be chargeable with the duty in respect of such bequest, in the same manner as if the annual produce thereof had been given by way of annuity; and such persons respectively shall be so chargeable with such duty, and the same shall be payable when they shall respectively become entitled to and begin to receive such produce, and shall be paid by equal portions during the aforesaid term of four years, if they shall so long continue to receive such produce; and where any other partial interest shall be given, or shall arise out of such property so to be enjoyed in

succession, the duty on such partial interest shall be charged and paid in the same manner as the duty is hereinbefore directed to be charged and paid in like cases of partial interests, charged on any property given, otherwise than to different persons in succession; and all and every person and persons who shall become absolutely entitled to any such legacy or residue, or part of residue, so to be enjoyed in succession, shall, when and as such person or persons respectively shall receive the same, or begin to enjoy the benefit thereof (s), be chargeable with and pay the duty for the same, or such part thereof as shall be so received, or of which the benefit shall be so enjoyed, in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed, or in such manner that the same shall be enjoyed in succession" (t).

Sect. 13. "That the duty payable on any legacy or residue, or part of residue, so given to or so to be enjoyed by different persons in succession, upon whom the duty shall be chargeable at one and the same rate, shall be deducted and paid by the person or persons having or taking the burthen of the execution of the Will or testamentary instrument under which the title thereto shall arise, upon payment or other satisfaction or discharge of every or any part of such legacy or residue, or part of residue, to any

36 Geo. 3,
c. 52.

and by whom
payable.

(s) The legacy duty in such cases may now be commuted for a single payment under sect. 11 of 43 Vict. c. 14, and sect. 43 of 44 & 45 Vict. c. 12, which see, *post*, p. 1436 (f).

(t) See *Atty.-Gen. v. Giles*, 5 H. & N. 255. A testator bequeathed his residuary estate to his daughter for life, after which to her husband: On the testator's death 11. per cent. duty was paid on her life interest, according to this section; afterwards her husband, having bequeathed his per-

sonal estate to her, predeceased her: His executors disclaimed the bequest to him in the original Will, and contended, consequently, that the residue of his wife's father's estate passed, as undisposed of, to her as his sole next of kin, and was chargeable, therefore, with only 11. per cent. duty, and not 101. per cent. (the rate payable by the husband): But it was held that the disclaimer was inoperative as to the duty: *Atty.-Gen. v. Munby*, 3 H. & N. 826.

36 Geo. 3.
c. 52.

trustee or trustees, or other person or persons to whom the same shall be payable, or paid in trust or for the benefit of the persons so entitled thereto in succession; and if the same shall not be so paid or satisfied to any such trustee or trustees, then such duty shall be deducted and paid out of the capital of the property so given, upon receipt, by any of the persons so entitled in succession, of any produce of such capital, or any part thereof, according to the amount of the capital of which such produce shall be so received; and where the duty chargeable upon any such bequest for the benefit of or to be enjoyed by different persons in succession shall be chargeable at different rates, so that the same cannot be paid at one and the same time, but must be paid in succession as aforesaid, then and in such case, all and every the person and persons having or taking the burthen of the execution of the Will or testamentary instrument in which such bequest shall be contained, shall be chargeable with such duties in succession, in the same manner as such persons would be chargeable with the like duties in case of immediate bequest; unless the property bequeathed shall have been paid or otherwise satisfied to or vested in any trustees or trustee as aforesaid, in which case such trustees or trustee, or his, her, or their representatives, shall be chargeable with the duties for and in respect of such property so vested in him, her, or them respectively, in such and the same manner as if he, she, or they had had or taken the burthen of the execution of the Will or testamentary instrument, by which such bequest shall have been made; and in like manner, where any partial interest shall be given, or shall arise out of any such property so to be enjoyed in succession, and such partial interest shall be satisfied or paid by the person or persons so enjoying such property, such person or persons shall be chargeable with the duties for and in respect of such partial interest, and shall retain and pay the same accordingly, in such and the same manner as if he, she, or they had had or taken the burthen of the execution of the Will or testamentary instrument, by which

such partial interest shall have been created; and in all such cases, the person or persons so chargeable with duty shall be debtors to the King's majesty, his heirs and successors, in like manner, and shall be subject to the like penalties as the person or persons having or taking the burthen of the execution of such Will or testamentary instrument are hereby made chargeable and subject to."

Sect. 14. "Provided always, That no duty shall be paid on any articles of plate, furniture, or other things, not yielding any income, and given to or for the benefit of, or so as that the same be enjoyed by, different persons in succession, whilst the same shall be so enjoyed in kind only by any person or persons not having any power of selling or disposing thereof, so as to convert the same into money or other property yielding an income; but if the same shall be actually sold or disposed of, or shall come to any person or persons having power to sell or dispose thereof, or having an absolute interest therein, then, and in each and every such case, the same duty shall be chargeable and paid thereon as if the same had been originally given absolutely, and with full power to sell or dispose thereof, and shall be chargeable upon and paid by the person or persons for whose benefit the same shall be sold, or who shall have power to sell or dispose thereof, or an absolute interest therein, and shall become the debt of such person or persons; but shall not be a charge on any person or persons by reason of his, her, or their having assented to such bequest, as the person or persons having or taking the burthen of the execution of the Will or testamentary instrument by which such bequest shall have been made."

Sect. 15. "Provided always, That where any legacy, or any residue, or part of residue, shall be so given by any Will or testamentary instrument, that different persons shall become entitled thereto in succession, the duty shall be charged thereon as given to be enjoyed in succession, whether the person or persons entitled thereto shall take the same under or by virtue of such Will or testamentary instrument,

36 Geo. 3,
c. 52.

Plate, &c.,
while enjoyed
in kind, not
liable to duty
till in possession
of persons
having power
to dispose
thereof.

Duty on legacies
enjoyed
in succession
to be charged
as such,
whether taken
under Wills or
by intestacy.

36 Geo. 3,
c. 52.

Duty on legacies in joint tenancy to be paid in proportion to the interests of the parties.

Duty on legacies subject to contingencies, to be charged as for absolute bequests, &c.

and the dispositions therein contained, or in default of such dispositions, and as entitled by intestacy."

Sect. 16. "Where any legacy, or residue or part of residue, shall be given to or for the benefit of any person or persons in joint tenancy, some or one of whom shall be chargeable with any duty hereby imposed, and some or one of whom shall not be so chargeable, the person or persons chargeable with duty shall pay such duty in proportion to the interest of such person or persons respectively in such bequest; and if any person or persons chargeable with duty, and entitled in joint tenancy as aforesaid, shall become entitled by survivorship, or by severance of the joint tenancy, to any larger interest in the property bequeathed, than that in respect of which such duty shall have been paid, then and in such case all and every such person or persons so becoming entitled by survivorship, or by severance, shall be charged with the same duty as if the property to which such joint tenant or joint tenants shall so become entitled had been originally given to or for the benefit of such person or persons only."

Sect. 17. "When any legacy or any residue, or part of residue, shall be given, subject to any contingency which may defeat such gift, and whereupon the same may go to some other person or persons, such bequest (unless chargeable as an annuity under the provisions herein contained) shall be charged with duty as an absolute bequest, to the person or persons who shall take the same subject to such contingency, and such duty shall be paid out of the capital of such legacy or residue, or part of residue, notwithstanding the same may, upon such contingency, go to some person not chargeable with the same duty, or with any duty; and if such contingency shall afterwards happen, and the property so bequeathed shall thereupon go in such manner that the same, if taken immediately after the death of the testator or testatrix, under the same title would have been chargeable with a higher rate of duty than the duty so paid, the person or persons becoming entitled thereto, shall be charged with and

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shall pay the difference between the duty so paid, and such higher rate of duty." 36 Geo. 3, c. 2.

Sect. 18. "Where any legacy, or the residue or any part of the residue, of any personal estate, shall be subjected to any power of appointment to or for the benefit of any person or persons specially named or described as objects of such power, such property shall be charged with duty as property given to different persons in succession; and in so charging such duty, not only the person and persons who shall take previous or subject to such power of appointment, but also any person and persons who shall take under or in default of any such appointment, when and as they shall so take respectively, shall, in respect of their several interests, whether previous, or subject to, or under, or in default of such appointment, be charged with the same duty, and in the same manner, as if the same interests had been given to him, her, or them respectively, in and by the Will or testamentary disposition containing such power, in the same order and course of succession as shall take place under and by virtue of such power of appointment, or in default of execution thereof, as the case may happen to be; and where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to any person or persons to whom the property would not belong in default of such appointment, such property, upon the execution of such power, shall be charged with the same duty, and in the same manner, as if the same property had been immediately given to the person or persons having and executing such power, after allowing any duty before paid in respect thereof (x), and where any property shall be given with any such general power of appointment, which property in default of appointment will belong to the person or persons

(u) See *Platt v. Routh*, 6 M. & W. 765, *post*, p. 1482. *Atty.-Gen. v. Brackenbury*, 1 H. & C. 782, *post*, 1484.

(z) The payment of this duty by the person executing such power

does not satisfy the duty payable under the Succession Duty Act by the person who succeeds by virtue of the appointment. *Atty.-Gen. v. Mitchell*, 6 Q. B. D. 548.

How duty on legacies subject to power of appointment shall be charged (u);

36 Geo. 3,
c. 52.

and how on
personal es-
tates directed
to be applied
in purchase of
real estates.

to whom such power shall also be given, such property shall be charged with, and shall pay the duty by this Act imposed, in the same manner as if such property had been given to such person or persons absolutely in the first instance, without such power of appointment."

Sect. 19. "Any sum of money or personal estate, directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate; unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate unless the same shall have been actually applied in the purchase of real estate before such duty accrued: but no duty shall accrue in respect thereof, after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied: Provided nevertheless, That in case before the same or some part thereof shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate, to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase" (y).

Sect. 20. "That estates *pur autre vie*, applicable by law in the same manner as personal estate, shall be charged with the duties hereby imposed as personal estate" (z).

(y) *De Lancey v. The Queen*, L. R. 6 Exch. 286, affirmed in Cam. Scacc. L. R. 7 Exch. 140.

(z) See *Chatfield v. Berchtoldt*, L. R. 7 Ch. 192, in which case a testator gave a rent-charge, to issue out of lands in England, to A. for life,

and directed that after her death it should be continued, and equally divided between B., C., and D. during their lives and the life of the longest liver. B. died domiciled abroad, leaving an English Will, by which she disposed of her

Estates *pur autre vie* applicable as personal estates, to be charged as such.

Sect. 21. "Provided always, That if any direction shall be given, by any Will or testamentary instrument, for payment of the duty chargeable upon any legacy or bequest out of some other fund, so that such legacy or bequest may pass to the person or persons to whom or for whose benefit the same shall be given, free of duty, no duty shall be chargeable upon the money to be applied for the payment of such duty, notwithstanding the same may be deemed a legacy, to or for the benefit of the person or persons who would otherwise pay such duty."

Sect. 22. "In cases of specific legacies, and where the residue of any personal estate shall consist of property which shall not be reduced into money (*b*), it shall be lawful for the person or persons having or taking the burthen of the administration of such effects, or the person or persons by whom the duty thereon ought to be paid, to set a value thereon, and offer to pay the duty according to such value; or to require the commissioners for management of the stamp duties, to appoint a person to set such value, at the expense of the person or persons by whom such duty ought to be paid; and it shall be lawful for the commissioners to accept the duty offered to be paid, upon the value set by the person or

personal estate. On the death of A., who was survived by C. and D., the Crown claimed from B.'s executors legacy duty in respect of B.'s third share of the rent-charge: and it was held that such duty was payable, for that the interest in the rent-charge which passed to B.'s executors was, by the Wills Act, "an estate *pur autre vie*, applicable by law in the same manner as personal estate," and therefore fell within 36 Geo. 3, c. 52, s. 20, and that it was not exempt from duty by reason of B.'s foreign domicile, inasmuch as, although it was by law applicable in the same manner as per-

sonal estate it was not by any of the statutes made personal estate, but was realty not following the person.

(*a*) As to what terms in a Will shall entitle a legatee to receive his legacy free of duty, see the cases collected *infra*, p. 1506 *et seq.*

(*b*) The provisions of this section apply to property which shall not be reduced into money during the course of the administration by the executor, and not merely to property which shall not have been reduced into money when the residuary account is brought in. *Atty.-Gen. v. Dardier*, 11 Q. B. D. 16.

36 Geo. 3,
c. 52.

Money left to
pay duty not
chargeable as
a legacy (*a*).

Mode of ascer-
taining duty
on property
not reduced
into money.

36 Geo. 3,
c. 52.

persons having or taking the administration of such effects, or by whom the duty for the same shall be payable without such appraisement, if the said commissioners shall think fit so to do; but if the said commissioners shall not be satisfied with the value so set, on which the duty shall be so offered, it shall be lawful for the said commissioners, notwithstanding such offer, to appoint a person to appraise such effects, and to set the value thereon, on which value so set the said commissioners shall assess the duty payable in respect thereof, and require the same to be paid; but if the person or persons by whom such duty shall be payable, shall not be satisfied with the valuation made under the authority of the said commissioners, and pay the duty accordingly, it shall be lawful for such person or persons to cause the valuation so made under the authority of the said commissioners, to be reviewed by the commissioners of the land tax for the time being, of the district or place where such effects shall be at their next meeting, after the said commissioners for management of the stamp duties shall have assessed and required payment of such duty as aforesaid, if fourteen days shall have elapsed between such time and the meeting of the said commissioners of land tax, and if not, then at the next succeeding meeting of the said commissioners, of which appeal six days' notice shall be given to the said commissioners of stamp duties; and the said commissioners of the land tax shall and may (if they think fit) appoint a person to appraise such effects, and set a value thereon, and shall and may hear and determine such appeal, in the same manner as in any other cases of appeal to them, and with the like authorities, and their judgment shall be final; and if the valuation made under the authority of the said commissioners of the stamp duties in the case last mentioned, shall not be duly appealed from within the time aforesaid, or shall be affirmed upon appeal, the duty shall be paid according to such valuation; and if any variation shall be made on such appeal, the duty shall be paid according to such variation; and if the duty assessed in manner aforesaid shall exceed the

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duty offered to and refused by the said commissioners of stamp duties, the expense of such appraisement and other proceedings in assessing such duties, shall be borne by the person or persons by whom such duty shall be payable; and if any dispute shall arise between any person or persons entitled to any such legacy, or residue, or part of residue, and any person or persons having or taking the burthen of the administration of such effects, with respect to the value thereof, or with respect to the duty to be paid thereon, the duty shall be assessed by the said commissioners of stamp duties on reference to them by either party for that purpose; and if the value of any property on which such duty ought to be paid shall be in dispute, the said commissioners of the stamp duties shall cause an appraisement to be made thereof at the expense of the person or persons by whom such duty ought to be paid, in the manner hereinbefore directed in other cases, and assess the duty thereon accordingly; and if such person or persons by whom such duty ought to be paid, shall be dissatisfied with such valuation, or with the assessment of duty made upon such valuation, by the said commissioners of the stamp duties, the same shall be reviewed and finally determined by the said commissioners of the land tax, upon appeal to them within the time, and under the restrictions, and in the manner hereinbefore directed in other cases; but if such valuation or assessment shall not be duly appealed from within the time limited for that purpose, or shall be affirmed upon appeal, the duty shall be paid according thereto; and if any variation shall be made therein on such appeal the duty shall be paid according to such variation; and in case the effects whereon any such duty shall be payable shall be at the distance of ten miles from London, then and in such case it shall be lawful to make the like application to such person as shall be deputed for that purpose by the said commissioners to act in their stead, in such cases, within the county or district in which such effects shall be; and such person so deputed shall act in such cases, in all respects, in the same manner as the said commissioners

36 Geo. 3,
c. 52.

36 Geo. 3,
c. 52.

Duty on legacies not satisfied in money, &c. to be paid according to the value of the satisfaction.

If legatees refuse to accept legacies, duty deducted, the Court, in case of suit, may order them to pay costs :

are hereby authorised to act, subject nevertheless to the instructions and control of the said commissioners."

Sect. 23. "Where any legacy, or part of any legacy, or residue, or part of residue, whereon any duty shall be chargeable by this Act, shall be satisfied otherwise than by payment of money or application of specific effects for that purpose, or shall be released for consideration or compounded for less than the amount of value thereof, then and in such case the duty shall be charged and paid in respect of such legacy, or part of legacy, or residue, or part of residue, according to the amount or value of the property taken in satisfaction thereof, or as the consideration for release thereof or composition for the same : Provided always, That if any legacy, or bequest, shall be made in satisfaction of any other legacy, or bequest, or title to any residue, or part of residue, of any personal estate remaining unpaid, the duty shall not be paid on both subjects, although both may be chargeable with duty. but shall be paid on the subject yielding the largest duty."

Sect. 24. "If any person or persons having or taking the burthen of the execution of the Wil. or other testamentary instrument, or the administration of the personal estate of any person deceased, or any person or persons hereby made chargeable with duty, shall declare himself, herself, or themselves ready and willing, and shall accordingly offer to pay any pecuniary legacy, or residue, or part of residue, deducting the duty payable thereon, or shall in like manner offer to deliver or otherwise dispose of any specific legacy, or any specific property, part of any residue of any personal estate, to or for the benefit of the person or persons entitled thereto, or to any trustee or trustees for such person or persons, upon payment of the duty payable in respect thereof, and the person or persons entitled to such legacy, or residue, or part of residue, or the trustee or trustees for such person or persons, shall refuse to accept such offer and to give a proper release and discharge for such legacy or residue, or so much thereof as shall be offered to be paid, delivered, or otherwise

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disposed of as aforesaid, then and in such case, although no actual tender shall be made, if any suit shall be afterwards instituted for such legacy or effects, respecting which such offer shall have been made, it shall be lawful for the Court in which such suit shall be instituted, to order all costs, charges, and expenses attending the same, to be paid by the person or persons who shall have refused to accept such offer, and to give or join in such release or discharge, or to order such costs, charges, and expenses, to be deducted and retained out of such legacy or effects, together with the duty payable thereon, as the said Court shall see fit; and in case any suit shall be instituted for payment of any legacy, or residue, or part of residue, of any personal estate, and the person or persons sued for the same shall be desirous of staying proceedings in such suit, on payment of the money due, or delivering or otherwise disposing of the specific effects demanded, after deducting or receiving the duty payable thereon, it shall be lawful for the Court in which such suit shall be instituted if it shall see fit, on application in a summary way, to make such order for payment of such legacy, or residue, or part of residue, or for delivering or otherwise disposing of such effects, and for payment of the duty payable thereon, and all such costs, charges, and expenses, attending such suit, as shall be just."

Sect. 25. "If any suit shall be instituted concerning the administration of the personal estate of any person dying testate, or intestate, or any part of such estate in which any direction shall be given touching the payment of any legacies or legacy of such person, or the residue of his or her personal estate, or any part thereof, the Court wherein such suit shall be instituted shall, in giving directions concerning the same,

(c) See *Foster v. Ley*, 2 Bing. N. S. 1402, *post*, p. 1510. *Re Sammon*, 3 M. & W. 381, as to the pendency of a suit not relieving executor from the necessity of delivering an account. See also *Hicks v. Kent*, 2 Beav. 141. As

to the obligation on solicitors not to let the Court make an order paying away a legacy without providing for the duty, see *Bryan v. Mansion*, 3 Jur. N. S. 475, *per Lord Cranworth*.

36 Geo. 3,
c. 52.

and in suits where the party sued may wish to stop proceedings on payment of bequests, deducting duty, the Court may make order therein.

If suit be instituted concerning administration, the Court to provide for payment of the duty (c).

36 Geo. 3,
c. 52.

Executors
may discharge
legacies on
payment of
the duty
accrued.

No legacy
liable to duty,
to be paid
without a re-
ceipt contain-
ing certain
particulars ;

provide for the due payment of the duties hereby imposed; and in taking any account of any personal estate, or otherwise acting concerning the same, such Court shall take care that no allowance shall be made in respect of any legacy, or part of legacy, or of any residue, or part of residue, in any manner whatsoever, without due proof of the payment of the duties hereby imposed."

Sect. 26. "Provided always, That any person or persons having or taking the burthen of the execution of any Will or other testamentary instrument, or the administration of the personal estate of any person deceased, may from time to time pay, deliver, or otherwise dispose of any legacy, or any part of any legacy, or make distribution of any part of the residue of any personal estate, on payment, from time to time, of such proportions of the duty hereby imposed, as shall accrue in respect of such part of such personal estate as shall be so administered."

Sect. 27. "No person or persons having or taking the burthen of the execution of any Will or testamentary instrument, or the administration of the personal estate of any person deceased, nor any trustee or trustees, or other person or persons hereby directed and required to account for any duty, shall, from and after the passing of this Act, pay, deliver, or otherwise dispose of, or in any manner satisfy, discharge, or compound for any legacy whatsoever, or any part thereof, or the residue of any personal estate, or any part thereof, in respect whereof any duty is hereby imposed, without taking a receipt or discharge in writing for the same, expressing the date of such receipt or discharge, and the names of the testator, testatrix, or intestate, under whose Will, or testamentary disposition, or upon whose intestacy the title to such legacy or part of legacy, or to such residue or part of residue, shall accrue, and of the person or persons to whom such receipt or discharge shall be given, and of the person or persons to whom such legacy, or residue or part of residue, shall have been given, or shall have belonged in consequence of intestacy, and the amount or value of the

legacy, or part of legacy, or residue, or part of residue for which such receipt or discharge shall be given, and also the amount and rate of the duty payable and allowed thereon; and that no written receipt or discharge for any legacy or part of any legacy, or for the residue of any personal estate, or any part of such residue, in respect whereof any duty is hereby imposed, shall be received in evidence, or be available in any manner whatever, unless the same shall be stamped, as required by this Act; and no evidence whatsoever shall be given of any payment, satisfaction, or discharge whatsoever, or of any release or composition of such legacy, or any part thereof, or of such residue, or any part thereof, without producing such receipt or discharge, duly stamped as aforesaid, unless the actual payment of the duty hereby imposed shall first be given in evidence: Provided always, That a copy of the entry, in the books of the commissioners of the stamps, of the payment of such duty, shall be admitted as evidence thereof: Provided also, That payment of any annuity shall not be deemed a payment for which such stamped receipt shall be required, under the directions of this Act, except the several payments which shall complete the payments for each of the first four years, during which such annuity shall be payable; and in like manner any payment in respect of any legacy or bequest, hereby directed to be charged with the duty in the same manner as annuities are hereby made chargeable with duty, shall not be deemed a payment for which such stamped receipt shall be required, except the several payments which shall complete the payments for each of the first four years in respect of which such legacy or bequest shall be chargeable with duty as an annuity."

Sect. 28. "That any person having or taking the burthen of the execution of any Will or testamentary instrument, or the administration of the personal estate of any person deceased, and any trustee or trustees, or other person or persons hereby directed and required to account for any duty, who shall pay, deliver, or otherwise dispose of, or in

36 Geo. 3,
c. 52.

no receipt
available
unless duly
stamped, &c.

Copy of entry
at stamp office
of payment of
duty, evidence.

Stamped
receipts for
annuities not
required but
on completing
payments for
each of the
first four
years.

Penalty of 10/
per cent. for
paying or re-
ceiving lega-
cies without
stamped
receipts.

36 Geo. 3,
c. 52.

any manner satisfy or discharge, or compound for any legacy given by such Will or testamentary instrument, or the residue, or any part of the residue, of such personal estate, to or for the benefit of any person or persons entitled to such legacy or any part thereof, or to such residue, or any part thereof, without taking such receipt or discharge in writing as aforesaid, and causing the same to be stamped within the time hereby allowed for stamping the same, shall forfeit and lose the sum of ten pounds *per centum* on the sum of money, or the value of the property if not money, for which such receipt or discharge ought to have been given in pursuance of this Act: and all and every person and persons receiving or taking the benefit of any such money or other property without giving a written receipt or discharge for the same, in which the duty payable in respect thereof shall be expressed to have been allowed or paid to the person or persons to whom such receipt or discharge shall be given, and which shall bear date on the day of signing the same, shall forfeit and lose the sum of ten pounds *per centum* on the sum of money, or on the value of the property, so received or taken."

Receipts to be stamped within twenty-one days after date, on which an acknowledgment of payment of the duty shall be written, &c.

Sect. 29. "Every such receipt or discharge shall be brought within the space of twenty-one days after the date thereof to the said head office of the said commissioners, or to some other office to be appointed by the said commissioners for such purpose, to be stamped, paying the duty for the same, and upon such payment either at the said head office, or at any other office to be appointed as aforesaid, the receiver-general or other proper officer to be appointed for that purpose by the said commissioners, as the case shall require, shall write upon such receipt or discharge an acknowledgment of the payment of the duty so paid in words at length, and bearing date the day on which such payment shall be made, and shall subscribe his name thereto, and enter an account thereof in a book or books to be provided for that purpose, to the intent that he may be thereby charged with the sum so paid; and in case the

duty shall be so paid at the said head office, then the receipt or discharge so brought to be stamped, shall be forthwith stamped with one of the said four stamps as the case shall require; and in case the duty shall be so paid at any other office to be appointed by the said commissioners as aforesaid, the receipt or discharge whereon such acknowledgment of the payment of duty shall be so written and subscribed, shall be transmitted within the space of twenty-one days from the day of payment of such duty to the said head office to be stamped, and the same shall be stamped accordingly with one of the said four stamps as the case shall require; and in case the person or persons paying such duty at any such office to be appointed as aforesaid, shall be desirous that the same should be transmitted to the said head office, by the officer to whom such duty shall be paid, and shall leave the same with such officer for such purpose, such officer shall thereupon sign and deliver an acknowledgment, that such receipt or discharge has been left with him for such purpose, and shall transmit such receipt or discharge to such head office to be stamped as aforesaid, and the same shall be sent again to such officer as soon as conveniently may be after the stamping thereof; and such officer shall deliver back the same to the person or persons entitled thereto, upon re-delivery to him of the acknowledgment which he shall have given for the same: Provided always, That if any such receipt or discharge shall not be so brought to any such office as aforesaid, within such space of twenty-one days as aforesaid, it shall nevertheless be lawful to carry such receipt or discharge to the said head office to be stamped in like manner, within three calendar months after the date thereof, paying the duty for the same, and also the further sum of ten pounds *per centum* on such duty by way of penalty for not having before paid such duty, on payment of which duty and penalty, the said commissioners are hereby authorized and required to stamp such receipt or discharge, in the same manner as if the same had been brought to the said office

36 Geo. 3,
c. 52.

Receipts may
be stamped
within three
months after
date, on pay-
ment of duty,
and 10*l.* per
cent. penalty;

36 Geo. 3,
c. 52.

but none to be stamped unless the duty be paid and they are brought to be stamped within the limited time.

Mistakes in paying duty may be rectified, if no suit be instituted, on payment of the difference within three months, and 10*l.* per cent.

48 Geo. 3,
c. 149, s. 44.
Commissi-
oners may
stamp receipts
for legacies,
after three
months from
the date on
payment of
duty and
penalty; and
remit penalty
(within
twenty-one
days), if
signed out of
Great Britain.

within the space of twenty-one days from the date thereof; but the said commissioners, or any of their officers, shall not on any pretence whatever, except as hereinafter directed, stamp any vellum, parchment or paper, upon which any receipt, or discharge for any legacy or part of legacy, or any residue of any personal estate, or any part thereof, shall be written or signed with the said new stamps, or any of them unless the duty for the same shall be paid, and such receipt or discharge shall be produced to be so stamped in manner aforesaid, within the times and in the manner hereinbefore respectively limited and appointed" (*d*).

Sect. 30. "If it shall appear to the satisfaction of the said commissioners of stamp duties, upon oath or affirmation to be administered by a justice of the peace, or master or masters extraordinary in Chancery, which oath or affirmation such person or persons are hereby empowered to administer, that less duty has been paid for any legacy, or residue, or part of residue, than ought to have been paid for the same, by mistake, without any intention to defraud; and if application shall be made to the said commissioners to rectify such

(*d*) But now by stat. 48 Geo. 3, c. 149, s. 44, "in all cases not provided for by the preceding clause, where any receipt or discharge given for any legacy, or for the residue, or any share of the residue, of any personal estate, which shall have been given by Will or other testamentary instrument, or have devolved to any person or persons upon intestacy, shall be brought to the head office, to be stamped after the expiration of three calendar months from the date thereof, it shall be lawful for the said commissioners to cause the same to be duly stamped, for making the same available, on payment of the duty, which shall be payable in respect thereof, together with the

penalty incurred, in consequence of the same not having been brought to be stamped, before the expiration of such three calendar months; and where any such receipt or discharge shall have been signed out of Great Britain, if the same shall be brought to be stamped, within twenty-one days after its being received in Great Britain it shall be lawful for the said commissioners to remit any penalty that may have been incurred thereon, and to cause the same to be duly stamped, on payment of the duty payable in respect thereof: anything contained in any former Act or Acts to the contrary notwithstanding."

mistake, and accept the duty really due before any suit shall be instituted concerning the same, and within three calendar months after payment of the money actually paid instead of the just duty, it shall be lawful for the said commissioners to accept the difference between the money paid and the just duty, together with the sum of ten pounds *per centum* on such difference by way of penalty in full for the just duty, and which shall be in discharge of all penalties incurred by non-payment of such duty, and to cause an acknowledgment of the payment of the just duty to be written on the receipt or discharge given for such legacy or residue or part of residue, and to be subscribed by the proper officer, and also to cause such receipt or discharge to be properly stamped, if necessary, in the same manner as would have been done if the just duty had been originally paid."

Sec. 31. "Provided always, and be it further enacted, That the party or parties paying or satisfying any legacy, or any residue of any personal estate, or any part of such residue, or receiving the same, contrary to the provisions of this Act, who shall, within the space of twelve calendar months after the offence committed, discover the other party or parties offending therein, so that such party or parties so discovered be thereupon convicted, such person so discovering shall be indemnified and discharged from all penalties incurred for any offence against this Act."

Sect. 32. There has already been occasion to state *verbatim* the earlier part of this section (e), by which it is provided that if by reason of the infancy, or absence beyond seas, of the legatees, legacies cannot be properly paid, the money may be paid into the Bank of England.

The statute proceeds to provide, that if it shall afterwards appear that such money has been improperly paid into the

36 Geo. 3,
c. 52.

Persons paying or receiving money contrary to this Act, indemnified on discovering the other offender :

If by infancy or absence legacies cannot be paid, the money may be paid into the Bank.

Provisions in case such money be improperly paid in ;

(e) See *ante*, p. 1263. The costs of paying the legacy into Court must come out of the estate, those of obtaining payment out must be

borne by the legatee. *Re Cawthorne*, 12 Beav. 56. *Re Jones*, 3 Drewr. 679. See also *post*, p. 1820.

36 Geo. 3,
c. 52.

provisions in
case of pay-
ment of too
much or too
little duty.

Bank, the Court of Chancery, upon petition, in a summary way, may dispose thereof, in such manner as justice shall require: And if it shall appear that the duty paid in respect of any such sum of money was more than ought to have been paid, the person who shall have paid such duty may apply to the Commissioners of stamps to repay such excess, and they may repay such excess; and if the duty paid appear to be less than the duty which ought to have been paid, the person who paid such money, upon payment of the full duty to the said Commissioners, in such manner as the same ought to be paid, with such penalties, if any, as ought to be paid in respect thereof, may apply to the Court of Chancery, in a summary way, for the repayment of the further sum paid to the said Commissioners for such duty, out of the money in the Bank so paid in by such person, which payment the said Court is authorized to order.

If it shall appear to the commissioners for stamps, at the end of two years after the death of any person, that it will require time to collect the effects, or be difficult to ascertain the residue of the personal estate, the duty may be compounded for:

Sect. 33. "If at the end of two years after the death of any person deceased, it shall appear to the satisfaction of the said Commissioners of stamp duties, that it will require time to collect the debts or effects of such person then outstanding, or that from circumstances it will be difficult to ascertain or adjust the amount of the clear residue of the personal estate of such person liable to duty, and the parties interested therein shall be desirous of compounding for the duty thereon, it shall be lawful for such parties respectively, with the consent of the commissioners of stamp duties, to make application to the Court of Exchequer at Westminster, if the deceased person resided in England or elsewhere, except in Scotland, and to the Court of Exchequer in Scotland, if the deceased resided in Scotland, for leave to compound such duty, stating upon oath the particulars of the personal estate for which such composition shall be proposed to be made, by affidavit to be filed in the said Court, and declaring at the same time upon oath, whether any other property of the deceased then outstanding, besides the property for which such composition shall be proposed to be

made, hath come to the knowledge of the said parties, or any of them, and the nature thereof, and the circumstances attending the same; and in such case it shall be lawful for the said Court of Exchequer in England or Scotland, as the case may be, to appoint a proper person to set a value on the personal estate, or such part thereof, for which no duty shall have been charged, and which shall be specified in such affidavit as the property for which such composition shall be desired, and to adjust and settle the duty, which justly and equitably, under all circumstances, ought to be paid in respect of such personal estate so specified, and thereupon it shall be lawful for the said commissioners, and they are hereby required, if the said Court of Exchequer to which such application shall be made, shall confirm the said adjustment and settlement, and order the duty to be accepted accordingly, and by authority of such order to accept payment of the sum so adjusted and settled, in full discharge of the duty on so much of such personal estate as shall be so specified, and according to such order, and to enter the same in their books accordingly, and to grant certificates thereof, expressing the receipt of such duty by way of composition under such order; and every such person to whom such certificate shall be granted, and every future representative of the same estate, and all persons entitled to the benefit of the property, for which such composition shall be so paid, shall be discharged from any further payment of duty on the same: and in all future payments of such property, it shall be lawful for the persons having or taking the burthen of the execution of any Will or testamentary instrument disposing such property, or the administration thereof, to pay, apply, and dispose of the same, and for all persons entitled to the benefit thereof to receive the same, without having the receipts and discharges in writing, hereby required to be given and taken for the same, stamped as hereinbefore directed: provided such receipts or discharges shall express the same to be given under the authority of such composition as aforesaid, and not liable to duty: Provided always nevertheless, That the duty shall

36 Geo. 3,
c. 52.

duty to be
paid on any

36 Geo. 3,
c. 52.
part of per-
sonal estates
not included
in the
composition.

be charged and paid upon all and every part of the personal estate of such person deceased, other than that which shall be specified in such affidavit as aforesaid, and included in the valuation in which such composition shall have been made as aforesaid, and for which the said Court of Exchequer shall allow and order such composition to be taken as aforesaid in the same manner as if no such composition had been made: and all and every person and persons shall be liable to all the like penalties and forfeitures for not duly paying the duty for such personal estate not compounded for, and subject to the like rules, methods, and directions for charging such duty, as such person and persons respectively would be liable to if such composition had not been made" (*f*).

(*f*) By s. 11 of the Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), it is provided that: "Where any legacy duty or succession duty shall be presumptively payable in respect of any interest in expectancy upon the determination of a life or other temporary interest in possession in a legacy or residue, or in personal property comprised in a succession, and the duty (if any), payable upon the life or other temporary interest shall have been fully paid and satisfied, it shall be lawful for the Commissioners of Inland Revenue, in their discretion, upon the application of the executor or trustee, or other person who would be accountable for the duty in respect of such interest in expectancy, if it were then in possession, to commute the duty presumptively payable for a certain sum to be presently paid. For assessing the amount which shall be so payable the Commissioners shall cause a present value to be set upon the presumptive duty, regard being had to any con-

tingencies affecting the liability to such duty, and the interest of money involved in the calculation being reckoned at the rate for the time being allowed by the Commissioners in respect of duties paid in advance under the Succession Duty Act, 1853. Upon the receipt of the certain sum the Commissioners shall give a discharge for the duty accordingly." And by s. 43 of the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), it is provided that: "It shall be lawful for the Commissioners of Inland Revenue upon the application of the person acting in the execution of the Will of any deceased person, and upon the delivery to them of an account showing the amount of the estate and effects in respect whereof legacy duty is payable, together with the names or description of the class of the persons entitled thereto and every part thereof, in possession or expectancy, and their degrees of consanguinity to the testator, to assess the duty upon the amount shown by the said account at such

Sect. 34. "And be it further enacted, That if at any time after payment of duty on any legacy, or residue, or part of residue, of the personal estate of any person deceased, any debt shall be recovered against the estate of such deceased person, or any loss shall happen, by reason whereof, or for any other just cause, any legatee or other person, by whom any legacy or part of legacy, or any residue of any personal estate hath been received or retained, shall be obliged to refund the same, or any part thereof, then in every such case it shall be lawful for the said commissioners of stamp duties, and they are hereby required, on due proof made on oath as aforesaid, to their satisfaction, of the amount of such sums refunded, and that by reason thereof there hath been an over-payment of duty, to settle and adjust the amount of such over-payment, and to repay the same out of the money in their hands, arising from the duties by this Act imposed, or to allow the same in future payments as the case may permit or require (g).

Sect. 35. "Whenever any person or persons having or taking the burthen of the execution of any Will or testamentary instrument, or the administration of any personal estate as aforesaid, shall be entitled to any legacy, or the residue, or any part of the residue, of the personal estate of any testator, testatrix, or intestate, such person shall be chargeable with the duty whenever he, she, or they shall be entitled, in the due course of administration, to retain to his, her, or their own use, any part of the said estate, in satisfaction of such legacy, or residue, or any part thereof: and every such person, before any such retainer shall transmit

a sum by way of composition as, having regard to the circumstances, shall appear to be proper, and to accept payment of the duty so assessed in full discharge of all claims for legacy duty under such Will. If the Commissioners are of opinion that an application should receive the assent of any

person, they shall refuse to entertain the application until such assent shall have been given."

(g) In case the Commissioners decline to repay the duty, the proper remedy seems to be a petition of right under 23 Vict. c. 34.

36 Geo. 3, c. 52.

If any legacy be refunded, the duty to be repaid.

Executors previous to retaining their legacies to transmit the particulars with the duty offered, to the commissioners of stamps, who shall charge the same agreeable to this Act.

36 Geo. 3,
c. 52.

Penalty for
neglect of pay-
ment of duty
for fourteen
days.

If adminis-
tration be
made void,
and any duty
shall have
been improp-
erly paid it
shall be re-
paid, but if it
ought to have
been paid, it
shall be
allowed in
account with
the rightful
executor.

to the said commissioners of stamp duties or their officers, a note containing the particulars of such legacy, residue, or part of residue, intended to be retained, and the amount or value thereof, and the duty which such person or persons shall offer to pay thereon, and the said commissioners shall charge and assess the duty thereon, in such manner as the duty shall be chargeable thereon by virtue of the provisions in this Act contained, and such duty shall be paid accordingly; and on payment of the said duty, the said receiver-general of the said duty, or officer appointed to receive the same, shall, at the foot of a duplicate of the said assessment duly stamped, in such manner as the said commissioners shall direct for such purpose, give a receipt for such duty in such form of words as the said commissioners shall direct, which receipt shall be a discharge for the duty expressed therein: and in case any such person or persons shall neglect to pay such duty as aforesaid, within fourteen days after the same ought to have been paid as aforesaid, every such person or persons shall forfeit and pay treble the value of the duty which ought to have been paid."

Sect. 37. "If the authority under or by colour of which any person shall have administered the estate or effects of any person deceased, or any part thereof, shall be void, or be repealed, or declared void, and such person shall before the avoidance, repeal, or declaration of avoidance have paid any duty hereby imposed, or any duty imposed by any of the said former Acts, which shall not be allowed to such person out of the estate or effects of such deceased person, by reason that the same duty was not really due or payable, the money paid for such duty shall, on proof thereof to the satisfaction of the said commissioners of stamp duties, be repaid to the person or persons who shall have paid the same, or his, her, or their representatives, by the said commissioners, out of any monies in their hands arising from the duties imposed by this Act, or the said former Acts: but in case such duty ought to have been paid by the rightful executor or executors, administrator or administrators, of

such deceased person, then and in such case, the payment of such duty shall be valid and effectual, notwithstanding such avoidance, repeal, or declaration of avoidance as aforesaid; and no such person shall, by reason of the avoidance, repeal, or declaration of avoidance of such authority, be sued, molested, or troubled for or in respect of such payment; but all such payments, in respect of the said duty, shall be allowed in account with such rightful executor or executors, administrator or administrators, and the same shall be deemed payments in the due course of administration, as fully and effectually as if such payments had been made by rightful executors or administrators: any law, usage, or custom, to the contrary notwithstanding" (h).

By 31 & 32 Vict. c. 124, s. 9, it is provided, "that in any case in which duty payable in respect of any legacy or residue under the Legacy Duty Acts in force, or in respect of any succession under the Succession Duty Act, 1853, shall be in arrear, the person by whom the arrears of duty may be payable shall be liable to pay interest thereon at £4 per cent. per annum; and such interest shall be recoverable by the Commissioners of Inland Revenue in the same manner as the arrears of duty, and as part thereof; provided that the acceptance or recovery by the said Commissioners of arrears of duty, with interest thereon as aforesaid, shall be an abso-

36 Geo. 3,
c. 52.

Arrears of
legacy duty
or succession
duty to be
paid with
interest.

(h) By an instrument purporting to be the Will of S. deceased, the whole of S.'s personalty, amounting in the net to 12,748*l.*, was bequeathed to I., a stranger in blood, who was executor: I. took out probate, and paid the duty of 10 per cent. on the whole net: Afterwards T., the next of kin to S., disputed the Will, on the ground that S. was not of disposing mind: I. paid 6,000*l.* to T., and consented that the Will should be revoked, and administration taken out by T., who in considera-

tion thereof, released to I. her claim on the 12,748*l.*: T., from her nearness of blood was liable to a duty of less than ten per cent.: It was held that, under the enactments of this section, I. was entitled to a return of duty, not only on the 6,000*l.*, but also on the remaining 6,748*l.*, and that the duty on the whole 12,748*l.* was to be accounted for between T. and the commissioners of stamps, as duty charged on T., at the lower rate: Reg. v. The Commissioners of Stamps, 6 Q. B. 657.

lute waiver of the penalties (if any) which may have been incurred under the Legacy or Succession Duty Acts."

44 Geo. 3,
c. 98.

The statute 44 Geo. III. c. 98, after reciting that the several duties therein mentioned are become very numerous, intricate and complicated, and it will naturally contribute to the public benefit to consolidate and simplify the same, enacts, "That from and after the 10th of October, 1804, all and singular the duties, &c. (aforesaid) shall cease and determine," and imposes the several duties contained in the schedule in lieu thereof.

45 Geo. 3,
c. 28.

Legacies, &c.,
out of real
estate subject
to duties (i).

Legacies charged upon or payment out of the produce of real estate were not subject to the payment of duty until the 45 Geo. III. c. 28: By that statute duties are imposed "Upon all legacies specific or pecuniary, or of any other description, whether the same be charged upon or payable out of any real or personal estate, and upon all residues or shares of personal estate left by any Will or testamentary instrument, or divided by force of the Statute of Distributions, or the custom of any province or place, and upon monies, or residues, or shares of monies arising from the sale of real estates, by any Will or testamentary instrument directed to be sold." And by section 4, it is enacted, "That every gift by any Will or testamentary instrument of any person dying after the passing of this Act, which, by virtue of any such Will or testamentary instrument, shall have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of, as he or she shall think fit, or which shall have been charged upon or made payable out of any real estate (l), or be directed to be satisfied out of any monies

What shall be
deemed a
legacy under
this Act (k).

(i) See also stat. 8 & 9 Vict. c. 76, s. 4, *post*, pp. 1442, 1443.

(k) This definition was extended by stat. 8 & 9 Vict. c. 76, s. 4, *post*, pp. 1442, 1443. But now by the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2), it is provided that legacies pay-

able out of or charged upon real estate, or the proceeds thereof, shall not be chargeable with legacy duty but with succession duty.

(l) See *Atty.-Gen. v. Pickard*, 3 M. & W. 552, *post*, p. 1484. *Atty.-Gen. v. Lord Hertford*, 14 M. & W. 284, *post*, p. 1486.

to arise by the sale of any real estate of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity, or in any other form, shall be deemed and taken to be a legacy within the true intent and meaning of this Act: Provided always, that nothing herein contained shall be construed to extend to the charging with the duties by this Act granted any specific sum or sums of money, or any share or proportion thereof charged by any marriage settlement or deed or deeds upon any real estate, in any case in which any such specific sum or sums, or share of proportion thereof, shall be appointed or apportioned by any Will or testamentary instrument under any power given for that purpose by any such marriage settlement or deed or deeds."

Sect. 5. "The duties hereby granted upon legacies, or charged upon or made payable out of any real estate, or out of any monies to arise by the sale of any real estate, or upon residues, or parts or shares of residues of any such monies, shall be accounted for, answered, and paid by the trustee or trustees to whom the real estate shall be devised, out of which the legacy or legacies, or share or shares, of any money arising out of the sale or mortgage, or other disposition of such real estate, shall be to be paid or satisfied; or if there shall be no trustees, then by the person or persons (*m*) entitled to such real estate, subject to any such legacy; or by the person or persons empowered or required to pay or satisfy any such legacy; and the said duties shall be retained (*n*) by the person paying or satisfying any such legacy or share of money, in like manner, and according to such rules and regulations, and under and subject to such penalties, as far as the same can be made applicable, as are contained in an Act passed in the thirty-sixth year of the reign of his present Majesty, intituled, *An Act for repealing*

45 Geo. 3,
c. 23.

Acts shall not
extend to ap-
pointments by
Will under
settlements,
&c.

Duties on lega-
cies charged
on real estates
shall be paid
by the trust-
ees, or the
persons en-
titled to such
estate, and
retained as
under 36
Geo. 3, c. 52.

(*m*) See the Atty.-Gen. v. Jackson, 2 C. & J. 101, *post*, pp. 1498, 1505.

(*n*) See Hales v. Freeman, 1 Brod. & Bing. 291, *post*, p. 1506.

45 Geo. 3,
c. 28.

certain duties on legacies and shares of personal estates, and for granting other duties thereon in certain cases."

48 Geo. 3,
c. 149.

The statute 48 Geo. III. c. 149, repealing the duties granted by the last Act (except arrears, which are to be recoverable by the same ways and means, &c., in all respects, as if this Act had not been made), enacts, by sect. 2, "That from and after the 10th of October, 1808, there shall be raised, levied, and paid," the several duties specified in the schedule; in which schedule, part 3, is contained the following:—"For every legacy, &c., given by any Will or testamentary instrument of any person who died before or upon the 5th of April, 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, retained, satisfied, or discharged, after the 10th of October, 1808," the several duties, after the rates therein specified. And "for every legacy, &c., &c., of any person who shall have died after the 5th of April, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged after the 10th day of October, 1808," the several other duties thereafter specified.

This statute was succeeded by the latest Stamp Act, 55 Geo. III. c. 184, which repeals the last-mentioned duties, with the same exception of arrears, and imposes the new duties above specified at large (o).

What gifts are
to be deemed
legacies.

A fuller and more explicit definition of a legacy is contained in the later statute of 8 & 9 Vict. c. 76, s. 4, by which, after reciting that "under or by virtue of the said several recited Acts (55 Geo. III. c. 184, 5 & 6 Vict. c. 82, 8 & 9 Vict. c. 2), certain duties have been granted and are now payable in Great Britain and Ireland respectively upon

(o) *Ante*, p. 1405.

legacies, and doubts have been entertained whether certain gifts by Will or testamentary instrument are legacies liable to the said duties, and it is expedient to remove such doubts," it is enacted, "that from and after the passing of this Act, every gift by any Will or testamentary instrument of any person, which by virtue of any such Will or testamentary instrument is or shall be payable, or shall have effect or be satisfied out of the personal or moveable estate or effects of such person, or out of any personal or moveable estate or effects which such person hath had or shall have had power to dispose of, or which gift is or shall be payable, or shall have effect or be satisfied out of, or is or shall be charged or rendered a burden upon the real or heritable estate of such person, or any real or heritable estate, or the rents or profits thereof (p) which such person hath had or shall have had any right or power to charge, burden or affect with the payment of money, or out of or upon any monies to arise by the sale, burden, mortgage, or other disposition of any such real or heritable estate or any part thereof, whether such gift shall be by way of annuity or in any other form, and also every gift which shall have effect as a donation *mortis causâ* shall be deemed a legacy within the true intent and meaning of all the several Acts granting or relating to duties on legacies in Great Britain and Ireland respectively, and shall be subject and liable to the said duties accordingly (q). Provided always,

8 & 9 Vict.
c. 76, s. 4.

(p) But now by the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2), it is provided that legacies payable out of or charged upon real estate or the proceeds thereof shall not be chargeable with legacy duty but with succession duty.

(q) It will be seen by reference to s. 38 (2) of 44 Vict. c. 12, that the accounts, in reference to which the duties on accounts are imposed, have to include property taken as a *donatio mortis causâ* :

the result is that there are payable in respect of such property both legacy duty and stamp duty in the nature of probate duty. And the property the subject of a *donatio mortis causâ*, which, as appears in an earlier portion of this work, partakes partly of the nature of a legacy and partly of the nature of a gift *inter vivos* is treated for the purpose of taxation as part of the estate of the testator or intestate. Sect. 38 also enlarges the property so to be treated by in-

8 & 9 Vict.
c. 76, s. 4.

that no sum of money, which by any marriage settlement is or shall be subjected to any limited power of appoint-

cluding in the account of the deceased's estate certain gifts and successions *inter vivos*, but it does not nor does any other legislation render such gifts and successions liable to legacy duty. The operation of sect. 38 has been somewhat extended by sect. 11 of 52 Vict. c. 7, which amplifies the definitions in sub-sect. 2 of sect. 38, and practically repeals the provisions in sub-sect. 3 for return of duty. These sections are as follows:—44 Vict. c. 12, s. 38 (2). "The personal or movable property to be included in an account shall be property of the following descriptions, viz.: (a) *Any property taken as a donatio mortis causa* made by any person dying on or after the 1st day of June, 1881, or taken under a voluntary disposition made by any person so dying purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise which shall not have been *bona fide* made three months before the death of the deceased.

(b) Any property which a person dying on or after such day, having been absolutely entitled thereto, has voluntarily caused or may voluntarily cause to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein, or in some part thereof passes or accrues by survivorship on his death to such other person.

(c) Any property passing under

any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a Will, whereby an interest in such property for life or any other instrument not taking effect as a Will, whereby an interest in such property for life, or any other period determinable by reference to death is reserved to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power to restore to himself or to reclaim the absolute interest in such property."

52 Vict. c. 7, s. 11, enacts: "Sub-section 2 of sect. 38 of the Customs and Inland Revenue Act, 1881, is hereby amended as follows:—The description of property marked (a) shall be read as if the word "twelve" were substituted for the word "three" therein, and the said description of property shall include property taken under any gift, whenever made, of which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise: The description of property marked (b) shall be construed as if the expression "to be transferred to or vested in himself and any other person" included also any purchase or investment effected by the person who was absolutely

ment to or for the benefit of any person or persons therein specially named or described as the object or objects of such power, or to or for the benefit of the issue of any such person or persons, shall be liable to the said duties or legacies under the Will in which such sum is or shall be appointed or apportioned in exercise of such limited power."

By stat. 16 & 17 Vict. c. 51 (An Act for granting to her Majesty Duties on Succession to Property, and for altering certain Provisions of the Acts charging Duties on Legacies and Shares of Personal Estates), it is enacted, by sect. 1, that "in the construction and for the purposes of this Act,

The term 'Real Property' shall include all freehold, copyhold, customary, leasehold and other hereditaments, and heritable property, whether corporeal or incorporeal, in Great Britain and Ireland, except money secured on heritable property in Scotland, and all estates in any such hereditaments:

The term 'Personal Property' shall not include leaseholds, but shall include money payable under any engagement, and money secured on heritable property in Scotland, and all other property not comprised in the preceding definition of real property (r):

entitled to the property either by himself alone or by arrangement with any other person:

The description of property marked (c) shall be construed as if the expression "voluntary settlement" included any trust, whether expressed in writing or otherwise, in favour of a volunteer, and if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and as if the expression "such property," wherever the same occurs, included the proceeds of sale thereof: The charge under

the said section shall extend to money received under a policy of assurance effected by any person dying on or after the 1st day of June, 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit."

(2) A return of stamp duty shall not be made under sub-section 3 of the said section 38 by reason of or in relation to any account delivered on or after the 1st day of June, 1889.

(r) Succession duty is not pay-

8 & 9 Vict.
c. 76, s. 4.

16 & 17 Vict.
c. 51 (Succession Duty Act).

Interpretation
of certain
terms in this
Act:

16 & 17 Vict.
c. 51.

The term 'Property' alone shall include real property and personal property :

The term 'Succession' shall denote any property chargeable with duty under this Act (rr) :

The term 'Trustee' shall include an executor and administrator, and any person having or taking on himself the administration of property affected by any express or implied trust :

The term 'Person' shall include a body corporate, company, and society :

able on legacies given by the Will of a person domiciled in a foreign country : *Wallace v. Atty.-Gen.*, L. R. 1 Ch. 1 ; but property to which there is succession under an English settlement vested in British trustees, whether the settlement be made by an alien or a British subject, and whether the settlement be made by deed or Will, and wherever the property is locally situate, is liable to succession duty : *Atty.-Gen. v. Campbell*, L. R. 5 H. L. 524. *Lyall v. Lyall*, L. R. 15 Eq. 1. And it must be remembered that although according to the decision in *Wallace v. Atty.-Gen.*, *ubi supra*, succession duty is not payable on legacies given by the Will of a person domiciled in a foreign country, yet where a testator with a foreign domicile by his Will directs an investment in England in trust, and such investment is made, succession duty will be payable in respect of the succession under the trust : *Re Badart's Trusts*, L. R. 10 Eq. 288. *Lyall v. Lyall*, *ubi supra* ; but unless the funds have come to the hands of the English trustees at the time of the death of the person on whose death succession duty is claimed,

no duty will be payable : *Lyall v. Lyall*, *ubi supra*. The word "property" includes foreign moveable property, as, for instance, funds or shares of a foreign government or corporation comprised in a British settlement, vested in trustees, subject to British jurisdiction, and recoverable by action in a British Court ; the mere fact of the person beneficially entitled under a settlement being a foreigner is not sufficient to exempt him from succession duty : *Re Ogilva's Settlement*, 7 C. D. 351. A covenant to pay money upon death, accompanied with a disposition of the fund covenanted to be paid, is a disposition of property within sect. 2. See *Atty.-Gen. v. Montefiore*, 21 Q. B. D. 461. Lord Advocate v. Roberts' Trustees, 21 Sco. Sess. Cas. 2nd ser. 449. *Re Micklethwaite*, 11 Ex. 452. And compare *Re Higgins*, 31 C. D. 142.

(rr) As to the effect of sub-s. (1) of sect. 6 of the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), incorporating into sub-s. (1) of that Act the definition of the term "succession" contained in this section, see the case of *Atty.-Gen. v. Aberdare* [1892], 2 Q. B. 684, *post*, p. 1477(a).

The term 'Legacy Duty Acts' shall denote the Acts now in force for charging duties on legacies and shares of the personal estates of deceased persons."

Sect. 2. "Every past or future disposition of property, by reason (s) whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently (t), and either originally or by way of substitutive limitation and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'Succession' (u); and the term 'Successor' shall denote the person so entitled; and the term 'Predecessor' (x) shall denote settlor, dis-

What disposition and devolutions of property shall confer successions:

definitions of the terms "successor," "predecessor."

(s) As to the construction of these words, see *Wilcox v. Smith*, 4 Drew. 40.

(t) As to what person may properly be said to be contingently entitled after an interval, see *Atty.-Gen. v. Gell*, 3 Hurl. & C. 615.

(u) As to what shall constitute a succession, see *Atty.-Gen. v. Yelverton*, 7 H. & N. 306. *Atty.-Gen. v. Gardner*, 1 Hurl. & C. 639. *Ring v. Jarman*, L. R. 14 Eq. 357. *Atty.-Gen. v. Robertson* [1892], 2 Q. B. 694. [1893], 1 Q. B. 293. A conveyance or assignment by way of *bona fide* sale does not create a succession within the meaning of this Act. *Fryer v. Morland*, 3 C. D. 675. And compare *De Rechberg v. Beeton*, 38 C. D. 192.

(x) As to what constitutes a predecessor, see *Re De Lancey*, L. R. 4 Ex. 345. *Atty.-Gen. v.*

Cecil, L. R. 5 Ex. 263. *Atty.-Gen. v. Littledale*, L. R. 5 Ex. 275. L. R. 5 H. L. 290. With regard to real property where the succession is by disposition the predecessor is the settlor, and where by devolution the predecessor is the person last in possession; *Lord Saltoun v. Lord Advocate*, 8 Macq. H. of L. 673. Where a power is created to be exercised over an estate, the donor of the power, the person out of whose estate a benefit or succession is to be derived, is within sect. 2 the predecessor of the person taking such benefit or succession: *Charlton v. Atty.-Gen.*, 4 A. C. 427. See also *Lord Braybrooke v. Atty.-Gen.*, 9 H. L. C. 150. *Atty.-Gen. v. Floyer*, *ibid.* 477. *Atty.-Gen. v. Smythe*, *ibid.* 497. See also *Atty.-Gen. v. Sib-*

16 & 17 Vict.
c. 51.

Joint tenants
taking by

poner, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived" (y).

Sect. 3. "Where any person shall, at or after the time

thorp, 3 H. & N. 424. In the case of an appointment by a donee of a general power which falls within sect. 2, and does not fall within sect. 4, the appointees must be held to derive their interest from the donor of the power as predecessor and not from the donee, and this, whether the power be joint or sole: *Re Barker*, 7 H. & N. 109. *Charlton v. Atty.-Gen.*, 4 A. C. 427. *Atty.-Gen. v. Mitchell*, 6 Q. B. D. 548. It has been perfectly well settled since the case of the *Lord Braybrooke v. Atty.-Gen.*, 9 H. L. C. 150, that where there is family arrangement for a resettlement of an estate, by which the tenant for life takes back his life estate and the powers which he had before, then everything else under the settlement must necessarily come out of the rest of the estate which belonged to the tenant in tail, and therefore the succession must be derived from the tenant in tail: *Atty.-Gen. v. Dowling*, 6 Q. B. D. 179, *per* Lord Selborne. It is different if the power of appointment in respect of the estate is granted for value given, for then the donee of the power may be the predecessor, although he is not the owner of the estate: *Atty.-Gen. v. Baker*, 4 H. & N. 19. *Re Jenkinson*, 24 Beav. 64. *Atty.-Gen. v. Dowling*, 6 Q. B. D. 177. See also *Atty.-Gen. v. Yelverton*, 7 H. & N. 306: but a tenant for life will not be considered the predecessor unless at the time of the settlement he had or claimed to have an inte-

rest in the estate subject to the power, or was a creditor on the estate: *Atty.-Gen. v. Floyer*, 9 H. L. C. 477. Marriage is not a disposition for valuable consideration so as to make the donee of the power a purchaser: *Re Ramsay's Settlement*, 30 Beav. 75. Further it should be noted that the case of a family settlement is not within the first branch of sect. 4; for the first branch of that section points to an absolute power, practically equivalent to property. A general power in a family settlement which cannot be exercised without the concurrence of two minds is not equivalent to a joint property in the two donees: *per* Lord Selborne in *Charlton v. Atty.-Gen.*, 4 A. C. 427. The words of sect. 4 apply to the case of one person possessing a general power to dispose of property as an absolute owner, and not to a power given in a family settlement to a father and son, where one is intended to be a check upon the other in the exercise of the power: *per* Lord Cairns, L. C., *ibid.* As to voluntary nomination under the Customs Annuity and Benevolent Fund in rendering the fund liable to succession duty, see *Atty.-Gen. v. Abdy*, 1 H. & C. 296: *aliter* as to a nomination to secure an advance.

(y) The general plan of the Act is expounded by Lord Justice Turner in *Oldfield v. Preston*, 3 De G. F. & J. 416. See also *Fryer v. Morland*, 3 C. D. 675.

appointed for the commencement of this Act, have any property vested in them jointly, by any title not conferring on them a succession, any beneficial interest in such property accruing to any of them by survivorship shall be deemed to be a succession; and every person to whom any such interest shall accrue shall be deemed to be the successor; and the person upon whose death such accruer shall take place shall be deemed to be the predecessor; and where any persons after the time appointed for the commencement of this Act shall take any succession jointly, they shall pay the duty, if any, chargeable thereon by this Act in proportion to their respective interests in the succession; and any beneficial interest in such succession accruing to any of them by survivorship shall be deemed to be a new succession, derived from the predecessor from whom the joint title shall have been derived" (z).

Sect. 4. "Where any person shall have a general power of appointment under any disposition of property taking effect (a) upon the death of any person dying after the time appointed for the commencement of this Act, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed as a succession derived from the donor of the power; and where any person shall have a limited power of appointment, under

16 & 17 Vict.
c. 51.

survivorship
to be deemed
successors.

General
powers of
appointment
to confer
successions.

(z) It was formerly said that in respect of property which had come to a husband and wife jointly there could be no succession by survival to the survivor, because the tenancy was by entireties: whether the effect of the Married Women's Property Act, 1882, has been to alter this, has not yet been decided. As to the effect generally of the Act on property coming to a husband and wife jointly, see *Re March*, 27 C. D. 166. *Re Jupp*, 39 C. D. 148. *Re Dixon*, 42 C. D.

306. See *ante*, pp. 961, 1327.

(a) The words "taking effect" refer to the "power" and not to the "disposition," and therefore where a power came into operation before the commencement of the Act it was held that sect. 4 did not apply, although the appointment did not take effect till after the commencement of the Act: *Re Lovelace*, 4 De G. & J. 340. 28 L. J. Ch. 489. *Atty.-Gen. v. Mitchell*, 6 Q. B. D. 548.



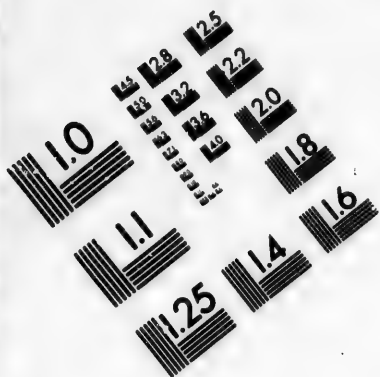
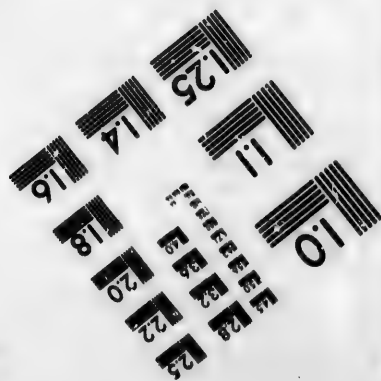
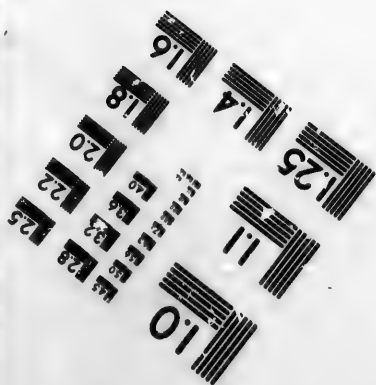
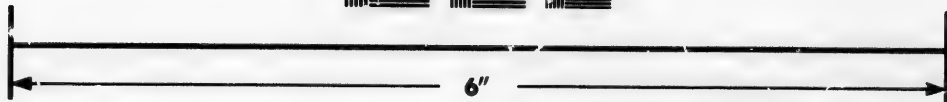
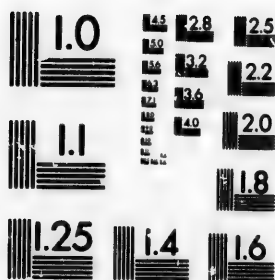


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18 & 17 Vict.
c. 51.

Extinction of
determinable
charges to
confer
successions

a disposition taking effect, upon any such death, over property, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor" (b).

Sect. 5. "Where any property shall, at or after the time appointed for the commencement of this Act, be subject to any charge, estate or interest determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person or persons upon the extinction or determination of such charge, estate or interest, shall be deemed to be a succession accruing to the person, or the persons if more than one, then entitled beneficially to the property or the income thereof, according to his or their respective estates or interests therein, or beneficial enjoyment thereof; and the person or persons from whom such successor or successors respectively shall have derived title to the property so charged shall be

(b) This section does not restrict the operation of the duty as regards appointments to cases where the powers are created by Wills taking effect, or by settlements made, after the commencement of the Act: *Re Lovelace*, 4 De G. & J. 340. The rule settled by this case, together with *Re Wallop's case*, 1 De G. J. & S. 656, is that, (in cases where sect. 4 applies,) where a general power is given and exercised, the appointee is a person taking in succession to the appointor, and the appointor is also a successor to the donor of the power: *Re Chapman's Trusts*, 2 H. & M. 450, *per Wood, V.-C.* Atty.-Gen. v. Upton, L. R. 1 Ex. 224. But *contra*, if sect. 2 and not sect. 4 applies: *Re Barker*, 7 H. & N. 109; where it appears to have been held that the appointee was liable as on a

succession derived from the donor of the power. Where A., having a general power of appointment, subject to a life interest in his sister B., appointed by Will to C. for life, with remainder to such persons as B. should appoint; and A. died, and then B. died in C.'s lifetime having appointed to strangers; and then C. died; it was held that B.'s appointees were liable to 10% per cent. legacy duty, but that the fund was not liable to succession duty in respect of the succession to A., by reason of the exemption in the 14th section, having regard to the principle indicated by the 16th section: *Re Chapman's Trusts*, 2 H. & M. 447. As to what is a general power within the meaning of this section, see *Charlton v. Atty.-Gen.*, note (x), *ante*.

deemed to be the predecessor or predecessors, as the case may be" (c). 16 & 17 Vict. c. 51

Sect. 6. "Provided, that no person entitled, at the time appointed for the commencement of this Act, to the immediate reversion in any real property expectant upon the determination of any lease for life or for years determinable on life, shall be chargeable with duty in respect of such determination, in the event of the same occurring in his lifetime."

Persons now beneficially entitled to real property subject to leases for life, not liable to duty.

Sect. 7. "Where any disposition of property, not being a *bona fide* sale, and not conferring an interest expectant on death on the person in whose favour the same shall be made, shall be accompanied by the reservation or assurance of or contract for any benefit to the grantor, or any other person, for any term of life or for any period ascertainable only by reference to death, such disposition shall be deemed to confer at the time appointed for the determination of such benefit an increase of beneficial interest in such property, as a succession equal in annual value to the yearly amount or yearly value of the benefit so reserved, assured, or contracted for, on the person in whose favour such disposition shall be made."

Dispositions accompanied by the reservation of a benefit to the grantor, &c., to confer successions.

(c) Sect. 5 relates to property subject to some charge, estate or interest, determinable on death, and enacts in substance that the increase of benefit accruing on the determination of such charge, estate or interest, to the person beneficially entitled to the property subject thereto, shall be a succession—that is to say, the section provides for the case of a person having property relieved from a burden by the death of another. It does not therefore apply in a case where property is limited to pass beneficially, alternatively on the lapse of a time certain or on a death, whichever shall first occur,

so as to entitle the person to whom the property passes, in the event of the death first occurring, to pay duty only on the value of the estate between the death and the end of the time limited, as being "the increase of benefit" accruing by reason of the death, but he must pay duty on the whole value of the estate accruing, as being a succession within sect. 2. *Atty.-Gen. v. Noyes*, 8 Q. B. D. 125. The determination of a dower, or jointure, by death will confer a succession on the person entitled to the estate relieved: *Harding v. Harding*, 2 Giff. 597.

16 & 17 Vict.
c. 51.

Dispositions
to take effect
at periods
depending on
death, or
made for
evading duty,
to confer
successions.

Sect. 8. "Where any disposition of property shall be made to take effect at a period ascertainable only by reference to the date of the death of any person dying after the time appointed for the commencement of this Act, such disposition shall be deemed to confer a succession on the person in whose favour the same shall be made; and where any disposition of property shall purport to take effect presently or under such circumstances as not to confer a succession, but by the effect or in consequence of any engagement, secret trust, or arrangement capable of being enforced in a Court of Law or Equity, the beneficial ownership of such property shall not *bonâ fide* pass according to such disposition, but shall in fact devolve to any person on death, or at some period ascertainable only by reference to death, then such last-mentioned person shall be deemed to acquire the property so passing as a succession derived from the person making the disposition as the predecessor; and where any Court of competent jurisdiction shall declare any disposition to have been fraudulent and made for the purpose of evading the duty imposed by this Act, it shall be lawful for such Court to declare a succession to have been conferred on such person at such time and to such an extent as such Court shall think just; and such last-mentioned person shall be deemed to have taken a succession accordingly derived from the person making such disposition as predecessor."

Duties to be
under the care
and manage-
ment of the
Commissioners
of Inland
Revenue.

Sect. 9. "The duties hereinafter imposed shall be considered as stamp duties, and shall be under the care and management of the Commissioners of Inland Revenue, hereinafter called 'The Commissioners,' who, by themselves and their officers, shall have the same powers and authorities for the collection, recovery and management thereof, as are by an Act passed in the session holden in the twelfth and thirteenth years of the reign of her present Majesty, chapter one, or by any other Act or Acts, vested in them for the collection, recovery and management of any stamp duties; and shall provide proper stamps for denoting

the rate *per centum* of the duties payable under this Act; and shall have all other powers and authorities requisite for carrying this Act into execution." 16 & 17 Vict. c. 51.

Sect. 10. "There shall be levied and paid to her Majesty in respect of every such succession as aforesaid, according to the value thereof, the following duties (*d*) (that is to say, Duties on successions.

Where the successor shall be the lineal issue or lineal ancestor of the predecessor, a duty at the rate of one pound *per centum* upon such value (*e*):

Where the successor shall be a brother or sister, or a descendant of a brother or sister of the predecessor, a duty at the rate of three pounds *per centum* upon such value:

Where the successor shall be a brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother of the predecessor, a duty at the rate of five pounds *per centum* upon such value:

(*d*) By the Customs and Inland Revenue Act, 1888, 51 & 52 Vict. c. 8, s. 21 (1), it is provided that the following additional duties besides those chargeable by this section shall be charged on successions on deaths occurring on or after July 1st, 1888; *viz.* Where the successor shall be the lineal issue or lineal ancestor of the predecessor, a duty at the rate of ten shillings per cent. upon the value of the interest of the successor; in all other cases a duty of thirty shillings on that interest: but this additional duty is not to be payable on leaseholds passing by Will or devolution of law, or on property included in an account according to the value whereof duty is payable under 44 & 45 Vict. c. 12.

(*e*) By sect. 41 of 44 Vict. c. 12, it is provided that: "In respect of any succession to property ac-

cording to the value whereof duty shall have been paid on the affidavit or inventory or account in conformity with this Act, the duty at the rate of one pound per centum imposed by the Succession Duty Act, 1853, shall not be payable." The exemption in sect. 41 applies not only to duties payable in connection with the Will or intestacy which gives rise to the claim for stamp duty, but to duties in connection with some other Will or intestacy or some prior disposition creating a succession; that is to say, its application is not limited to cases where the succession duty which would have been claimable but for this section and the duty the payment of which under stat. 55 Geo. III. c. 184, is the basis of the exemption, are payable in respect of the same administration: *Re Haygarth's Trusts*, 22 C. D. 545.

16 & 17 Vict.
c. 51.

Where the successor shall be a brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother of the predecessor, a duty at the rate of six pounds *per centum* upon such value :

Where the successor shall be in any other degree of collateral consanguinity to the predecessor than is hereinbefore described, or shall be a stranger in blood to him, a duty at the rate of ten pounds *per centum* upon such value" (f).

Provision as
to married
persons
chargeable
with succession
or legacy
duties.

Sect. 11 "Where any person chargeable with duty under this Act in respect of any succession, or chargeable with duty under the Legacy Duty Acts in respect of any legacy bequeathed to him or her by a testator dying after the time appointed for the commencement of this Act, or in respect of the personal estate of any person dying after the same period, shall have been married to any wife or husband of nearer consanguinity than himself or herself to the predecessor, testator or deceased person, then the person taking such succession, legacy or personal estate, shall pay in respect thereof the same rate of duty only as such his or her wife or husband would have been chargeable with if she or he had taken the same."

What duties
payable when
the successor
is also the
predecessor.

Sect. 12. "Where any person shall take a succession under a disposition made by himself, then, if at the date of such disposition he shall have been entitled to the property comprised in the succession expectantly on the death of any person dying after the time appointed for the commencement of this Act, and such person shall have died during the continuance of such disposition, he shall be chargeable with

(f) Although the *status* of legitimacy will be determined according to the law of the domicile of the parents ; *Re Goodman's Trusts*, 17 C. D. 266. *Skottowe v. Young*, L. R. 11 Eq. 474 ; yet the mere fact that illegitimate children acknowledged by the parent may by

the law of the domicile be entitled to take his property, will not prevent them being treated as strangers in blood to their putative father for the purposes of this section, unless the law of domicile also legitimates them : *Atkinson v. Anderson*, 21 C. D. 100.

duty on his succession, at the same rate as he would have been chargeable with if no such disposition had been made; but a successor shall not in any other case be chargeable with duty upon a succession taken under a disposition made by himself, and no person shall be chargeable with duty upon the extinction or determination of any charge, estate or interest created by himself, unless at the date of the creation thereof he shall have been entitled to the property subjected thereto expectantly on the death of some person dying after the time appointed for the commencement of this Act" (g).

Sect. 13. "Where the successor shall derive his succession from more predecessors than one, and the proportional interest derived from each of them shall not be distinguishable, it shall be lawful for the commissioners to agree with the successor as to the duty payable; but if no such agreement shall be made, the successor shall be deemed to have derived his succession in equal proportions from each predecessor, and shall be chargeable with duty accordingly" (h).

Sect. 14. "Where the interest of any successor in any personal property shall, before he shall have become entitled thereto in possession, have passed by reason of death to any other successor or successors, then one duty only shall be paid in respect of such interest, and shall be due from the successor who shall first become entitled thereto in possession; but such duty shall be at the highest rate which, if every such successor had been subject to duty, would have been payable by any one of them" (i).

16 & 17 Vict.
c. 51.

Provision as
to joint pre-
decessors.

Duty on
transmitted
successions.

(g) See as to the construction of this section, *Atty.-Gen. v. Sibthorp*, 3 H. & N. 424. *Atty.-Gen. v. Braybrooke*, 5 H. & N. 488, S. C. *sub nom.* *Lord Braybrooke v. Atty.-Gen.*, 9 H. L. C. 450. *Atty.-Gen. v. Gardner*, 1 H. & C. 639. *Atty.-Gen. v. Cecil*, L. R. 5 Ex. 263.

(h) As to the construction of

this section, see *Atty.-Gen. v. Baker*, 4 H. & N. 19.

(i) See *Re Chapman's Trusts*, 2 H. & M. 447. *Atty.-Gen. v. Cleave*, 31 L. T. N. S. 86. Where an interest in personal property has been transmitted before it has ripened into enjoyment, it matters not whether the person originally en-

16 & 17 Vict.
c. 51.

Duties payable
in respect of
transferred
interests.

Sect. 15. "Where, at the time appointed for the commencement of this Act, any reversionary property expectant on death shall be vested, by alienation or other derivative title, in any person other than the person who shall have been originally entitled thereto under any such disposition or devolution as is mentioned in the second section of this Act, then the person in whom such property shall be so vested shall be chargeable with duty in respect thereof as a succession at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created; and where, after the time appointed for the commencement of this Act, any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place (*k*).

titled died before or after the commencement of the Act, only one duty is payable on any succession to such property, whether such duty be legacy or succession duty. If the duty is succession duty and the interest has passed through more than one successor, then under this section the duty payable shall be the highest that would have been paid by any of such successors. If the duty be legacy duty, then under sect. 18 no succession duty of any kind is payable: *Atty.-Gen. v Littledale*,

L. R. 5 Ex. 275. L. R. 5 H. L. 290.

(*k*) As to the construction of this section, see *Atty.-Gen. v. Gardner*, 1 Hurl. & C. 639. *Atty.-Gen. v. Rushton*, 2 Hurl. & C. 812. *Atty.-Gen. v. Cecil*, L. R. 5 Ex. 263. *Atty.-Gen. v. Littledale*, L. R. 5 Ex. 275. L. R. 5 H. L. 290. "By alienation or by any title not conferring a new succession" means "either by alienation or by any title other than alienation, in both cases not conferring a new succession." Settlement after the Succession Duty Act: A. tenant for

Sect. 16. "Where property shall become subject to a trust for any charitable or public purposes, under any past or future disposition, which, if made in favour of an individual, would confer on him a succession, there shall be payable in respect of such property, upon its becoming subject to such trusts, a duty at the rate of ten pounds *per centum* upon the amount or principal value of such property; and it shall be lawful for the trustee of any such property to raise the amount of any duty due in respect thereof, with all reasonable expenses, upon the security of the charity property, at interest, with

16 & 17 Vict.
c. 51.

Succession
subject to
trusts for
charitable
or public
purposes
chargeable
with duty.

life. B. remainderman in fee. A. and B. convey their estates for money to C. in fee. C. dies having devised to D. in fee. D. pays duty on his succession from C. and then sells: On A.'s death no more succession duty will be payable than has already been paid by D.: *Re Cooper and Allen's Contract*, 4 C. D. 502. If a tenant for life and a remainderman respectively mortgage their interests, and the mortgagees sell, the purchaser takes the remainderman's succession by alienation not conferring a succession within sect. 15, and will accordingly be liable to duty on the death of the tenant for life if he still remains the owner, *aliter* if he dies, for then there is a new succession, and the successor coming in under that title will have to pay the succession duty: *Ibid.* Where a succession is alienated, and falls into possession after the death of the alienor, duty is payable under this section at the same rate as if no alienation had been made, and the alienor had survived the falling into possession: *Sol.-Gen. v. Law Revisionary Interest Society*, L. R. 8 Ex. 233. Sums advanced to chil-

dren under a power out of funds settled by marriage settlement on the usual trusts are liable to succession duty as a succession the title to which has been accelerated within the meaning of this section: *Ex parte Sitwell*, 21 Q. B. D. 466. But where a tenant for life and remainderman join in disentailing and resettling a property, and limiting an annuity immediately to the remainderman during the joint lives of himself and the tenant for life, that is not an acceleration of interest within this section: *Inland Revenue Commissioners v. Harrison*, L. R. 7 H. L. 1. The successor from whom duty is payable is the person who on the happening of the death eventually becomes beneficially entitled in possession; that which was conferred upon any previous successor was only an expectant interest, not a succession. The interest of an executor, not being beneficial, is not a succession within sect. 2 or within sect. 15; for sect. 15 imposes no new duty, only a duty in substitution for that imposed by sect. 2: *Atty.-Gen. v. Littledale*, L. R. 5 Ex. 275. L. R. 5 H. L. 290.

16 & 17 Vict.
c. 51.

Provisions for
life policies
and certain
post obit
bonds.

power for him to give effectual discharges for the money so raised" (l).

Sect. 17. "No policy of insurance on the life of any person shall create the relation of predecessor and successor between the insurers and the assured, or between the insurers and any assignee of the assured, and no bond or contract made by any person *bonâ fide* for valuable consideration in money or money's worth, for the payment of money or money's worth after the death of any other person, shall create the relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same shall be made; but any disposition or devolution of the monies payable under such policy, bond, or contract, if otherwise such as in itself to create a succession within the provisions of this Act, shall be deemed to confer a succession" (m).

(l) Atty.-Gen. v. Montefiore, 21 Q. B. D. 461.

(m) Notwithstanding the fact that the exception created by this section is limited to bonds and contracts made by any person *bonâ fide* for valuable consideration in money or money's worth, for the payment of money or money's worth after the death of any other person, a contract for valuable consideration to pay money on the death of the contracting party is not within the scope of the Act, nor does such a contract create a succession or make the vendor and purchaser thereunder predecessor and successor within the meaning of sect. 2 of the Act: see *Fryer v. Morland*, 3 C. D. 675. The 17th section therefore was unnecessary, and must be treated as inserted in the Act *ex cautela*. In short, the Act only grants a duty on succe-

sions to property by persons succeeding to estates by gratuitous title, the only exception being that marriage consideration is treated as if it were a gratuitous title: *per Jessel, M. R., ibid.* p. 681: the words "money or money's worth" appearing to have been selected for the purpose of excluding the marriage consideration. Although a purchaser for money or money's worth of a reversion is not within the statute, yet if the purchase is made by trustees under a Will, and paid for out of the testator's estate, the beneficiaries entitled to the purchased estate are successors, liable to duty when the reversion falls into possession; *De Rechberg v. Beeton*, 38 C. D. 192. See also *Oldfield v. Preston*, 3 De G. F. & J. 398, in which case it was held that there was no succession as between the subscribers to a ton-

Sect. 18. "Where the whole succession or successions derived from the same predecessor, and passing upon any death to any person or persons, shall not amount in money or principal value to the sum of one hundred pounds, no duty shall be payable under this Act in respect thereof or of any portion thereof; and no duty shall be payable under this Act upon any succession, which, as estimated according to the provisions of this Act, shall be of less value than twenty pounds in the whole (n), or upon any monies applied to the payment of the duty on any succession according to any trust for that purpose, or by any person in respect of a succession, who, if the same were a legacy bequeathed to him by the predecessor, would be exempted (o) from the payment of duty in respect thereof under the Legacy Duty Acts; and no person shall be charged with duty under this Act in respect of any interest surrendered by him or extinguished before the time appointed for the commencement of this Act; and no person charged with the duties on legacies and shares of personal estate under the Legacy Duty Acts, in respect of any property subject to such duties, shall be charged also with the duty granted by this Act in respect of the same acquisition of the same property" (p).

Sect. 19. "No legatee or other person shall, after the time appointed for the commencement of this Act, be chargeable under the Legacy Acts with duty, not then already due, in respect of any leasehold hereditaments of any testator or

16 & 17 Vict.
c. 51.

Exemptions.

Leasehold
estates not to
be charged
with legacy
duty as
personal
estate.

(n) By sect. 10, sub-sect. 2, of the Customs and Inland Revenue Act, 1889, it is provided that, subject to the relief given by sect. 18, succession duty shall be charged on successions under 20*l.* in value.

(o) The exemptions here referred to are the special exemptions given by the Legacy Duty Acts, and the section does not extend to cases where no duty was imposed by those Acts; in effect the word

"exempted" must be construed in its legal sense, and not as meaning "free from;" *Atty.-Gen. v. Fitzjohn*, 2 H. & N. 465. *Re Wallop's Trusts*, 1 De G. J. & S. 656, 672.

(p) See *Earl Howe v. Earl of Lichfield*, L. R. 2 Ch. 155. *Atty.-Gen. v. Littledale*, L. R. 5 Ex. 275. L. R. 5 H. L. 290. *Atty.-Gen. v. Mitchell*, 6 Q. B. D. 548.

16 & 17 Vict.
c. 61.

Duties to be
paid on the
successor
becoming
entitled in
possession, but
in the case of
outstanding
interests, on
the determi-
nation thereof.

The interest
of a successor
in real prop-
erty to be
considered as
an annuity.

deceased person, as belonging to the personal estate of the testator or deceased."

Sect. 20. "The duty imposed by this Act shall be paid at the time when the successor or any person in his right or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof; except that if there shall be any prior charge, estate or interest not created by the successor himself, upon or in the succession, by reason whereof the successor shall not be presently entitled to the full enjoyment or value thereof, the duty in respect of the increased value accruing upon the determination of such charge, estate or interest shall, if not previously paid, compounded for or commuted, be paid at the time of such determination; and except that in case of an annuity or property hereby made chargeable as an annuity, the duties shall be paid by such instalments as are hereinafter directed or referred to; provided that no duty shall be payable upon the determination of any lease purporting at the date thereof to be a lease at rack-rent, in respect of the increase accruing to the successor upon such determination" (q).

Sect. 21. "The interest of every successor, except as herein provided, in real property, shall be considered to be of the value of an annuity equal to the annual value of such property (r), after making such allowances as are hereinafter directed, and payable from the date of his becoming entitled thereto in possession, or to the receipt of the income or profits thereof during the residue of his life, or for any less

(q) If, however, the prior charge, estate or interest, created by the successor himself, confers a new succession, the person who created the charge only pays the duty upon the increased value of his estate when the charge, estate or interest so created ceases: *Re Peyton*, 7 H. & N. 265, 287.

(r) As to the meaning of the

words "annual value of such property," see *Atty.-Gen. v. Lord Sefton*, 2 Hurl. & C. 362. 11 H. L. C. 257. Stock produced by a sale of real estate under the London Dock Act (39 & 40 Geo. III. c. 47), subject to jointure, is real estate: *Shard v. Shard*, 14 Ves. 328.

period during which he shall be entitled thereto; and every such annuity, for the purposes of this Act, shall be valued according to the tables in the schedule annexed to this Act; and the duty chargeable thereon shall be paid by eight equal half-yearly instalments, the first of such instalments to be paid at the expiration of twelve months next after the successor shall have become entitled to the beneficial enjoyment of the real property in respect whereof the same shall be payable, and the seven following instalments at half-yearly intervals of six months each, to be computed from the day on which the first instalment shall have become due (s), provided that if the successor shall die before all such instalments shall have become due, then any instalments not due at his decease shall cease to be payable, except in the case of a successor who shall have been competent to dispose by Will of a continuing interest in such property, in which case the instalments unpaid at his death shall be a continuing charge on such interest. in exoneration of his other property, and shall be payable by the owner for the time being of such interest" (t).

(s) By the Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), s. 22, the successor has the option of paying half the succession duty by four equal annual instalments, commencing at the end of a year after entering upon enjoyment, and the other half either upon the day of payment of the last of such instalments, or by four further annual instalments, with interest at 4½ per cent. on the amount remaining unpaid.

(t) It has been held that the word "competent" in this section means to refer to the successor's interest in the property, and not to his understanding: *Atty.-Gen. v. Hallett*, 2 H. & N. 368. The case is within the exception en-

grafted on the proviso notwithstanding the successor becomes competent by his own act after the time of his becoming successor. The power of a tenant in tail in possession to enlarge his estate so that he shall become competent to dispose by Will of a continuing interest in the entailed property is incident to the estate which such tenant takes under the instrument creating the entail; and, if he exercises the power, he must be treated, for the purpose of succession duty, as if he had succeeded to such enlarged estate. Thus where a tenant in tail executed a disentailing deed, and died before any instalment of duty under the Act became due, and his

16 & 17 Vict.
c. 51.

Rules for
valuing lands,
houses, &c.

Rule as to
timber.

Rule as to
advowsons.

Sect. 22. "In estimating the annual value of lands used for agricultural purposes, houses, buildings, tithes, teinds, rent-charges, and other property yielding or capable of yielding income not of a fluctuating character, an allowance shall be made of all necessary outgoings" (u).

Sect. 23. "Where timber, trees, or wood, not being coppice or underwood, shall be comprised in any succession, the successor shall be chargeable with duty upon his interest in the net monies, after deducting all necessary outgoings for the year, which shall from time to time be received from any sales of such timber, trees, or wood, and shall account for and pay the same yearly; provided that no duty shall be payable on the net monies received from the sale of timber, trees, or wood in any one year, unless such net monies shall exceed the sum of ten pounds; provided, that if the successor shall be desirous of commuting the duty, and shall deliver to the commissioners an estimate of the net monies obtainable by him from the sale of such timber, trees, and wood as may, in a prudent course of management of the property, be felled by such successor during his life, the commissioners, if satisfied with such estimate, shall accept the same and assess the duty accordingly."

Sect. 24. "A successor shall not be chargeable with duty in respect of any advowson or church patronage comprised in his succession, unless the same, or some right of presentation, or some other interest in or out of such ad-

son and devisee (who but for the deed would have been the next tenant in tail) succeeded to the property, he was held liable to satisfy the duty which his father ought to have paid. The interest of the father became under such circumstances, according to the proviso in this section, a "continuing interest," of which the father was "competent to dispose by Will," and the duty was a

"continuing charge on such interest." *Lord Lilford v. Atty.-Gen.*, 3 H. & C. 239. 2 H. L. C. 63.

(u) The successor is not entitled under this section to a deduction for income tax or the agent's charge for collecting rents: *Re Elwes*, 3 H. & N. 719: nor to deduction for reasonable expenses of trustees acting under authority of the Will: *Re Earl Colley*, L. R. 1 Ex. 288.

vowson, or church patronage, shall be disposed of by or in concert with him for money or money's worth, in which case he shall be chargeable with duty upon the amount or value of the money or money's worth for which the same, or any such presentation or interest, shall be so disposed of at the time of such disposal."

16 & 17 Vict.
c. 51.

Sect. 25. "Where a successor, entitled to any real property, subject to any lease by reason whereof he shall not be presently entitled to the full enjoyment thereof, shall not have paid duty in respect of the full yearly value of such property, he shall be chargeable with duty upon his interest in any fine or grassum or other consideration which may be received during his life for the renewal of any such lease, or the grant of any reversionary lease of the same property."

Rule as to
property
subject to
beneficial
leases.

Sect. 26. "The yearly value of any manor, opened mine, or other real property of a fluctuating yearly income shall either be calculated upon the average profits or income derived therefrom, after deducting all necessary outgoings, during such a number of preceeding years as shall be agreed upon for this purpose between the commissioners and the successor, before the first payment of duty on the succession shall have become due; or if no such period shall be agreed upon, then the principal value of such property shall be ascertained, and the annual value thereof shall be considered to be equal to interest calculated at the rate of three pounds *per centum per annum* on the amount of such principal value."

Rule as to
manors, mines,
&c.

Sect. 27. "Where any body corporate, company, or society shall become entitled, as successors, to any real property, the duty in respect thereof shall be assessed upon the principal value of such property, but shall be payable by such instalments, at such times, and in such manner as the same would be payable if assessed in respect of property devolving on a successor in fee simple; and it shall be lawful for such body corporate, company, or society, or any trustee thereof, to raise the amount of any duty due in respect of their succession

Duty payable
by corpora-
tions, &c.,
taking real
estates.

16 & 17 Vict.
c. 51.

Allowance for
fines, &c., paid
by successor.

Real property
directed to be
sold to be
charged as
personalty.

Personal
property to be
invested in
real property
how to be
charged.

upon the security thereof, at interest, with power for them to give effectual discharges for the money so raised" (x).

Sect. 28. "If a successor, or any person on his behalf, upon becoming entitled to any copyhold or other real property, shall be subject to any fines, casualties of superiority, compositions, reliefs, or charges incident to the tenure thereof, and due in respect of his succession, he shall be entitled to have a deduction allowed to him of the amount of such fines, casualties, compositions, reliefs, or charges from the assessable value of his interest in such copyhold or other real property."

Sect. 29. "The interest of any successor in monies to arise from the sale of real property under any trust for the sale thereof, so far as the same shall not be chargeable with duty under the Legacy Duty Acts, shall be deemed to be personal property chargeable with duty under this Act; provided that where such monies shall be subject to any trust for the re-investment thereof in the purchase of other real property, to which the successor would not be absolutely entitled, such monies shall be deemed to be real property, and for the purpose of this Act each successor's interest therein shall be considered to be of the value of an annuity, payable during his life, or for any less period during which he shall be entitled, equal in amount to the annual produce of the actual trust property at the time of his becoming entitled in possession, whether the same shall then be the real property subject to the trust or direction for sale, or any property purchased in substitution for it, or any intermediate investment of the produce of the sale of the original property."

Sect. 30. "The interest of any successor in personal property, subject to any trust for the investment thereof in the purchase of real property to which the successor would be absolutely entitled shall, so far as the same shall not be

(x) See Sol.-Gen. v. Law Reversionary Interest Society, L. R. 5 Ex. 233.

chargeable with duty under the Legacy Duty Acts, be chargeable with duty under this Act as personal property; and personal property subject to any trust for the investment thereof in the purchase of real property to which the successor would not be absolutely entitled shall, so far as the same shall not be chargeable with duty under the Legacy Duty Acts, be chargeable with duty under this Act as real property: and for the purposes of this Act each successor's interest therein shall be considered to be of the value of an annuity, payable during his life, or for any less period during which he shall be entitled, equal in amount to the annual produce of the actual trust property at the time of his becoming entitled in possession, whether the same shall be the real property directed to be purchased, or any intermediate investment of the personal property directed to be invested in such purchase" (y)

Sect. 31. "Where it shall be required to calculate, for the purposes either of this Act or of the Legacy Duty Acts, the value of any annuity, or of any interest chargeable with duty as an annuity, such value shall, after the time appointed for the commencement of this Act, be calculated according to the tables in the schedule annexed to this Act, and not according to the tables in the schedule annexed to the Act of the Thirty-sixth year of the Reign of King George the Third, chapter fifty-two, and such annuity or interest shall be chargeable with duty accordingly."

Sect. 32. "The following provisions relating to the assessment and payment of duty on personal estate, and the exemption thereof from duty in certain cases, namely, the eighth, tenth, eleventh, twelfth, fourteenth, and twenty-third sections of the said Act of the Thirty-sixth year of the Reign of King George the Third, chapter fifty-two, shall be

(y) In *Re De Jancey*, L. R. 4 Ex. 345, 5 Ex. 102, it was held that money left by Will to be applied in the purchase of real estate is chargeable, so long as it

is not actually so applied, with duty under the Legacy Duty Acts, and not under this section, however it may devolve.

16 & 17 Vict.
c. 51.

Annuities
under this
Act and the
Legacy Duty
Acts to be
valued ac-
cording to the
tables annexed
to this Act.

Provisions as
to the assess-
ment of per-
sonalty.

16 & 17 Vict.
c. 51.

Allowance to
donee of
general power
of appoint-
ment.

What allow-
ance to be
made for in-
cumbrances.

applicable to the personal property comprised in any succession, and to the assessment and payment of duty thereon, as if such personal property were a legacy bequeathed by the predecessor to the successor, and were subject to the said provisions, and as if the tables in the said Act referred to were the tables in the schedules annexed to this Act" (2).

Sect. 83. "Where the donee of a general power of appointment shall become chargeable with duty in respect of the property appointed by him under such power, he shall be allowed to deduct from the duty so payable any duty he may have already paid in respect of any limited interest taken by him in such property" (a).

Sect. 84. "In estimating the value of a succession no allowance shall be made in respect of any incumbrance thereon created or incurred by the successor, not made in execution of a prior special power of appointment, but an allowance shall be made in respect of all other incumbrances, and also in respect of any monies which the successor may previously to his possession have laid out in the substantial repairs or permanent improvement of real property comprised in his succession; provided that upon any successor becoming entitled to real property subject to any prior principal charge, an allowance shall be made to him in respect

(2) Where a person absolutely entitled to a reversionary interest in personalty settled the same on the usual trusts of a marriage settlement, and on the reversion falling in, paid the whole of the succession duty which had become payable thereon out of his own monies, it was held, having regard to this section, that he was entitled to be repaid out of the corpus of the fund, and to have the trustees raise the necessary amount: *Cuddon v. Cuddon*, 4 C. D. 583. "The 32nd section says this, that certain provisions of the Legacy Duty Act, specified in the section, shall apply

'to the personal property comprised in any succession and to the assessment and payment of duty thereon, as if such personal property were a legacy bequeathed by the predecessor to the successor, and were subject to the said provisions.' That is, those sections apply when they have any application": *per* Jessel, M. R., *Atty.-Gen. v. Noyes*, 8 Q. B. D. 125, 138.

(a) Owners in fee simple are not equivalent to donees of a general power of appointment within the meaning of this section: *Re Cooper and Allen's Contract*, 4 C. D. 802.

only of the yearly sums payable by way of interest or otherwise on such charge as reducing the annual value *pro tanto* of such real property" (b).

16 & 17 Vict.
c. 51.

Sect. 35. "In estimating the value of a succession no allowance shall be made in respect of any contingent incumbrance thereon; but in the event of such incumbrance taking effect as an actual burden on the interest of the successor, he shall be entitled to a return of a proportionate amount of the duty so paid by him in respect of the amount or value of the incumbrance when taking effect" (c).

No allowance to be made in respect of contingent incumbrances, unless they take effect.

Sect. 36. "In estimating the value of a succession no allowance shall be made in respect of any contingency upon the happening of which the property may pass to some other person; but in the event of the same so passing the successor shall be entitled to a return of so much of the duty paid by him as will reduce the same to the amount which would have been payable by him if such duty had been assessed in respect of the actual duration or extent of his interest."

The duty on successions to be calculated without regard to contingencies.

Sect. 37. "Where a successor shall not have obtained the whole of his succession at the time of the duty becoming payable, he shall be chargeable only with duty on the value of the property or benefit from time to time obtained by him; and wherever any duty shall have been paid on account of any succession, and it shall afterwards be proved to the satisfaction of the commissioners that such duty, not being due from the person paying the same, was paid by mistake, or was paid in respect of property which the successor shall have been unable to recover, or from or of which he shall have been evicted or deprived by any superior title, or that for any other reason it ought to be refunded, the commissioners shall thereupon refund the same to the person entitled thereto."

Provision for allowance or return of duty.

(b) See as to the construction of this section, *Re Peyton*, 7 H. & N. 265.

(c) As to incumbrances conferring a new succession, see *ante*, sect. 15, p. 1456.

16 & 17 Vict.
c. 51.

Allowance to
be made to
successor in
respect of
relinquished
property.

Power for
commissioners
to compound
duties.

Power of
commissioners
to receive

Sect. 38. "Where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property, the commissioners shall, upon the computation of the assessable value of his succession, make such an allowance to him as may be just in respect of the value of such property" (d).

Sect. 39. "Where, in the opinion of the commissioners, any succession shall be of such a nature, or so disposed or circumstanced, that the value thereof shall not be fairly ascertainable under any of the preceding directions, or where, from the complication of circumstances affecting the value of a succession, or affecting the assessment or recovery of the duty thereon, the commissioners shall think it expedient to exercise this present authority, it shall be lawful for them to compound the duty payable on the succession upon such terms as they shall think fit, and to give discharges to the successor, upon payment of duty according to such composition; and it shall be lawful for them, in any special cases in which they may think it expedient so to do, to enlarge the time for payment of any duty."

Sect. 40. "It shall be lawful for the commissioners to receive any duty tendered to them in advance, and to allow

(d) Under this section it was held that if a tenant for life and his son the first tenant in tail under a Will or a previous settlement resettle the estate, and by such resettlement an annuity, charged upon the estate, is given to the son during his father's life, and the father dies and the son succeeds to the estate on which the annuity is charged, there must be, in calculating the succession duty under this section, an allowance made to the son in respect of the amount of the annuity. *Lord Braybrooke v. Atty.-Gen.*, 9 H. L. C. 150. *Commissioners of Inland*

Revenue v. Harrison, L. R. 7 H. L. 1. See *Le Marchant v. Commissioners of Inland Revenue*, L. R. 10 Ex. 392; 1 Ex. D. 185. *Contra*, *Atty.-Gen. v. Silthorpe*, 3 H. & N. 424.

But now by sect. 10 (1) of the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), it is provided that the allowance under this section 38 shall only be made in respect of property which the successor may have acquired by a title not conferring a succession on him, and which passes from the successor to some other person.

discount thereon at the rate of four pounds *per centum per annum*, or at such other rate as may from time to time be directed by the commissioners of her Majesty's Treasury; and no person by reason of his having made any payment of duty in advance, shall be prejudiced in his right to have any repayment of duty made to him to which he may become entitled under any of the provisions of this Act."

16 & 17 Vict.
c. 51.
duty in
advance.

Sect. 41. "It shall be lawful for the commissioners, in their discretion, upon application made by any person who shall be entitled to a succession in expectancy, to commute the duty presumptively payable in respect of such succession for a certain sum to be presently paid, and for assessing the amount which shall be so payable they shall cause a present value to be set upon such presumptive duty, regard being had to the contingencies affecting the liability to such duty, and the interest of money involved in such calculation being reckoned at the rate for the time being allowed by the commissioners in respect of duties paid in advance; and upon the receipt of such certain sum they shall give discharges to the successor accordingly" (e).

Power for
commissioners
to commute
future duties.

(e) By sect. 11 of the Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), it is provided that: Where any legacy duty or succession duty shall be presumptively payable in respect of any interest in expectancy upon the determination of a life or other temporary interest in possession in a legacy or residue, or in personal property comprised in a succession, and the duty (if any) payable upon the life or other temporary interest should have been fully paid and satisfied, it shall be lawful for the Commissioners of Inland Revenue, in their discretion, upon the application of the executor or trustee, or other person who would be accountable for the duty in respect of such interest in ex-

pectancy, if it were then in possession, to commute the duty presumptively payable for a certain sum to be presently paid. For assessing the amount which shall be so payable the Commissioners shall cause a present value to be set upon the presumptive duty, regard being had to any contingencies affecting the liability to such duty, and the interest of money involved in the calculation being reckoned at the rate for the time being allowed by the Commissioners in respect of duties paid in advance under the Succession Duty Act, 1853. Upon the receipt of the certain sum the Commissioners shall give a discharge for the duty accordingly.

16 & 17 Vict.
c. 51.

Duty to be a
first charge on
property.

Sect. 42. "The duty imposed by this Act shall be a first charge on the interest of the successor, and of all persons claiming in his right, in all the real property in respect whereof such duty shall be assessed; and such duty shall also be a first charge on the interest of the successor in the personal property in respect whereof the same shall be assessed, while the same shall remain in the ownership or control of the successor, or of any trustee for him, or of his guardian or committee, or tutor or curator, or of the husband of any wife who shall be the successor; and the said duty shall be a debt due to the crown from the successor, having, in the case of real property comprised in any succession, priority over all charges and interests created by him, but such duty shall not charge or affect any other real property of the successor than the property comprised in such succession: provided that where any settled real property comprised in a succession shall be subject to any power of sale, exchange, or partition, exercisable with the consent of the successor, or by the successor with the consent of another person, he shall not be disqualified by the charge of duty on his succession from effectually authorizing by his consent the exercise of such power, or exercising any power with proper consent, as the case may be, and in such case the duty shall be charged substitutively upon the successor's interest in all real property acquired in substitution for the real property before comprised in the succession, and in the meantime upon his interest also in all monies arising from the exercise of any such power, and in all investments of such monies" (f).

(f) The operation of the 42nd section of the Succession Duty Act on an exercise of a power of sale is to shift the duty to the purchase-money or its investments: *Dugdale v. Meadows*, L. R. 6 Ch. 501. And the operation of the section is the same where the sale is under the powers conferred by the 22nd section of the Settled Estates Act, 1877: *Re Warner's Settled Estates*, 17 C. D. 711.

Where a testator had entered into a covenant to pay a sum of money to the trustees of the marriage settlement free from all deductions, the trustees of the settlement and not the executors are liable for succession duty. *Re Higgins*, 31 C. D. 142.

But now as to limitation of time for recovering succession duty, see *post*, p. 1515.

Sect. 43. "The commissioners shall, at the request of any successor, or any person claiming in his right, accept or cause to be made so many separate assessments of the duty payable in respect of the interest of the successor in any separate properties, or in defined portions of the same property, as shall be reasonably required; and in such cases the respective properties shall be chargeable only with the amount of duty separately assessed in respect thereof: and it shall be lawful also for the commissioners, by their certificates, to be issued in such form as they shall think fit, from time to time to declare that any duties already assessed, whether collectively or distributively, in respect of any succession, shall thenceforth be charged, as to any unpaid instalments, according to any further distribution thereof, upon separate parts only of the property in respect of which such assessment shall have been made, in which case the charge of such duties shall be thenceforth limited according to such further distribution."

Sect. 44. "The following persons, besides the successor, shall be personally accountable to her Majesty for the duty payable in respect of any succession, but to the extent only of the property or funds actually received or disposed of by them respectively after the time appointed for the commencement of this Act; that is to say, every trustee, guardian, committee, tutor, or curator, or husband in whom respectively any property, or the management of any property, subject to such duty, shall be vested, and every person in whom the same shall be vested by alienation or other derivative title at the time of the succession becoming an interest in possession; and all such trustees, guardians, committees, tutors, curators, husbands, and persons shall be authorised to compound or pay in advance or commute any duty, and retain out of the property subject to any such duty the amount thereof, or to raise such amount, and the expenses incident thereto, at interest on the security of such property, with power to give effectual discharges for the same, and such security shall have priority over any charge or incumbrance created by the

16 & 17 Vict.
c. 51.

Provision for
the separate
assessments of
properties.

What persons
accountable
for duty.

16 & 17 Vict.
c. 51.

Notice of suc-
cession to be
given to the
commissioners
and a return of
the property
made.

successor; and in the event of the non-payment of such duty as aforesaid every person hereby made accountable shall be a debtor to her Majesty in the amount of the unpaid duty for which he shall be so accountable" (g).

Sect. 45. "The persons hereby made accountable for the payment of duty in respect of any succession, or some of them, shall, in the case of personal property, at the time of the first payment, delivery, retainer, satisfaction, or other discharge of the same or any part thereof to or for the successor or any person in his right, and in the case of real property when any duty in respect thereof shall first become payable, give notice to the commissioners or to their officers of their liability to such duty, and shall at the same time deliver to the commissioners or to their officers a full and true account of the property for the duty whereon they shall respectively be accountable, and of the value thereof, and of the deductions claimed by them, together with the names of the successor and predecessor, and their relation to each other, and all such other particulars as shall be necessary or proper for enabling the commissioners fully and correctly to ascertain the duties due; and the commissioners, if satisfied with such account and estimate as originally delivered, or with any amendments that may be made therein upon their requisition, may assess the succession duty on the footing of such account and estimate; but it shall be lawful for the commissioners, if dissatisfied with such account and estimate, to cause an account and estimate to be taken by any person or persons to be appointed by themselves for that purpose, and to assess the duty on the footing of such last-mentioned account and estimate, subject to appeal, as herein-after provided; and if the duty so assessed shall exceed the duty assessable according to the return made to the commissioners, and with which they shall have been dissatisfied,

(g) The executor paying a debt is not accountable as a trustee within the meaning of this section, *Re Higgins*, 31 C. D. 142; 29

C. D. 697. As to the liability of an executor paying a legacy under sect. 6 of 36 Geo. III. c. 52, see *ante*, p. 1411.

and if there shall be no appeal against such assessment, then it shall be in the discretion of the commissioners, having regard to the merits of each case, to charge the whole or any part of the expenses incident to the taking of such last-mentioned account and estimate on the interest of the successor, in respect whereof the duty shall be due, in increase of such duty, and to recover the same forthwith accordingly; and if there shall be an appeal against such last-mentioned assessment, then the payment of such expenses shall be in the discretion of the court of appeal hereinafter appointed" (h).

Sect. 46. "If any person required to give any such notice or deliver such account as aforesaid shall wilfully neglect to do so at the prescribed period, he shall be liable to pay to her Majesty a sum equal to ten pounds *per centum* upon the amount of duty payable by him, or in the case of a succession chargeable with a higher rate of duty than one pound *per centum* upon the value thereof, upon such less sum as such duty, if assessable at the rate of one pound *per centum* upon the value of the succession, would amount to, and a like penalty for every month after the first month during which such neglect shall continue; and if any person liable under this Act to pay any duty shall, after such duty shall have been finally ascertained, wilfully neglect to do so within twenty-one days, he shall also be liable to pay to her Majesty a sum equal to ten pounds *per centum* upon the amount of duty so unpaid, or upon such less sum as such duty, if assessable at the rate of one pound *per centum* on the value of the succession, would amount to, and a like penalty for every month after the first month during which such neglect shall continue."

Sect. 49. "Every person who under the provisions of this Act may deliver any account or estimate of the property

Penalty on not giving notices of succession, and on not paying duty when ascertained.

Accounting party to verify his account by

(h) By 52 & 53 Vict. c. 7, s. 10 (3), it is provided that if the Commissioners are dissatisfied with an account and estimate delivered

under this section they may, subject to appeal, assess the duty or proceed as this section directs.

16 & 17 Vict.
c. 51.

production of
books and
documents,
and commis-
sioners may,
without fee,
inspect and
take copies of
public books.

Power for
accountable
party to
appeal.

comprised in any succession shall, if required by the commissioners, produce before them such books and documents in the custody or control of such person, so far as the same relate to such account or estimate, as may be capable of affording any necessary information for the purpose of ascertaining such property and the duty payable thereon: and the commissioners may, without payment of any fee, inspect and take copies of any public book; but all such information shall be deemed to be confidential, and the commissioners shall not disclose the same, or the contents of any document or book, to any person, otherwise than for the purposes of this Act."

Sect. 50. "It shall be lawful for any accountable party dissatisfied with the assessment of the commissioners, upon giving, within twenty-one days after the date of such assessment, notice in writing to the commissioners of his intention to appeal against such assessment, and a statement of the grounds of such appeal, such statement to be furnished within the further period of thirty days, to appeal by petition accordingly to her Majesty's Court of Exchequer in England (*hh*), Scotland, or Ireland, according to the place in which the appellant shall be resident; and every such Court, or any judge thereof sitting in chambers, shall have jurisdiction to hear and determine the matter of such appeal and the costs thereof, with power to direct, for the purposes of such appeal, any inquiry, valuation, or report to be made by any officer of the Court, or other person, as such Court or judge may think fit: Provided, that where the sum in dispute in respect of duty on such assessment does not exceed fifty pounds, the accountable party may, having given notice of appeal and delivered a statement of the grounds thereof as hereinbefore directed, appeal to the judge of the County Court in England, the Sheriff Court in Scotland, or the Assistant Barrister's Court in Ireland, for the district,

(*hh*) Now to the Queen's Bench Division of the High Court of Justice, by virtue of Judicature

Act, 1873, s. 16, and the Order in Council of December 16, 1880.

county, or division in which the appellant shall be resident, or the property be situate; and every such judge shall have jurisdiction to hear and determine the matter of such last-mentioned appeal, with the like power and authority as are by this section given to a judge of her Majesty's Court of Exchequer" (i).

Sect. 51. "Whenever any payment of duty shall be made under this Act, the same shall be entered in a book to be kept by the commissioners for this purpose, and the receiver general of inland revenue or other proper officer appointed by the commissioners, shall give a receipt for the same in such form as they shall think fit, and stamped with the proper stamp for denoting the rate of duty, and the commissioners shall from time to time deliver to any person interested in any property affected by such duty, on applying for the same for any reasonable purpose approved by the commissioners, a certificate in such form as they may think fit, of such payment" (k).

Sect. 52. "Every receipt and certificate purporting to be in discharge of the whole duty payable for the time being in respect of any succession or any part thereof shall exonerate a *bonâ fide* purchaser for valuable consideration, and without notice, from such duty, notwithstanding any suppression or misstatement in the account upon the footing whereof the same may have been assessed, or any insufficiency of such assessment; and no *bonâ fide* purchaser of property for valuable consideration under a title not appearing to confer a succession shall be subject to any duty with which such property may be chargeable under the provisions of this Act, by reason of any extrinsic circumstances of which he shall not have had notice at the time of such purchase."

(i) An appeal is given from the decision of the Court or Judge to the Exchequer Chamber, and then to the House of Lords, by stat. 28 & 29 Vict. c. 104, s. 59. Now by the Judicature Act, 1873, s. 18, sub-s.

4, the jurisdiction of the Court of Exchequer Chamber has been transferred to the Court of Appeal.

(k) See *Earl Howe v. Earl of Lichfield*, L. R. 1 Eq. 641. L. R. 2 Ch. 155.

Duty to be entered by the commissioners in a book, and a stamped receipt to be given.

Protection to *bonâ fide* purchasers.

16 & 17 Vict.
c. 51.

Courts in suits
for the admini-
stration of
property to
provide for
payment of
duty.

Commence-
ment of Act.

Short title.

Stat. 28 & 29
Vict. c. 104,
s. 55, for
summary
proceedings
for account
and payment
of succession
and legacy
duty.

Sect. 56.
Summary
proceedings for
payment of
succession or
legacy duty
assess ed.

Sect. 53. "Whenever any suit shall be pending in any Court for the administration of any property chargeable with duty under this Act, or the Legacy Duty Acts, such Court shall provide, out of any property which may be in the possession or control of the Court, for the payment of duty to the commissioners."

Sect. 54. "This Act shall be taken to have come into operation on the 19th day of May, 1853, and shall take effect accordingly."

Sect. 55. "This Act may be cited for all purposes as 'The Succession Duty Act, 1853.'"

By stat. 28 & 29 Vict. c. 104, sections 47 and 48 of the 16 & 17 Vict. c. 51 (Succession Duty Act), sections 12, 13, 14, and 15 of 22 & 23 Vict. c. 21, and the 1st section of the stat. 24 & 25 Vict. c. 92, are repealed, and by sect. 55 it is enacted, "If any person accountable and chargeable with duty under the Succession Duty Act or the Legacy Duty Acts required by the commissioners of inland revenue to deliver an account under those Acts or any of them makes default in doing so, the commissioners may sue out of the Court of Exchequer a writ of summons commanding him to deliver an account, and to pay the duty and the costs of the proceedings, or to show cause to the contrary, and on cause being shown, such order shall be made as seems just."

And by section 56, "where, in pursuance of the Succession Duty Act or the Legacy Duty Acts, the commissioners of inland revenue make an assessment of duty, and the duty is not paid, and there is no notice of appeal against the assessment under sect. 50 of the Succession Duty Act (*kk*), or of disputing the liability to assessment, the commissioners may sue out of the Court of Exchequer a writ of summons commanding the person liable for the duty, or the owner of any property expressly charged therewith, to pay the duty payable by him and the costs of the proceedings, or to show cause to the contrary, and on cause being shown, such order shall be made as seems just."

(*kk*) *Ante*, p. 1474.

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1873, s. 18
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By sect. 58, in such proceedings the Court may refer the matter to the proper officer for his report, and may therefore order a special case, and may give judgment thereon subject to proceedings in error.

18 & 17 Vict.
c. 51.
Sect. 58.

By sects. 59 and 60, in such proceedings by writ of summons an appeal is given to the Exchequer Chamber (*l*), and thence to the House of Lords.

Sects. 59, 60.

By stat. 52 & 53 Vict. c. 7, section 6, it is enacted that—

52 & 53 Vict.
c. 7, s. 6.
Statute duty on
successions.

- (1.) "Where the value of any succession upon the death of any person dying on or after June 1, 1889, chargeable with duty under the Succession Duty Act, 1858 (*m*), and the Customs and Inland Revenue Act, 1888 (*n*), exceeds 10,000*l*., and where the value of any succession to real property under the will or intestacy of any person so dying chargeable with duty under the said Act does not exceed 10,000*l*., but such value together with the value of any other benefit taken by the successor under such will or intestacy exceeds 10,000*l*., a separate statement of the value of the succession shall be delivered to the Commissioners of Inland Revenue together with the account to be delivered under section 45 (*o*) of the said Act."
- (2.) "There shall be charged and paid on every statement to be delivered in conformity with this section, in respect of the value of the succession, a duty of 1*l*. for every full sum of 100*l*. and for any fraction of 100*l*. over any multiple of 100*l*. of such value."
- (3.) Exempts leaseholds included in an account delivered according to section 98 of the Customs and Inland Revenue Act, 1881.

(*l*) Now by the Judicature Act, 1873, s. 18, sub-s. 4, the jurisdiction of the Court of Exchequer Chamber has been transferred to the Court of Appeal.

(*m*) 16 & 17 Vict. c. 51. See Atty-Gen. v. Aberdare, [1892] 2 Q. B. 684.

(*n*) 51 Vict. c. 8.

(*o*) See *ante*, p. 1472.

52 & 53 Vict
c. 7, s. 6.

(4.) Makes this duty additional (*p*).

(5.) "The value upon which the duty imposed by this section in respect of a succession to real property is to be charged and assessed shall be ascertained in accordance with the Succession Duty Act, 1853, subject to the following provisions :

"(a.) In the case of a successor who is entitled to the real property comprised in his succession for an estate in fee simple or in fee according to the custom of any manor or for lives renewable under any custom or under any lease for lives or for any estate in tail or under an entail under which he can acquire the property in fee simple without consent of any person or is entitled to any such property for life and competent to dispose as he shall think fit of a continuing interest therein, the value shall be the principal value of such property based upon the annual value estimated after making such allowances (if any) as ought to be made under the said Act. The duty payable in respect of such principal value shall not in any case exceed the amount which would be chargeable upon an annuity equal to such annual value according to the highest value in Table III. in the Schedule of the Succession Duty Act, 1853 ;

"(b.) In the case of an increase of benefit accruing to a successor and chargeable to succession duty by reference to sections, 5, 20, or 25, of the Succession Duty Act, 1853 (*q*), where the value of the succession apart from the increase of benefit shall exceed 10,000*l.*, such increase of benefit shall be chargeable with duty under this section whatever may be the value thereof; and where the value of the succession, apart from the increase of benefit, shall not exceed 10,000*l.*, the value of such increase of benefit, as well as of every preceding increase of benefit, shall be added to the value of the succession for the purpose of the said duty."

(*p*) The effect of this sub-section is to incorporate into sub-section (1) the definition of the term "succession" contained in sect. 1

of the Succession Duty Act, 1853 (*ante*, p. 1446) ; Atty.-Gen. v. Aberdare, [1892] 2 Q. B. 684.
(*q*) *Ante*, pp. 1450, 1460, 1463.

- (6.) The duty imposed by this section shall in the case of real property be a first charge thereon or on the interest of the successor therein, according as the duty is or is not chargeable on the principal value of such property, and shall be paid in like manner as if the duty were a part of the succession duty payable under section 22 of the Customs and Inland Revenue Act, 1888, and together with the payments in respect of that duty.

52 & 53 Vict.
c. 7, s. 6.

By section 7, the additional duty is not to be payable in respect of the value of the estate and effects of any person dying on or after June 1, 1896.

Duration of
charge of
estate duty.

By section 8, double duty or interest is payable in case of default.

Double duty or
interest payable
in case of
default.

By section 9, the duties are to be stamp duties, and the required statements are to be in the prescribed form (r).

Duties to be
stamp duties.

Having thus collected the principal statutory provisions now in force with respect to duties on legacies and successions, it remains to point out, more fully, the construction which has been put on these Acts by the Courts of law and equity: and for this purpose, it is proposed to consider, 1st, the amount of duties payable; 2ndly, on what subjects the duties are payable; 3rdly, by whom the duties are payable.

(r) "Estate duty" is a new duty. It is an additional duty upon large estates which pass in consequence of a death, not an additional property tax on large benefits which are received by individuals in consequence of a death. The intention of section 5 is to give the new duty whenever the whole estate of a testator exceeds 10,000*l.*, without reference to the amount taken by any particular beneficiary. So also under section 6, the whole fund and not the interest in it of any individual successor is the "succession," the

value of which is referred to in the words, "where the value of 'any succession' exceeds 10,000*l.*;" but "succession" means any one succession, i.e., estate duty is payable where the value of the one fund which passes upon the death of a predecessor, as the result of one disposition or devolution exceeds 10,000*l.* It does not mean that duty is payable wherever all the property whatsoever, which passes upon the death of the predecessor, is more than 10,000*l.* See *Att.-Gen. v. Aberdare*, [1892] 2 Q. B. 684, 690.

CHAPTER THE FIRST.

AS TO THE AMOUNT OF DUTIES PAYABLE ON LEGACIES AND
SUCCESSIONS.

What shall be
considered a
legacy paid.

IT was formerly often material to ascertain under what circumstances a legacy might be said to be "paid, delivered retained, satisfied or discharged," within the meaning of the statute.

But because of the length of time which has elapsed since the passing of 55 Geo. III. c. 184, a mere reference to the cases which have been decided on the meaning of the above words is considered sufficient (a). And further, it would seem that cases which formerly escaped duty on the construction put on the above words would now be hit by the Succession Duty Act, and therefore *quâcunque viâ* duty would be paid.

Amount of
duty payable
in case of a
legacy to hus-
band and wife,
where the one
is a child of
the testator,
and the other
a stranger.

Formerly, a question, with respect to the amount of the duties payable, arose in the instance of legacies given to a husband and wife for life, in a case where the one is of kin to the testator, so as to be within the lower scale of duties, and the other a stranger in blood, so as to be within the highest (b).

But by the 11th section of the Succession Duty Act it is provided in the case of legacies given to any married person by testators dying after May 19, 1858, as well as in case of successions under that Act, that duty shall be paid at the lower rate if the husband or wife of such person would

(a) *Atty.-Gen. v. Manners*, 1 M. & W. 563; *Atty.-Gen. v. Loscombe*, 5 H. & N. 564.
Price, 411; *Atty.-Gen. v. Wood*, 2 Y. & J. 290; *Hill v. Atkinson*, 2 Meriv. 45; *Coombe v. Triest*, 1 My. & Cr. 69; *Atty.-Gen. v. Hancock*, 2

(b) *Atty.-Gen. v. Bacchus*, 9 Price, 30; *Atty.-Gen. v. Burnie*, 3 Y. & J. 531.

have been chargeable on a lower scale had the legacy been given to him or her (c).

It may be remarked, that the Acts do not specify any time at which the executor or administrator must render his final or residuary account at the stamp office; for the obvious reason, that the peculiar circumstances of the property of the deceased would, in many cases, preclude the possibility of complying with any such restriction: But the duty must be paid on the accruing profits and income of the effects of the deceased, from the time of his death to that of delivering the account and offering to pay the duty at the stamp office (d). In *The Attorney-General v. Cavendish* (e), Lord F. Cavendish died in October, 1808, and on the 20th of July, 1808, the defendant, as executor and residuary legatee, delivered in his residuary account of the testator's personal estate intended to be retained by him, and offered to pay the duty on the residuary estate, exclusive of the interest which had accrued since the testator's decease, 32*l.* less than it would have been had the duty been computed on the interest accrued: And it was decided that the duty was payable on the interest accrued from the death up to the time of the delivering of the account.

So in *Thomas v. Montgomery* (f), it was holden, that when a legacy is not paid at the time appointed by the testator, legacy duty is payable, not merely on the capital sum bequeathed, but on the aggregate amount of capital and interest, which is ultimately received by the legatee (g).

But it was holden by the Court of Exchequer, in *The Attorney-General v. Holbrook* (h), that where by a Will a specific debt is forgiven, which is known and ascertained at the time of the testator's death, legacy duty is not payable upon the interest accruing in respect of such debt, between the time of such death and the period when the executors close their accounts.

In what cases
duty is payable
on the interest
as well as the
principal of a
legacy.

(c) See *ante*, p. 1454.

(d) 1 Rep. Leg. 787, 3rd edit.

(e) Wightw. 82.

(f) 3 Russ. Chanc. Cas. 582.

(g) See also *Accord. Bate v. Payne*, 13 Q. B. 900, as to profits accruing on leaseholds.

(h) 3 Younge & Jerv. 114.

CHAPTER THE SECOND.

UPON WHAT SUBJECTS THE DUTIES ARE PAYABLE.

What are to be regarded as legacies payable out of personalty.

IT has appeared that legacies of every description, given by Will or other testamentary instrument (*a*), payable out of personal estate, including donations *mortis causâ* (*b*), and whether given by way of annuity or otherwise (*c*), and also legacies given subject to contingencies (*d*), are liable to the duties imposed by the statute 55 Geo. III. c. 184.

Leaseholds.

As to leaseholds, the Succession Duty Act (s. 19) provides that after May 19, 1853, they shall not be chargeable with legacy duty, but shall be included in the term "real property," and, as such, be liable to succession duty (*e*).

There has already been occasion to consider generally what instruments are to be regarded as testamentary (*f*). But it may be proper to inquire more particularly into the question with reference to the legacy duty.

What is a testamentary instrument:

In *The Attorney-General v. Jones* (*g*), a man conveyed by deed, for a nominal consideration, his leasehold and personal property to trustees, for the use of himself for life, and several persons therein named at his death, with a power reserved of revocation or alteration of the trusts: He never parted with the deed, or with any part of the property during his life; and he confirmed in most respects, such disposition of it by Will at his death: And it was holden by the Court of Exchequer (Wood, B., *dissentiente*), that the two instruments

(*a*) *Ante*, p. 1405.

(*b*) *Ante*, pp. 1413, 1443.

(*c*) *Ante*, pp. 1408, 1413, 1443.

(*d*) *Ante*, p. 1420.

(*e*) *Ante*, p. 1459.

(*f*) See *ante*, pp. 93—97. See

also *Gaskell v. Gaskell*, 2 Y. & J. 502; and the remarks by Wood, V.-C. on that case, 4 K. & J. 214 215.

(*g*) 3 Price, 368.

should be considered as to be taken and construed together as testamentary instruments, and that the property passing under them should pass as legacies, and be subject to duty.

This decision was questioned in subsequent cases, but the question of its propriety has ceased to be of any practical importance since cases of this kind, which occur after May 19, 1853, will fall within the operation of the 8th section of the Succession Duty Act (*h*).

In *Woodbridge v. Spooner* (*i*), where she deceased, in her lifetime, gave to the plaintiff a promissory note to pay him or order "on demand the sum of 100*l.* for value received and his kindness to me," with a verbal engagement on the part of the plaintiff, that the note should not be demanded until after her death, it was holden by the Court of King's Bench, that parol evidence could not be received to show that it was not given for a valuable consideration: and that such a note did not operate by way of testamentary disposition: nor was it void on the ground that it was a fraud on the legacy duty, that duty never having attached upon it, and there being nothing to show that the amount passed by way of a *donatio mortis causa* (*k*).

With respect to the suggestion of fraud on the legacy duty, it was said by Lord Lyndhurst in *Re Evans* (*l*), that every subject has a right so to shape the disposition of his property as to avoid the legacy duty, if possible, and that there is no fraud in so doing, but now to cases of this kind also, which occur after the Succession Duty Act

(*h*) *Ante*, p. 1452.

(*i*) 1 Chitt. Rep. 661. S. C. 3 Barn. & Ald. 233.

(*k*) But in a case which occurred after the Wills' Act, where among the testator's papers two letters were found, sealed and directed "For Sarah Gough, my late servant," each containing a promissory note signed by him, and one of the letters stated that the deceased enclosed 200*l.* as a

mark of respect, and the other, that the enclosed was for her long and faithful services, it was held, that the notes were, in effect, invalid testamentary instruments and void: *Gough v. Findon*, 7 Exch. 48.

(*l*) 2 Cr. M. & R. 221. See also *Farquharson v. Cave*, 2 Coll. 366; *Vandenberg v. Palmer*, 4 K. & J. 215.

money taken
under a
testamentary
appointment
by virtue of
a power :

has come into operation, the 8th section of that statute appears to have been intended to apply (*m*).

The duties imposed by the Legacy Acts are payable, not only upon a legacy payable out of the personal estate, strictly considered of the testator, but out of any personal estate which the testator had the power of disposing of, as he or she might think proper: Thus in *Re Cholmondeley* (*n*), by the marriage settlement of Mrs. Cholmondeley, 20,000*l.* was vested in trustees, upon trust to pay the dividends to Sir Philip Francis for life, and after his death to Mr. Cholmondeley for his life, with remainder to Mrs. Cholmondeley for her life, and with a power of appointment amongst her children, in case there should be any; and, in default of issue, to such persons as she should by Will appoint, in case she died in her husband's lifetime, or by deed or Will, in case she should survive her husband; and in default of appointment, amongst her next of kin; Mrs. Cholmondeley died in her husband's lifetime, having, by her Will, appointed this sum of 20,000*l.* to certain persons mentioned in her Will: And the Court of Exchequer held, that legacy duty was payable on the 20,000*l.*: The Barons were of opinion that, taking together all the Acts, applicable to the same subject, and passed *in pari materia*, and the Legislature in the 36 Geo. III. (*o*), and the 45 Geo. III. (*p*), having described and defined what they meant by a legacy, it was impossible to come to a conclusion that they meant to use that term in a more limited sense in the statute of 53 Geo. III.

In *Platt v. Routh* (*q*), John Ramsden, by his Will dated the 10th of March, 1825, after giving various legacies, and directing his real estates to be sold and converted into personalty, gave the general residue of his personal estate to his daughter Judith Ann Platt, and three other persons, his

(*m*) See *ante*, p. 1452, and p. 1443, note (*g*).

(*n*) 1 Crompt. & Mees. 149. S. C. 3 Tyrwh. 10.

(*o*) See *ante*, pp. 1412, 1413.

(*p*) See *ante*, p. 1440. See also stat. 8 & 9 Vict. c. 76, s. 4, *ante*, pp. 1442, 1443.

(*q*) 6 Mees. & W. 756.

executrix and executors, upon trust to permit his said daughter to receive the interest and dividends thereof during her life, and after her death (subject to certain payments then to be made) upon trust for such person or persons, *other than and except Joseph Woodhead and his relations, Moses Hoper and his relations, and the relations of the late husband of his said daughter and every of them*, in such parts, shares, and proportions, and in such manner and form as the said Judith A. Platt, whether sole or covert, should by Will appoint, and in default of appointment, in trust for the next of kin of Dyson Ramsden; and the testator declared, that in case his said daughter should intermarry with the said Joseph Woodhead or any of his relations, or should reside with or receive visits from him or them, then the bequest in her favour should utterly cease: The testator died in May, 1825, and his Will was duly proved by his executrix and executors. After his death, the said Judith A. Platt married George E. Platt, and the interest and dividends of the testator's residuary estate (which was very considerable), were regularly paid to her until her death, on the 7th of September, 1837: In April, 1837, she made a Will, and thereby, in exercise of the power under her father's Will, she gave 10,000*l.* consols to the descendants of the before-named Dyson Ramsden, and all the rest of her late father's property to various persons, strangers in blood both to her father and herself: By order of the Master of the Rolls, a case was stated for the opinion of the Barons of the Exchequer, as well as to the liability of Judith A. Platt's Will to the probate duty (*r*), as also as to the legacy duty payable in respect to the bequests contained in the two Wills: Their Lordships thought that the question, so far as regarded the legacy duty, depended entirely upon the construction to be put upon the 18th section of the 36 Geo. III. c. 52 (*s*), which regulates the duty in cases where legacies are given subject to power of appointment; and

(*r*) See *ante*, p. 550 (*c*).

(*s*) *Ante*, p. 1421.

they were of opinion, that the power under consideration must be treated as a general and absolute power within the meaning of that section: The Barons were also of opinion, that according to the true construction of the 7th section of the same statute (*t*), the property subject to the power was personal estate, which Judith A. Platt had power to dispose of as she should think fit: Their Lordships accordingly certified to the Master of the Rolls their opinion, that, on the death of Judith Ann Platt, a duty of one per cent. became payable in respect of the bequest in the Will of John Ramsden of the residue of his estate and effects to the said Judith Ann Platt, after allowing any duty already paid in respect thereof: And also their further opinion, that legacy duty was payable in respect of the bequest contained in the Will of the said Judith Ann Platt, at the same rate at which it would have been payable, if they had been mere legacies given by her, payable out of her own personal estate. This opinion of the Barons was afterwards affirmed by the decree of Lord Langdale (*u*), and finally by the decision of the House of Lords (*x*).

In *The Attorney-General v. Brackenbury* (*y*), it was held that where the residuary legatees were the persons who would have been entitled in default of appointment, if the donee of the power had exercised it by charging in the first instance his residuary estate with his debts and legacies, it is not competent for the residuary legatees to disclaim the fund under the appointment and elect to take under the gift to them in the original instrument, so as to be chargeable only with a lower rate of duty.

legacy charged
on land by the
execution of a
power created
by Will:

In *The Attorney-General v. Pickard* (*z*), a testator devised real estates to William Trenchard for life, with remainder to his first and other sons in tail, with remainder to Thomas Pickard for life, remainder to his first and other sons in tail,

(*t*) *Ante*, p. 1412. See also
stat. 8 & 9 Vict. c. 76, s. 4, *ante*,
pp. 1442, 1443.

(*x*) 10 Cl. & F. 257.

(*y*) 1 Hurlst. & C. 782.

(*z*) 3 Mees. & Wels. 552.

(*u*) 3 Beav. 257.

remainder to George Pickard for life, with remainders over, and gave a power to the several persons who, by virtue of the limitations in the Will, should be in actual possession of the estates by deed or Will, to appoint to any woman or women they should marry, by way of jointure, rent-charges not exceeding 750*l.* per annum for life, to be issuing out of and chargeable upon the devised estates, clear of all taxes, and deductions whatsoever: William Trenchard died without issue, and Thomas Pickard entered into possession of the estates, and by his Will, charged them with 750*l.* per annum by way of jointure to his wife under the power, and died without issue male: whereupon George Pickard entered into possession: And the Barons of the Exchequer held, that George Pickard was chargeable (under 45 Geo. III. c. 28, s. 5, *ante*, p. 1441) with legacy duty after the rate of 10*l.* per cent. on the value of the rent-charge of 750*l.* per annum; their Lordships being of opinion, that the annuity in question, being a legacy, was charged upon the real estates by the Will which created the power to charge, in like manner as if the person, to whom it was given by the execution of the power, had been mentioned by name as the object of the testator's bounty in the Will which gave the power. And this decision was afterwards affirmed in the Exchequer Chamber (a).

This case was followed by that of *The Attorney-General v. Henniker* (b), in which it was held by the same Court to make no difference that by the husband's appointment of the annuity by way of jointure it was given to the wife on condition that she should relinquish her right to dower (d).

In giving the judgment of the Court of Exchequer Chamber in the case of *The Attorney-General v. Pickard*,

by the execution of a power created by deed:

(a) 6 Mees. & Wels. 438.

(b) 7 Exch. 331.

(d) See also *Accord. Sweeting v. Sweeting*, 1 Drew. 331. The Barons doubted whether, if this condition had been annexed by the original testator himself, the duty

would have been payable on the whole annuity, or on the amount of it after deducting the value of the dower. But in *Sweeting v. Sweeting*, Kindersley, V.-C., was of opinion there is no ground for any such doubt.

Lord Denman intimated his opinion, that charges of this nature would be exempt, if originally made by deed, under the proviso contained in stat. 45 Geo. III. c. 28, s. 4 (e). And this opinion was subsequently acted upon by the Court of Exchequer in *The Attorney-General v. Lord Hertford* (f). There A., by deed, dated in 1802, conveyed certain lands to trustees, to the use of himself for life, remainder to B., his son, for life, with remainders over: The deed contained a proviso, that it should be lawful for B., by his last Will, to limit and appoint to the use of himself, or any other person or persons, any annual sum or sums of money, not exceeding the yearly sum of 700*l.*, to be charged upon and payable out of the lands included in the deed, to commence from the death of B., and to be either perpetual or in fee, or payable for such times and in such manner in all respects as B. should think fit: B., by his Will, by virtue of this power, appointed an annuity of 700*l.* a-year to C. for her life, charged upon and payable out of the said land: And it was held by the Court of Exchequer, that legacy duty was not payable in respect of such annuity.

This decision occasioned the passing of the stat. 8 & 9 Vict. c. 76 (g), which contains a wider definition of a legacy, and a narrower proviso, than that contained in the statute of 45 Geo. III. And legacy duty has since become chargeable on every disposition by Will, under a power, of money which is payable out of real estate, or a charge thereon, whether the power was created by deed or Will: And it has also been held that the statute is retrospective, so that the duty is chargeable on money paid after the Act came into operation, notwithstanding the testator died before (h).

It will be seen that in the Act of Victoria, the proviso at

(e) See *ante*, p. 1440.

(f) 14 Mees. & Wels. 284.

(g) *Ante*, p. 1442. See Trevor on Taxes of Succession, p. 104, 105.

(h) *Atty.-Gen. v. Lord Hertford*, 3 Exch. 670. As to the duties now payable on legacies charged on or payable out of realty, see *infra*

the end of the clause confines the exemption from duty to money which, by marriage settlement, is subjected to any limited power of appointment to or for the benefit of persons specially named or described therein as the objects of the power, or of their issue. And even this exemption has been practically repealed by the Succession Duty Act (i).

It has appeared (k), that legacies of every description of the value of 20*l.* or upwards, given out of or charged upon real or heritable estate (l), or out of any moneys to arise by sale, mortgage, or other disposition of real or heritable estate, or any part thereof, and also the clear residue, when given to one person, and every share of the clear residue, (when given to two or more persons,) of the moneys to arise from the sale, mortgage, or other disposition of any real or heritable estate *directed to be sold*, mortgaged, or otherwise disposed of, by any Will or testamentary instrument, where such residue or share shall amount to 20*l.* or upwards, are subjected to the stamp duties (m). With respect to the

Duties on legacies, &c. out of, or charged on, real estate :

land directed to be sold :

(i) See Trevor on Taxes of Succession, 187.

(k) *Ante*, pp. 1405, 1406.

(l) No legacy duty is payable on the value of personal estate given up by one legatee to another under the doctrine of Election (*ante*, p. 1304 *et seq.*) : But when the testator devises his own real estate to A., and bequeaths A.'s personal estate to B., the legacy duty is payable on the value of the personal estate so charged on the testator's real estate : *Laurie v. Clutton*, 15 Beav. 131. Where, however, a testator died in 1811, having devised lands to his nieces as tenants in common in fee, with a proviso that if his nephew should transfer 10,000*l.* consols into the names of trustees for the benefit of the nieces, the lands should

enure to the use of the nephew, and the nephew in the course of the following year having exercised his option, and transferred the consols, it was held, in *The Attorney-General v. Wyndham*, 1 Hurl. & C. 571, that the defendant, the executor of the last surviving trustee, was liable to pay duty on the 10,000*l.* consols at the rate of two-and-a-half per cent. ; for that the money arose by a "disposition" of the testator's real estate, within the meaning of the stat. 48 Geo. 3, c. 149, sect. 2. See *ante*, p. 1442.

(m) See also stat. 45 Geo. 3, c. 28, *ante*, p. 1440, and stat. 8 & 9 Vict. c. 76, s. 4, *ante*, p. 1442. But now by sect. 21 (2) of 51 & 52 Vict. c. 8, it is enacted that legacies payable out of or charged upon real estate or the proceeds thereof

construction of this part of the statute of the 55 Geo. III. c. 184, the Court of Exchequer, in *Re Evans* (n), decided that where there is a bequest of real property to trustees and a discretion given to them to sell or not to sell, as they shall think best for the *cestuis que trust*, the duty does not attach, notwithstanding the trustees shall have exercised their discretion by an actual sale; for that a sale made under a *discretion* given to trustees to sell and distribute the proceeds, but without any positive direction imposing on them the obligation of selling, is not to be considered a sale *directed* by the testator, within the meaning of the statute. This case has been regarded by the Court of Exchequer as overruled by the cases of *The Atty.-General v. Mangles* (o), and the *Atty.-General v. Simcox* (p), and it was considered to be fully established that if an actual sale takes place, the proceeds are liable to duty, whether the sale is made by the trustees under an absolute direction given to the trustees to sell at all events, or under a direction given to them to sell in case they shall deem it expedient to do so (q). However, a contrary doctrine seems to have been maintained in the case of *The Advocate-General v. Smith* (r), in the House of Lords, where Lord St. Leonards said he thought the case of *In re Evans* had been rightly decided, and he denied that it had ever been overruled. It has also been held, that if a real estate is sold under the general power of the Court of Chancery to direct a sale for satisfying charges, no legacy duty is payable, although the Will contains a discretionary power to trustees to sell (s).

Again, where the trustees have a discretion to sell or not to sell, and they think fit not to sell, the legacy duty does not

are not to be chargeable with legacy duty but with succession duty.

(n) 2 Cr. M. & R. 306.

(o) 5 M. & W. 120.

(p) 1 Exch. 749.

(q) See 1 Exch. 765, 766, 768, *Atty.-Gen. v. Metcalfe*, 6 Exch. 43,

by Parke, B.

(r) 1 Macq. H. of L. 760.

(s) *Hobson v. Neale*, 8 Exch. 368. 17 Beav. 178. *Secus*, where the sale is ordered by the Court, in consequence of the directions in testator's Will: *Harding v. Harding*, 2 Giff. 597.

attach (t). And consequently, in every Will of this kind, where *no actual sale* takes place, a question of construction arises, *viz.*, whether, taking the Will altogether, there is a *direction* to the trustees to convert the estate into money; or whether it is really left in their *discretion*, not to convert it into money, but to leave it as land. The words of discretion may be so controlled as to show that they are only in semblance words of discretion, and in reality words of direction (u); and if they are of the latter description, the legacy duty will attach under the Act, notwithstanding the *cestui que trust* in fact takes the property in *statu quo*, and the trustees do not convert it into money by sale, according to the directions of the Will, there being no claim to render such sale necessary (x).

If a testator devises real estate to trustees with directions to sell it, and invest the money arising from such sale in the purchase of other real estate, no duty is payable, though the estate be sold, and the proceeds paid to the person entitled to the estate to be bought (y).

It was held by Lord Cottenham in *The Attorney-General v. Jones* (z), that the profits arising from the tolls of a light-house are real estate, and not subject to legacy duty.

These and similar questions have obviously lost their importance since the Succession Duty Act has taxed all real estate equally with personalty.

In *The Attorney-General v. Jackson* (a), the testator, Samuel Jackson, gave a life estate in his freehold property to Charlotte Troughton, and after her death, and in the event of her husband, Joseph Troughton, surviving her, he

Duty on a bequest of rent-charge, annuity, &c., &c.

(t) Atty.-Gen. v. Mangles, 5 M. & W. 120.

(u) Advocate-General v. Ramsay's Trustees, 2 Cr. M. & R. 224, note (a).

(x) Atty.-Gen. v. Holford, 1 Price, 420. Williamson v. Advo-

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cate-General, 10 Cl. & F. 1 Accord.

(y) Mules v. Jennings, 8 Exch. 830. Heal v. Knight, 8 Exch. 839, note (a).

(z) 1 Mac. & G. 574.

(a) 2 Crompt. & Jerv. 101.

gave him "one annuity or yearly rent-charge" of 500*l.* a-year, payable quarterly, out of his real estate, with a landlord's power of distress and entry, and subject to that annuity, he gave his real estate in moieties to Randle Jackson and William Jackson, Randle Jackson having an estate in fee, and William Jackson an estate for life: The question was, whether the annuity of 500*l.* a-year, thus given to Joseph Troughton, was to be considered a legacy within the meaning of the Acts of Parliament imposing duties on legacies: It was contended, on behalf of the defendants, that the subject-matter was in fact real property; that it was a rent-charge, *i. e.*, a freehold interest in the party in whose favour it was granted; that it was as much so, as far as related to the 500*l.* per annum, as the estate out of which it issued; and that it was not the intention of the Legislature, in imposing the legacy duties, to impose any duty whatever upon real property: But the Court of Exchequer held, that the annuity in question fell precisely within the terms made use of by the Legislature in the stat. 55 Geo. III. c. 184, with respect to gift by way of annuity, *viz.* "all gifts of annuities, or by way of annuity, or of any partial interest or benefit, out of any such estate or effects as aforesaid" (*b*), and was therefore liable to the duty (*c*).

But in *Shirley v. Lord Ferrers* (*d*), a testator devised certain estates to the use of trustees for the term of 500 years, and subject thereto, to the use of other trustees, to preserve contingent remainders, with remainder to the first and other sons of C. S. (then an infant), with divers remainders over, and he directed that the trustees of the term should, after paying certain annuities, apply so much of the rents and profits of the estate as they should think fit (not exceeding in any one year a certain amount), in aid of another fund,

(*b*) *Ante*, p. 1408.

(*c*) See also *Stow v. Davenport*,
5 B. & Adol. 359. 2 Nev. & M.
805, in which case the Court of

K. B. recognized and acted on this
decision.

(*d*) 1 Phill. Ch. C. 167.

to the maintenance and education of C. S., until she should attain twenty-one or marry, and that they should accumulate the surplus rents and profits for the benefit of C. S. when she should attain twenty-one or marry, and if she died under twenty-one and unmarried, then for the benefit of the parties entitled under the subsequent limitations of the estates, and that upon her attaining twenty-one or marrying, they should during her lifetime, pay the surplus rents, after paying the annuities, to her for her separate use: It was contended, on behalf of the Crown, that the trust for maintenance amounted to "a gift by way of annuity," or "to a partial interest or benefit:" But it was held, by Lord Lyndhurst that the sums annually applied out of the rents and profits, under the trusts of the term, to the maintenance and education of C. S. until her marriage, were not liable to legacy duty (e): And his Lordship expressed his opinion, that nothing but what is a charge upon the estate of another person is within the Act (f).

Legacies of personal estate to be laid out in land were within the scope of the Acts, prior to the statute 36 Geo. III. c. 51, imposing a stamp duty on receipts (g): And there is no reason for excepting this class of legacies from the operation of the retrospective schedules (h).

Duty on legacies to be laid out in land.

It was holden in the case of *Izon v. Butler* (i) that a bequest by the obligee of a bond to the obligor in these terms, "I remit and forgive to Thomas Whithurst the sum of 500*l*. which he stands indebted to me on his bond, and I direct

Duty on a legacy consisting of forgiveness of a debt.

(e) Succession duty would now, however, be chargeable under such circumstances by virtue of 16 & 17 Vict. c. 51.

(f) See *Swabey v. Swabey*, 15 Sim. 502 (*ante*, p. 540), as to money belonging to the testator, and charged on his own real estate, continuing a charge so as to be

subject to legacy duty.

(g) *Re De Lancey*, L. R. 4 Ex. 345. See *ante*, p. 1409. As to liability to succession duty, see sect. 30, of 16 & 17 Vict. c. 51, *ante*, p. 1464.

(h) *Atty.-Gen. v. Hancock*, 2 Mees. & W. 563.

(i) 2 Price, 34.

the said bond to be delivered up to him and cancelled," was merely a personal legacy, and subject to the incidents affecting legacies. And accordingly, in *The Attorney-General v. Holbrook (j)*, the obligee of a bond, after the death of one James Willis, the principal therein, but during the life of the surety, who was the testator's brother, made his Will, containing the following directions relative to the bond: "I hereby forgive the bond debt, both principal and interest, due to me and entered into by James Willis and my brother James Holbrook with and for him, for the said James Willis's paying me the principal sum of 4,000*l.* and interests, &c., &c., and do order the said bond, at my decease, to be delivered up and cancelled:" The interest upon the bond was paid up to the death of the testator, whom his brother, James Holbrook, survived: And it was holden that this was a legacy, whereon legacy duty was payable by James Holbrook.

Whether duty payable on a bequest to creditors.

In *Foster v. Ley (k)*, where a testatrix bequeathed property in trust to pay off the debts of her first husband that could be legally and satisfactorily proved against him, as it was her will and desire that the same should be discharged, the Court of Common Pleas held, that the creditors ought to pay the legacy duty on their several debts. But in *Williamson v. Naylor (l)*, where a testator by his Will declared that one-fifth of the residue of his personal estate should be divided amongst certain of his creditors, named in a schedule to his Will, and the schedule contained both the names of the creditors, and the debts due to them respectively, the remedy for the recovery of which was barred by the Statute of Limitations; it was held by Lord Lyndhurst, C. B., and afterwards by Alderson, B., that the parties so named in the schedule were not to be considered as legatees but as creditors; for that the bequest was not a legacy subject to the

(j) 3 Y. & J. 114. S. C. 12 Price, 407. 174. S. C. cited *nomine* Richards v. Foster.

(k) 2 Bingh. N. C. 269. See (l) 3 Y. & C. 208. *Ante*, p. O'Connor v. Haslam, 5 H. L. C. 170, 1074.

payment of legacy duty, but a trust created by the testator in satisfaction or reduction of debts, the remedy for the recovery of which was barred by the statute (*m*). Nevertheless, in *Turner v. Martin* (*n*), where a testator who was a certificated bankrupt, directed his executors to pay in full all his creditors who had proved, it was held by Lord Cranworth, C., that the legacy duty was payable on the amount which the testator had directed to be paid to the official assignee for that purpose: for that the testator must be regarded as having conferred a mere bounty on the creditors.

In a case before Shadwell, V.-C., *Re Franklin's Charity* (*o*), Joseph Franklin bequeathed to the poor of the parish of Haddenham 50*l.* per annum for ever, to be laid out in bread at Christmas, and distributed by the minister and churchwardens to the most needy objects in the parish: And the testator charged all his leasehold and personal property with this, amongst other legacies: And his Honor held, that this was a legacy on which duty ought to be paid; on the ground that, although it was not expressed to be given to any individual, yet, in effect, it was given in such a manner, as that the executor held it in trust for certain purposes: And his Honor, in giving his judgment, observed, that where legacies have been given to treasurers of hospitals, and other charitable institutions, it has been considered as a matter of course to pay the duty.

Duty on a legacy given to a charity.

But in *Re Wilkinson* (*p*), the Barons of the Exchequer held, that executors cannot be called upon to pay legacy duty upon the whole of a residue bequeathed to them in trust to divide the interest "among poor pious persons, male or female, old or infirm, in ten or fifteen pounds, as they see fit, not omitting large and sick families, if of good

(*m*) See also *Phillips v. Phillips*, 3 Hare, 290. (*o*) 3 Younge & Jerv. 544. S. C. 3 Sim. 147.

(*n*) 7 De G. M. & G. 429. See also *Re Sowerby's Trusts*, 2 Kay & J. 630. (*p*) 1 Cr. Mees. & Rose. 142. S. C. 4 Tyrwh. 514.

character" (q). This judgment, which was afterwards affirmed in the Exchequer Chamber (r), has been regarded, in effect, as having overruled the above decision of the Vice-Chancellor: And it has been observed, that the 11th section of the statute 36 Geo. III. c. 52 (s), on which much stress was laid by the Barons, and the Judges in error, does not appear to have been brought under his Honor's notice, in the argument of the case before him.

However, in *The Attorney-General v. Fitzgerald* (t), where the testator gave his residuary estate (which amounted to 13,000*l.*) to his executors to be by them appropriated to the education of the children of the poor in Ireland, principally those in or about Limerick; the same learned Judge held that legacy duty was payable on the residue. And his Honor said, that there was a material distinction between the case of *Re Franklin's Charity* and the case of *Re Wilkinson*: That in the former there was a gift of a perpetual annuity of 50*l.* to be disposed of in charity; in the latter, the Judges seem to have considered that there was a gift of a sum in gross, which was at once to be disposed of by the executors, apparently, as if it was not a charity; But that this of itself furnished a material difference between the two cases; because, if the bequest was to be considered as a charitable bequest in its origin, then the Court of Chancery must, of necessity, have a dominion over the subject of the bequest, and would, from time to time, determine in what manner the property should be enjoyed; and long before any person participated, the legacy must be paid: And his Honor added, that he much doubted whether either portion

(q) If any of the objects of the above bounty should have received to the amount of 20*l.* or upwards, by having been selected to receive such bounty on more than one occasion, legacy duty would attach on such amount, and the duty would be calculated according to the nearness of blood of such indi-

vidual, and in that case the executors would be accountable for, and bound to retain the duty chargeable on such amount: *Re Wilkinson*, 1 Cr. Mees. & Rosc. 142.

(r) *Atty.-Gen. v. Nash*, 1 Mees. & Wels. 237.

(s) See *ante*, pp. 1415, 1416.

(t) 13 Sim. 83.

of the 11th section of 36 Geo. III. c. 52, applies to a case, where the whole subject of the bequest must be taken *in solido*, at once, for the purpose of being applied in perpetuity, in some manner that may be such that no one individual will ever participate in the subject itself, but will have a benefit which results from the application of a large sum of money in some given manner, not consisting in the payment of money: The learned Judge proceeded to express his opinion, that the legacy in question was liable to duty in the same manner as if it had been given to the trustees for an existing school for the purposes specified. This view of the subject was recognized and acted upon by Parke, B., in a similar case, on a subsequent occasion, *Re Griffiths* (u), and the learned Baron expressed his concurrence in this opinion of V.-C. Shadwell. And in two subsequent cases (x), Romilly, M. P., declined to follow the case of *Re Wilkinson* and said he believed that decision had been afterwards disapproved of by the Court which decided it. Again in a late case (y), the Court of Exchequer held, that a bequest of money for the purpose of building a church and parsonage house, and of endowing and repairing the church, was subject to a legacy duty of 10*l.* per cent. (z).

In cases within the operation of the Succession Duty Act, all questions of this kind will be disposed of by the 16th section of that statute (a).

The statute 39 Geo. III. c. 73, after reciting that "it is expedient that certain specific legacies given to bodies corporate, or other public bodies and societies, should be exempted from the duties imposed on legacies," proceeds to enact, "that no legacy consisting of books, prints, pictures,

39 Geo. 3,
c. 73.

No legacy of
books be-
queathed to
any body cor-
porate, &c.,

(u) 14 M. & W. 510.

(x) *Re Pearce*, 24 Beav. 491.
Harris v. Earl Howe, 29 Beav.
261.

(y) *Re Parker*, 4 H. & N. 666.

(z) The Barons were of opinion
that at all events the duty was
payable under the 16th section of
the Succession Duty Act.

(a) *Ante*, p. 1420.

to be preserved
shall be liable
to any duty.

Duty on
legacies of
property in
this country
belonging to
a foreigner.

Duty on
legacies of
property
situate out of
Great Britain.

statues, gems, coins, medals, specimens of natural history, or other specific articles, which shall be given or bequeathed to or in trust for any body corporate, whether aggregate or sole, or to the Society of Serjeants' Inn, or any of the Inns of Court or Chancery, or any endowed school, in order to be kept and preserved by such body corporate, society, or school, and not for the purposes of sale, shall be liable to any duty imposed on legacies by any law now in force."

It has been long established that property in this country, belonging to a foreigner who dies domiciled abroad, and appoints an English executor, and bequeaths to English legatees, is not liable to legacy duty (*b*).

If the testator was a British subject domiciled in Great Britain, all his personal property, in whatever part of the world it may be situate, is considered as English personal estate, and is liable to the duties imposed by the statutes on legacies and successions: For the rule is, that personal property follows the person, and is not in any way to be regulated by the *situs* (*c*): Thus, in *Re Ewin* (*d*), it was held by the Court of Exchequer, that American, Austrian, French and Russian stock, the property of a testator domiciled in England, was liable to legacy duty.

But it is clear that the legacy Acts are co-extensive with the limits of this kingdom, and this kingdom only, and do not extend to the territorial possessions of the Crown in the colonies (*e*). Hence, where persons die domiciled in India, whose estates, though the estates of British subjects, are distributed in India, they are not chargeable with any legacy duty (*f*). Hence, also, if a testator die domiciled in India, and his personal estate be wholly in India, and his executor be resident there, and the executor remit to a legatee in

(*b*) *Re Bruce*, 2 Cr. & J. 436. 103, by Alexander, L. C. B. 1 S. C. 2 Tyrwh. 475. Cr. & J. 158. 1 Tyrwh. 107, by

(*c*) See *ante*, p. 1387 *et seq.* Bayley, B.

(*d*) 1 Cr. & J. 151.

(*e*) 1 Cr. & J. 153. 1 Tyrwh. (f) By Alexander, L. C. B. 1 Cr. & J. 153. 1 Tyrwh. 103.

England, or to some other person in England, for the specific use of the legatee, the amount of his legacy, it has uniformly been held that no legacy duty is payable on such remittance, inasmuch as the whole estate is administered in India, and the remittance is in respect of a demand which is considered as established there (*g*). Accordingly, in *Hay v. Fairlie* (*h*), a testator, resident in India, bequeathed to an infant a sum of money to be invested in the Company's securities, of which the interest was to be applied to her maintenance, and the principal to be settled upon herself for life, with remainder to her children: He was lost on his voyage to England, leaving all his property in India: His executors, resident in that country, proved his Will at Calcutta, invested the legacy in the Company's securities, and for several years remitted the interest to their correspondents in London, for the benefit of the legatee, who had come to England: A part of that interest was brought into Court in a suit established by her for the appointment of a guardian and for the allowance of maintenance, and an order was made for the payment to her guardian, out of the fund so created, of 200*l.* a-year, as maintenance: And Lord Gifford, M.R., held, that there was a specific appropriation in India of the legacy, and that the payment of 200*l.* a-year was not liable to the legacy duty. So, in *Logan v. Fairlie* (*i*), a testator resident in India, and having all his property there, bequeathed his residuary personal estate to his brother, J. H., and his sister, H. L., in equal shares; but in case his sister should die before him, then to her children: The executor, who was also resident in India, having proved the Will there, remitted the residue to his agent in England, with a letter in which he desired the agent to appropriate the fund according to the annexed extract of the Will, by which it would be perceived that half went to J. H. and half to H. L. or her children: H. L. had died in the lifetime of the testator, leaving nine

(*g*) By Sir J. Leach, V.-C., in *Logan v. Fairlie*, 2 Sim. & Stu. 201.

(*h*) 1 Russ. Chanc. Cas. 117.

(*i*) 1 Myl. & Cr. 59.

infant children: A suit was instituted in England by the children against the agent, and also against the executor and J. H., who were both out of the jurisdiction, for the purpose of having a moiety of the fund secured: And it was held, by the Lords Commissioners Pepys and Bosanquet, that no legacy duty was payable upon such moiety, inasmuch as it had been appropriated in India.

The rule was once supposed to be different, where, although the testator was domiciled abroad, the assets came to be administered in England: Thus, in *The Attorney-General v. Cockerell (j)*, the Barons of the Exchequer held, that legacies bequeathed by a British subject resident in the East Indies, out of his personal estate, to persons living in England are liable to the duty, if the executor proves the Will in England, and pays the legacies here, notwithstanding the testator realized and possessed his property in India, resided there, made his Will there, and died there; and although the executors were in India at the time of their appointment, and the Will was originally proved there. So in *The Attorney-General v. Beatson (k)*, it was holden by the Court of Exchequer, that the legacy duty is payable on bequests of personal property in India, by a Will there, and administration granted under it there, if it be remitted to England, and applied by another administrator in Scotland, under administration granted in England. Again, in *Logan v. Fairlie (l)*, Sir John Leach, V.-C., expressed his opinion that if a part of the assets of a testator, who at his death was resident in India, and had all his property there, is found in England, in the hands of the agent of his executor, without any specific appropriation, and a legatee in England institute a suit here for the payment of his legacy, out of such unappropriated assets, then such assets are to be considered as administered in England, and the legacy duty is payable in respect of them.

(j) 1 Price, 165.

(k) 7 Price, 560.

(l) 2 Sim. & Stu. 284.

But modern decisions appear to have overruled this distinction: and it must be regarded as now fully established that the personal assets situate in India, of a testator who resides and makes his Will, and dies in India are not subject to legacy duty, although such assets are afterwards remitted to this country, by an executor who has proved the Will in India, to executors who have proved the Will in England, and are administered under a decree of the Court of Chancery here. Thus, in *Jackson v. Forbes* (m), a testator born in Scotland, who resided and died in India, having real and personal property there situate, but no assets in England, by his Will and testamentary papers, left the whole of his property in equal divisions to his four natural children, or the survivors of them, and their heirs, subject to legacies and annuities: His executors obtained an Indian probate, and paid the debts and bequests, and converted the principal part of the estate into money which they sent to their bankers in England, and invested it in the funds in their own names: Proceedings were commenced in England against the executors, to determine the claims under the Will; whereupon the stock was transferred into the name of the Accountant-General of the Court of Chancery, and the Court made a decree ascertaining the shares of the several claimants: And the Barons of the Exchequer held that the legacy duty was not payable on legacies or shares of the residue bequeathed. And this decision was affirmed in the House of Lords (n). Again, in *Arnold v. Arnold* (o), a man possessed of personal estates, situate partly in England, but principally in the East Indies, where he was employed in the service of the East India Company, made his Will in the East Indies, and died there: After specifically bequeathing his property in England to his wife, his Will gave considerable pecuniary legacies to his infant children, and to various other persons, some of whom were native inhabitants of India.

(m) 2 Cr. & J. 382.

Gen. v. Forbes, 2 Cl. & F. 48.

(n) Atty.-Gen. v. Jackson, 8 Bligh. 16. S. C. nomine Atty.-

(o) 2 Myln. & Cr. 256.

One of the executors lived in Calcutta, and proved the Will there, and having collected the Indian assets, and thereout paid the testator's Indian debts and funeral expenses, he remitted the surplus to England to the other executors, by whom probate of the Will, in respect of the property in England, had been already obtained in this country: In a suit instituted in this Court by the testator's children against the executors, for the administration of the estate, the fund so remitted was transferred into Court, and having proved insufficient to pay the pecuniary legacies in full, it was ultimately ordered to be apportioned among the different legatees, in proportion to their respective legacies: And Lord Cottenham held, that the legacy duty was not payable in respect of any of the sums so appropriated to the respective legatees: His Lordship considered the decision by the House of Lords in *The Attorney-General v. Jackson* as precisely in point, and conclusive of the case before him: But the learned Judge also stated, that independently of that authority, he should upon the construction of the Act (86 Geo. III. c. 52 (p)), have been of opinion that the legacies in question were not legacies given by the Will of a person intended by the Act: for when the Act speaks of "any Will of any person" and of the legacies being payable out of the personal estate, it must be considered as speaking of persons and Wills, and personal estates in this country: that being the limit of the sphere of the enactment (q).

It may be observed that there were still several questions connected with these authorities, which could not be regarded

If the
deceased,
whether a

(p) See *ante*, p. 1410 *et seq.*

(q) The decision in this case must not be understood as at all qualifying the decision of the Court of Exchequer, *Re Ewin*, 1 Cr. & J. 151, *ante*, p. 1496. On the contrary, it was decided by the Barons of the Court (*Re Coales*, 7 M. & W. 390) that if a British born subject, domiciled in England,

dies here and makes his Will here, leaving assets in India, which are administered by his executor here, they are subject to the legacy duty, notwithstanding they were received in India and remitted to the executor here by an administrator *cum testamento annexo* appointed under an Indian grant of administration.

as precisely settled by them. Thus, it was undecided, whether property situate abroad, or in this country, belonging to an alien who is domiciled here, is liable to the duty: or whether property, situate in this country, belonging to a British subject who dies domiciled in the British colonies, or domiciled in a foreign country (*r*), is so liable. In a former edition of this Work, Sir Edward Vaughan Williams suggested that the principle ought to be applied to these cases (as it appears to have been in the decision of the case of *Re Ewin*) (*s*), that personal property follows the person and is to be considered as situate wherever the domicile of the proprietor is (*t*); and consequently, that if the deceased, whether a British subject or a foreigner, died domiciled in England, all his personal estate, wherever situate, is to be regarded as English estate, and therefore liable: But if he died domiciled out of England, then the whole of his personal property, wherever it happened to be at the time of his death, is to be regarded as situate in the country of domicile, and therefore exempt. This suggestion has been fully justified by the subsequent decision of the House of Lords in the case of *Thompson v. The Advocate-General* (*u*): There a British born subject died domiciled in a British colony: At the time of his death he was possessed of personal property locally situate in Scotland: Probate of his Will was taken out in Scotland, for the purpose of there administering this property: and out of the fund thus obtained by the executor, legacies were paid to legatees residing in Scotland: And, it was held, on the principle above mentioned, that legacy duty was not payable in respect of these legacies. In the course of the discussion of this case, the following question was put by the House to the Judges: *viz.* "A., a British born subject, born in England, resided in a British

British born subject or a foreigner, died domiciled here, all the assets, wherever situate, are liable to the duty: if he died domiciled abroad, all are exempt.

(*r*) See *Atty.-Gen. v. Dunn*, 3 Mees & W. 511.

(*s*) 1 Cr. & J. 151, *ante*, p. 1496.

(*t*) See *ante*, p. 1387 *et seq.*

(*u*) 12 Cl. & F. 1. S. C. 13 Sim.

153. See also *Accord. The Commissioners of Charitable Donations v. Devereux*, 13 Sim. 14. *Chatfield v. Berchtoldt*, L. R. 12 Eq. 464. L. R. 7 Ch. 192.

colony: He made his Will, and died domiciled there: At the time of his death, he had debts owing to him in England: His executors in England collected these debts, and out of the money so collected paid legacies to certain legatees in England. The question is, are such legacies liable to the payment of legacy duty?" The Judges were unanimously of opinion in the negative. And the House decided accordingly.—This case was afterwards regarded by the Court of Exchequer in *The Attorney-General v. Napier (x)* as having definitely settled the principle above stated; and the Barons decided accordingly a converse case; viz. that where the intestate was domiciled in England and the property abroad, it was liable to the duty.

So as to
Succession
Duty.

The rule
applies to
legacies given
in exercise of
powers by
testator
domiciled out
of England:

but not to
succession
duty.

Accordingly it has been held that Succession Duty is not payable on legacies given by the Will of a person domiciled in a foreign country (y).

The same principle applies to cases, where legacies are given in exercise of powers—for though in such cases the rule that the property follows the person can hardly be applied, yet the statute (36 Geo. III. c. 52, s. 7), having put into one class legacies given by testators out of personal estate, or out of any personal estate they may have had power to dispose of, could not have intended that a different rule should apply to different members of the class, and that duty should be payable by the appointees under the Wills of donees of powers domiciled out of Great Britain, when no duty would be payable by legatees under the Wills of those persons to be paid out of their personal estates (z). But the rule is different as to Succession Duty on testamentary appointments under English instruments (a).

(x) 6 Exch. 217, 220.

(y) *Wallace v. Atty.-Gen.*, L. R. 1 Ch. 1. See also *Atty.-Gen. v. Campbell*, L. R. 5 H. L. 524, and compare *Re Capdevielle*, 2 H. & C. 985. *Atty.-Gen. v. Blucher de Wahlstatt*, 3 H. & C. 374. *Re*

Badart's Trusts, L. R. 10 Eq. 288.

And see *ante*, p. 1446 (r).

(z) *Re Wallop's Trusts*, 1 De G. J. & S. 656.

(a) *Ibid.* See also *Re Lovelace*, 4 De G. & J. 340.

This difference is well illustrated by the two cases of *The Attorney-General v. Campbell* (b) and *Lyall v. Lyall* (c). In *The Attorney-General v. Campbell*, A. was domiciled in Portugal, but on a visit to England made his Will in English form and appointed executors, some of whom resided in England. He desired his executors to collect his property, which was in Portugal, to convert it into cash, pay certain legacies and invest the residue in the English 3 per cents., to appropriate what they should think necessary to pay a life annuity of 50*l.* to his sister, on the termination of which the appropriated fund was to revert to and form part of his residuary estate, and be divided (like the rest) among his three children. The executors exactly performed the directions of the trust: when the sister died the part appropriated to satisfy her annuity became divisible among the children: And it was held that this constituted a succession within the meaning of the second section of the Succession Duty Act, and was liable to the payment of succession duty. The general rule is stated to be that: Where personal property is bequeathed by a person not domiciled in this country, it is not, in the first instance liable to legacy or succession duty on being paid to the legatee. But where the executor directed to collect foreign property and invest it here, has discharged the duty imposed on him and has placed the fund, in the way required, in this country, any subsequent devolution of it becomes liable to duty, though the party on whom it may devolve *namely* (like the testator) be domiciled *abroad*.

The case of *Lyall v. Lyall* was as follows: By a marriage settlement executed in England, the husband assigned to trustees (all domiciled and resident in England) an English policy of assurance, effected on his own life for 2000*l.*, payable at the expiration of six months after his death, and a sum of consols, and covenanted to pay to the trustees within three years the sum of 1000*l.*; and it was declared

(b) L. R. 11 Eq. 378. L. R. 5 (c) L. R. 15 Eq. 1.
H. L. 524.

that the policy moneys and the 1000*l.* should be held upon trust for investment and payment of the income to the wife for life, and then to the husband for life and then for division among the children of the marriage. The husband died within three years, having been at the time of his marriage, and thenceforth, up to the time of his death, domiciled in New South Wales. The wife survived only three months, and left one child, the plaintiff, who was also domiciled abroad. At the time of the wife's death neither the policy moneys nor the 1000*l.* covenanted to be paid to the trustees had been paid to them: And it was held on the authority of *The Attorney-General v. Campbell* that succession duty was payable by the plaintiff on the funds to which he became entitled under the settlement. By his Will the husband appointed trustees and executors in New South Wales to collect his residuary estate (which was all locally situate in that country), and transmit the same to trustees and executors in England who were to invest the funds so transmitted in England and pay the income to his wife for life, and after her death to divide the same among the children. At the time of his wife's death no part of the residuary estate had reached the hands of the English trustees, but large remittances were afterwards made to them: And it was held that no succession duty was payable by the plaintiff on the funds to which he became entitled under the Will.

CHAPTER THE THIRD.

BY WHOM THE DUTIES ARE PAYABLE.

IT will be observed, by referring to the statute 36 Geo. III. c. 52, s. 6, that the duties, in all cases wherein it is not otherwise thereby provided for, must be paid by the executor or administrator, upon retainer for his own benefit, or for the benefit of any other persons, of any legacy or part of any legacy, or of the residue or any part of such residue, which he shall be entitled so to retain; and also upon delivery, payment, or discharge of any legacy or residue, &c., to which any other person shall be entitled (a). It is the duty of the executors to deduct the legacy duty when they pay the legacy, and if they do not do so, they are made personally responsible (b).

Duties payable by executor or administrator unless otherwise provided for.

Legacy duty to be deducted by executor or administrator.

By the statute 45 Geo. III. c. 28, s. 5 (c), it is provided, that the duties imposed on legacies charged upon, or made payable out of real estate, &c., shall be paid by the trustee or other person entitled to the real estate which is subject to the legacy, and that the duty shall be retained by the person paying such legacy, in like manner as is provided, respecting legacies out of personal estate, by the statute 36 Geo. III. c. 52 (d). In the case of *The Attorney-General v. Jackson*, before stated (e), the land out of which the legacy was payable,

(a) See *ante*, p. 1410.

(b) *Per Parke, B.*, in *Re Sammon*, 3 Mees. & W. 386. There is a plain distinction between legacy duty and succession duty in this respect—the Legacy Duty Act provides that the executors shall be liable to see to the payment of the duty; the Succession Duty Act does not contain a similar provi-

sion applicable to sums which an executor has to pay under a covenant: *per Lindley, L. J.*, in *Re Higgins*, 31 C. D. 142, 146. As to limitation of an executor's liability by lapse of time, see *post*, p. 1515, and see *ante*, p. 1411.

(c) See *ante*, p. 1441.

(d) See *ante*, p. 1410 *et seq.*

(e) See *ante*, p. 1489.

had been devised to two persons in moieties; the one moiety to the one for life, and the other moiety to the other in fee: And the Court of Exchequer held, that both the parties, the tenant for life of the one moiety, and the tenant in fee of the other, were liable to the Crown for the payment of the legacy duty.

The collection of the Succession Duty is provided for by the 44th and five following sections of the statute 16 & 17 Vict. c. 51, by which that duty is imposed (*f*). And it will be observed, that by the interpretation clause (*g*), the term "trustee" is to include an executor or administrator.

It was decided in *Hales v. Freeman* (*h*), upon the construction of the Legacy Duty Acts, that a trustee under a Will, who had paid the legacy duty upon an annuity, charged on land, after the expiration of four years from the death of the testator, might recover the amount of duty so paid from the legatee, notwithstanding a previous assignment of the annuity by such legatee (*i*).

But a question may arise, whether the legacies are not, by the terms of the Will, to be paid in full, free of the legacy duty, so as to make it incumbent on the executor to retain the duty out of the residue, instead of deducting it from the payment to the legatee (*k*).

(*f*) See *ante*, p. 1471 *et seq.*

(*g*) See *ante*, p. 1446.

(*h*) 1 Brod. & Bing. 391. S. C. 4 Moo. 21.

(*i*) This case was recognized and acted on in *Stow v. Davenport*, 5 B. & Adol. 366. *Bate v. Payne*, 13 Q. B. 900. A purchaser from a legatee is not necessarily subject to the same liability as the legatee himself in this respect: *Farwell v. Seale*, 3 De G. & Sm. 359.

(*k*) In such cases, no duty shall be chargeable on the money to be applied to the payment of the duty: See stat. 36 Geo. 3, c. 52, s. 21, *ante*, p. 1423. A direction

in a Will, "I direct all the legacies left by my Will and codicil to be paid free of legacy duty," will not free property liable to succession duty from that duty: *Re Johnston*, 26 C. D. 538, 554. In the case of *Re Johnston*, 26 C. D. 538, it was held that under the words "all the legacies left by my Will and codicil to be paid free of legacy duty," the legacy duty was to be paid out of the estate on all legacies as well pecuniary as specific, the word "paid" not being sufficient under the circumstances to cut down the direction to pecuniary legacies only. See also *Ansley v. Cotton*,

In *Barksdale v. Gilliat* (l), the testator directed all the legacies to be paid at the expiration of six months after his decease *without any deduction*: And Lord Eldon held, that the legatees were entitled to the full amount, and that the legacy duty must be paid by the executors. So in *Smith v. Anderson* (m), the testator gave certain annuities, and directed them to be paid *without any deduction whatsoever*: And Sir John Leach, M.R., held, that the annuities should be paid clear of legacy duty, on the ground, that, from the nature of the property out of which the annuities were to be paid, there could be no deduction, except in respect of the legacy duty: His Honor, in giving judgment, said, that he admitted that it was to be stated as the fair result of Lord Eldon's judgment in the above case of *Barksdale v. Gilliat*, that his Lordship considered that a direction to pay annuities without deduction would not extend to exempt the annuitants from the legacy duty, if, from the nature of the property out of which the annuities were payable, there was any other deduction to which the annuities might be subject. The correctness, however, of this view of Lord Eldon's judgment was denied by Lord Brougham in *Louch v. Peters* (n), and by Alderson, B., in *Gude v. Mumford* (o).

In *Dawkins v. Tatham* (p), an annuity was given by a

16 L. J. Ch. 55, where it was held that the general term "legacy" will include a gift of stock, and *Douglas v. Congreve*, 1 Keen, 410, where it was held that the term "pecuniary legacy" will not have that effect, although it will include the forgiveness of a debt: *Morris v. Livie*, 11 L. J. Ch. 172. Where a particular legacy is directed to be paid free of legacy duty, and the estate is insufficient to pay all the legacies, the legacy duty on the sum to be actually received by the legatee must be paid by the executor before apportioning the fund available for the payment of

the legacies rateably amongst the legatees: *Re Wilkins*, 27 C. D. 703. *Heath v. Nugent*, 29 Beav. 226.

(l) 1 Swanst. 562.

(m) 4 Russ. Chanc. Cas. 352.

(n) 1 M. & K. 489.

(o) 2 Y. & C. 448.

(p) 2 Sim. 492. It must be observed, that in the case already mentioned of *Hales v. Freeman*, 1 Brod. & Bingh. 391, the Court of C. P. held that a legatee, to whom an annuity was given "clear of all deduction," was compellable to refund the amount of the duty: But the point which might have been

Will, *clear of all deductions*, and was directed to be paid out of certain sums of stock standing in the testator's name: And Sir I. Shadwell, V.-C., held that the executors were bound to pay the legacy, free from the legacy tax.

In *Stow v. Davenport* (q), lands were devised to the use among others, that M. A. F. should take, from and out of the same premises, an annuity or yearly charge of 500*l.* a-year, to be paid *clear of all taxes and deductions*, remainder to S. for life, subject to the annuity: And the Court of King's Bench held, that the annuity was to be paid clear of legacy duty, and was a charge upon the land; and consequently, that S., who had entered into possession under the devise to him, and been compelled to pay the legacy duty on the annuity, pursuant to 45 Geo. III. c. 28, s. 5, could not recover it again from the annuitant (r).

Again, in *Louch v. Peters* (s), a testatrix gave to L. for his life an annuity or clear yearly sum of 500*l.*, to be paid and payable half-yearly, out of real estate, *clear of all taxes and outgoings*: And it was held, by Sir J. Leach, M. R., and

raised upon the construction of these words does not appear to have been noticed by either the bar or the bench; and the argument and decision proceeded on a totally distinct ground.

(q) 5 B. & Adol. 359. S. C. Nev. & M. 805.

(r) Whether or not an annuity is to be free from any deduction for income tax must depend upon the meaning of the words used by the testator, that is, upon the meaning with which he uses the word "deduction." *Prima facie* the word "deduction" does not include income tax, because income tax is not a deduction, but a payment—to be made by the recipient of the legacy; and there

must be something else besides the word "deduction" to make the gift of an annuity free of income tax. In the cases of *Festing v. Taylor*, 3 B. & S. 217. Lord Lovat *v. Duchess of Leeds*, 2 Dr. & Sm. 62. *Turner v. Mullineux*, 1 J. & H. 334. *Re Bannerman's Estate*, 21 C. D. 105, the Court found sufficient to construe the Will in the wider sense. In the cases of *Wall v. Wall*, 15 Sim. 513. *Lethbridge v. Thurlow*, 15 Beav. 334. *Abadam v. Abadam*, 33 Beav. 475. *Sadler v. Rickards*, 4 K. & J. 302. *Pearreth v. Marriott*, 22 C. D. 182. *Gleadow v. Leatham*, 22 C. D. 269, the Court was unable to admit such construction.

(s) 1 M. & K. 489.

afterwards by Lord Brougham on appeal, that the annuitant took it clear of the legacy duty.

Further, in *Courtoy v. Vincent* (t), a testator directed his executors and trustees to pay certain annuities and legacies clear of the property tax, and all expenses attending the same: And it was held by Sir T. Plumer, M. R., that the legacy duty ought to be paid out of the assets of the testator, and that the annuitants and legatees were entitled to receive the full amount of their respective legacies and annuities, without any deductions in respect of legacy duty.

So in *Godsden v. Dotterill* (u), a testator bequeathed to his sister a legacy of 100*l.*, to be paid to her *free from all expenses*; and it was held by Sir J. Leach, M. R., that this legacy was to be paid discharged of duty.

Again, in *Gude v. Mumford* (v), a testator devised to James Metherell, for his life, "one annuity or clear yearly sum of 100*l.*," and charged his estates at Chobham with the payment of "the said annuity or yearly sum of 100*l.*:" He then devised the estates at Chobham to trustees, in trust to levy and raise the annuity, and pay the same to James Metherell; and subject thereto, and all costs, charges, and expenses attending the raising and paying the same, in trust for A. for life, with remainder to B. in fee: And Alderson, B., held, that James Metherell was entitled to the annuity clear of all deductions for legacy duty, and that the residuary estate was chargeable with the duty payable thereon: The learned Baron observed, that it was clear, from the authorities on the subject, that if, from any directions contained in the Will, an intention on the part of the testator can be collected that the legacy duty should be paid by the executor, the Court will carry that direction into effect: And the learned Judge denied that the view taken by Sir J. Leach (x), of Lord Eldon's judgment in *Barksdale v. Gilliat*, was correct: but declared his opinion, that the

(t) 1 Turn. & Russ. 433.

(v) 2 Younge & Coll. 448.

(u) 1 M. & K. 56.

(x) See *ante*, p. 1507.

right construction of it was, that Lord Eldon considered the words "without deduction" to mean, in their ordinary sense, "clear of all deduction," and then went on to examine, whether, in the four corners of the Will, he could find the same words used, in another sense, or or in a more definite and limited sense; and whether, if he could find an intention to use them in a limited sense, he could carry that intention into effect; and upon the whole he arrived at the conclusion that the words must be used in their ordinary sense without qualification (y).

But in *Foster v. Ley* (z), where a testatrix bequeathed property in trust "to pay off the debts of her first husband, as it was her will that the same should be discharged," and the moneys remaining unexpended, to her nephew; the Court of Common Pleas held, that the creditors ought to pay the legacy duty upon their several debts; and that the matter having been overlooked in an order made by the Court of Chancery for the payment of the debts, the executors, who had paid the debts in full, and then paid the legacy duty, might recover the amount from the creditors respectively, in an action for money paid to their use.

Again, in *Sanders v. Kiddell* (a), a testatrix gave to trustees such a sum of money as that the annual produce thereof, when invested in the funds, would produce the clear yearly sum of 500*l.*, upon trust to pay the annual produce to certain of her relations in succession for life, and afterwards, as to one-fifth part, upon trust to pay it to M. C. Gascoigne for his life, and after his decease, to any wife who might survive him, during her life, and after the decease of the survivor of them, upon trust for his children: And Sir L. Shadwell, V.-C., held that the fund was not exempted from legacy duty; for that it appeared, from the language of the

(y) See also *Accord. Marris v. 19 Beav. 499. Warbrick v. Varley,*
Burton, 11 Sim. 161. Ford v. 30 Beav. 241. Re Coles's Will,
Ruxton, 1 Coll. 403. Bailey v. L. R. 8 Eq. 271.
Boulton, 14 Beav. 595. Haynes v. (z) 2 Bingh. N. S. 269.
Haynes, 3 De G. M. & G. 590. (a) 7 Sim. 536.

Will, that the testatrix meant that what she had directed to be done, should be done at once; that M. C. Gascoigne might or might not marry a relation of the testatrix, and his children might be related in some degree to the testatrix, or they might not; and, therefore, that the word "clear" must be taken to refer not to the legacy duty, but to the expenses of investment, and so on (b). And this case was recognised and acted upon by Romilly, M. R., in *Pridie v. Field* (c).

Where one legacy is given by Will free of duty, and by a codicil another is given in *substitution* of that given by the Will, and upon the same trusts, the substituted legacy is also to be considered as given free from the duty; because, being a mere substitution, it is *prima facie* attended with the same incidents: so where a subsequent addition is made to a prior legacy, the addition will have the same qualities (d).

Thus in *Cooper v. Day* (e), the testator gave to his widow 800*l.*, payable within three months from his death, and free from legacy duty: He also gave 4,000*l.* to trustees, payable to them within the same period, free from legacy duty, in trust for his two daughters, to be paid at twenty-one, with intermediate interest for their maintenance: By a codicil, the testator bequeathed to his wife an additional sum of 200*l.* free from legacy duty: he also revoked the legacy of 4,000*l.* and in substitution gave in trust for his daughters 5,000*l.*, "upon the trusts, and to and for the same intents and purposes, and under and subject to the same powers, provisoes and limitations, as expressed in his Will concerning the legacy of 4,000*l.*;" By a second codicil the testator revoked the gift of 5,000*l.*, and gave in its place 6,000*l.* to the same trustees,

(b) In this case the testator did not use the words "clear of all deductions," and besides, the parties were to take in succession: *per* Shadwell, V.-C., in *Marris v. Burton*, 11 Sim. 161, 163. Where a legacy, the fund being in Court, was assigned by a deed, which represented that it was *unincumbered*, it

was held that the legacy duty did not constitute an "incumbrance:" *Bliss v. Putnam*, 7 Beav. 40.

(c) 19 I. v. 497.

(d) By Sir J. Leach, V.-C., 6 Madd. 31. See the cases collected, *ante*, p. 1162, note (h). *Post*, p. 1512, note (i).

(e) 3 Meriv. 154.

upon the trusts, &c., following the words in the first codicil : The only question was, whether the legacy of 6,000*l.* was to be paid free of the legacy duty : and Sir William Grant declared, upon the authority of the cases of *Leacroft v. Maynard* (*f*), and *Crowder v. Clowes* (*g*), that the substituted legacy of 6,000*l.* was to be taken as exempted from the legacy duty, in like manner with the original legacy, in the place of which it was given. So in *Shaftesbury v. Marlborough* (*h*), a testator by his Will gave an annuity to his grandson, and directed the executors to pay the legacy duty on all the legacies and annuities given by his Will : By a codicil, he gave an annuity to his grandson *in lieu* of the annuity given by his Will : And Sir L. Shadwell, V.-C., held, that the annuity given by the codicil was free from legacy duty ; his Honor observing, that when the thing bequeathed by a codicil is given as a mere substitution for that which is bequeathed by the Will, it is to be taken with all its accidents (*i*).

But in *Chatteris v. Young* (*j*), the testator bequeathed to his daughter 50,000*l.*, of which 20,000*l.* was to be paid to her absolutely, and, as to the remaining 30,000*l.*, she was to receive the interest to her separate use during her life, and after her death, the principal was to be paid to such person or persons, as she might by her Will appoint ; and, after giving various other legacies, and bequeathing to the same daughter a share of the residue of his personal estate, he directed that all the specific and pecuniary legacies thereinbefore bequeathed should be paid to the respective legatees free of the legacy duty : The daughter having died in his lifetime, he afterwards by a codicil, "instead of the legacies given to her by my Will, which are now lapsed," bequeathed to her husband 20,000*l.* : Sir John Leach, V.-C., decreed (*k*),

(*f*) 3 Bro. C. C. 233. S. C. 1 v. Lord Harrowby, 1 De G. F. & Ves. 279. J. 428, overruling S. C. Johns.

(*g*) 2 Ves. 449, 450.

425.

(*h*) 7 Sim. 237.

(*j*) 2 Russ. Chanc. Cas. 171.

(*i*) See also *Accord. Fisher v. Brierley*, 30 Beav. 267. *Johnstone*

(*k*) 6 Madd. 30.

Ch. III.] *By whom the Duties are Payable.*

that the husband was not entitled to have the 20,000*l.* paid to him free of legacy duty: And upon appeal to the Lord Chancellor, his Lordship (Lord Lyndhurst) was of opinion that the legacy given to the husband by the codicil could not be considered as given by way of substitution for the legacy which the Will had destined for his wife, but was an independent, distinct, substantive bequest: He therefore confirmed the judgment of the Vice-Chancellor, and dismissed the appeal (*l*).

In *Byne v. Currey* (*m*), a testator by his Will, bequeathed certain legacies to charitable institutions, and directed that they should be paid as follows, "Which charitable legacies I direct may be paid out of my personal estate, prior to the payment of my debts, and the said legacies hereby by me given and bequeathed:" He then directed "all his legacies to be paid within two years after his decease, free of any deduction for tax or duty:" By a codicil, he bequeathed legacies payable and raiseable immediately: And the Court of Exchequer held, that the charitable legacies, and the legacies given by the codicil raiseable immediately, were payable free from legacy duty (*n*).

In *Douglas v. Congreve* (*o*), a testator gave to M. S. 50,000*l.*, three per cent. consols, to be transferred within six months after his decease, and, after giving a variety of specific and pecuniary legacies, he directed that the duty upon all the pecuniary legacies thereinbefore bequeathed should be paid out of his general personal estate: And Lord Langdale, M.R., held, that the legacy of the stock was not a pecuniary legacy, and consequently not exempted under this clause of the Will from the payment of legacy duty.

In *White v. Lake* (*p*), a testator gave several pecuniary and specific legacies, and directed that "all legacies and bequests"

(*l*) See also *Burrows v. Cottrell*, 3 Sim. 375. *Early v. Benbow*, ante, p. 7, note (*s*).

(*m*) 2 Cr. & Mees. 603. S. C. 4 Tyrwh. 479.

(*n*) See *Accord. Williams v. Hughes*, 24 Beav. 474.

(*o*) 1 Keen, 410.

(*p*) L. R. 6 Eq. 188.

by his Will given, should be paid or satisfied free of duty, and he devised his residuary real estate to A. for life, and afterwards upon trust for sale: and Lord Romilly, M.R., held, upon the ordinary meaning of the words "legacies and bequests," and also upon the general construction of the Will, that the legacy duty which would become payable on the proceeds of the real estate, was not payable out of the personal estate.

In *Lord Londesborough v. Somerville* (q), the testator directed legacy duty to be paid out of his general personal estate on the annuities and pecuniary legacies given by the Will: And it was held by Romilly, M. R., that the income of residuary uninvested personal estate directed to be invested in land and settled to uses, was not an annuity within such direction (r).

Out of what
fund the duty
is to be paid.

In *Noel v. Lord Henley* (s), a legacy was bequeathed to be paid out of the rents and profits, and the produce of the sale of a real estate devised to be sold for the payment of such legacy, *inter alia*: In a subsequent part of the Will, this legacy was directed by a general clause, extending to all the legacies before given, to be paid in full, free of the duty: And the Court of Exchequer held, that the duty on that particular legacy must be paid out of the real fund, and not out of the

Exemption of
legatees for life
extended to
legatee in
remainder.

(q) 19 Beav. 295.

(r) In *Calvert v. Sebbon*, 2 Keen, 672, a testator bequeathed some specific chattels and a sum of 200*l.* to A., and he directed his executors to invest in the funds such a sum as would produce 200*l.* a year, clear of the legacy duty, and all other deductions, which annual sum was to be paid to A. for her life, and after her decease the principal was to be paid to other parties; and the testator directed his executors to pay the legacy duty on the specific and pecuniary legacies and yearly sum given to A.: A. and the legatees in re-

mainder, were strangers in blood to the testator; so that the same rate of duty was chargeable on the whole bequest, and the full amount of the duty payable at once (see *ante*, pp. 1416, 1417): And Lord Langdale, M. R., held, that the legacy duty was payable out of the testator's residuary estate, both in respect to the interest given to A., and to those in remainder; inasmuch as the residuary legatee could not on A.'s death, call back any part of the duty that had been paid.

(s) 7 Price, 241. S. C. in Dom. Proc. 12 Price, 213.

personality; the exemption from the duty being an augmentation of the legacy, and therefore payable out of the specific fund (t).

It may here be convenient to notice that by recent statutes certain limitations of time have been imposed on the right of the Crown to recover legacy and succession duties. Thus by 52 & 53 Vict. c. 7, s. 14, it is provided that no person shall, under a testamentary document admitted to probate, or under letters of administration, or under a confirmation, be liable for payment of any legacy, succession, or estate duty, after six years from the settlement of the account in respect of which the duty is payable, where such account was in all respects a full and true account. And further that trustees, executors and administrators, are not to be liable after six years if it be proved to the Commissioners that the account rendered was correct to the best of their knowledge.

Limitation of time in recovering legacy and succession duties.

By sect. 18 of 52 & 53 Vict. c. 7, it is provided that:—

- (1.) A person may deposit with the Commissioners an attested copy of any document creating a liability for succession or estate duty, other than a testamentary one admitted to probate.
- (2.) A receipt is to be given by the officer of the Commissioners for such document.
- (3.) After such a receipt has been given for a copy of such a document, no person is to be liable for duty under it after six years from the date of notice to the Commissioners of the fact which gives rise to an immediate claim to such duty.
- (4.) The costs of depositing the copy and obtaining the receipt are to be considered duly incurred by the trustee or executor.

Power to deposit copies of documents and liability to duty to cease after specified period.

By 52 & 53 Vict. c. 7, s. 12, it is provided that (1) notwithstanding sect. 42, and any other provision of the Act of 1853, real property estates and interests shall not be liable as against

(t) See also *Stow v. Davenport*, Catharine's College, L. R. 16 Eq. ante, p. 1508. *Wilkinson v. Barber*, 19. *Wilson v. O'Leary*, L. R. 17 L. R. 14 Eq. 96. *Farrer v. St.* Eq. 419.

purchasers or mortgagees for succession or estate duty after six years from the date of notice to the Commissioners that the successor has become entitled, or from that of the first payment of an instalment or part of the duty or (where the successor has availed himself of the option given by 51 & 52 Vict. c. 8, s. 22), after two years from the time for payment of the last instalment or part of the duty, or in the absence of any such notice or payment after the lapse of twelve years from the happening of the event (whether before or after the passing of this Act) which gave rise to an immediate claim to such duty, or if such period expires within six years from the date of the passing of the Act, then after the expiration of six years from the last-mentioned date.

(2.) The duty unpaid at the end of such periods shall be paid by the successor or persons mentioned in sect. 44 of the Act of 1853, other than the purchaser or mortgagee, and be charged upon other property comprised in the succession (unless vested in the purchaser or mortgagee), and in the case of a mortgage upon the equity of redemption.

(3.) A purchaser or mortgagee shall not for the purpose of obtaining the exemption be bound to see that the duty is discharged out of the purchase-money or loan.

PART THE FOURTH.

OF THE LIABILITIES OF AN EXECUTOR OR ADMINISTRATOR.

BOOK THE FIRST.

OF ASSETS.

HAVING investigated in a former part of this Work the quantity of the estate which devolves to an executor or administrator, it remains, 1st, to consider what portion of that property is regarded in law as applicable by him to the satisfaction of the different claimants on the estate in his hands, as well upon valuable consideration as volunteers: and, 2ndly, to complete the examination already commenced in an earlier stage of this Treatise (*a*), of the order in which that application must be made, with reference to the priority subsisting among the claimants (*b*).

The property which will be the subject of these two inquiries, is called *assets* in the hands of the executor or administrator, that is, sufficient, from the French *assez*, to make him chargeable to a creditor, and a legatee or party in distribution, so far as such property extends.

This portion of the estate of the deceased is sometimes designated by the older writers by the term "*assets enter mains*," in contradistinction to "*assets per descent*," by which last expression is denoted that portion which descends to the heir, and which is sufficient to charge him, as far as it goes, with specialty debts of his ancestor.

(a) *Ante*, p. 850 *et seq.*

of the priority of specialty debts

(b) This subject is of less importance than formerly by reason

having been taken away by 32 & 33 Vict. c. 46.

CHAPTER THE FIRST.

OF PERSONAL ASSETS, LEGAL OR EQUITABLE.

What shall be said to be assets in the hands of an executor :

THE general rule with respect to what shall be said to be assets in the hands of an executor or administrator to charge him, is thus laid down in a book of authority (a): "All those goods and chattels, actions and commodities, which were of the deceased in right of action or possession as his own, and so continued to the time of his death, and which after his death the executor or administrator doth get into his hands as duly belonging to him in the right of his executorship or administration, and all such things as do come to the executor or administrator in lieu or by reason of that, and nothing else, shall be said to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee."

assets which were never in the testator :

There are many instances in which property in the hands of an executor, is regarded as assets, although it was never in the testator : Thus if an executor renew a lease, he shall account for the new lease, as well as the old, as assets (b) ;

(a) Touchst. 496.

(b) Anon. 2 Ch. Cas. 208. Bromfield v. Chichester, 2 Dick. 480. James v. Dean, 11 Ves. 392. Randall v. Russell, 3 Meriv. 190. See also Fitzroy v. Howard, 3 Russ. C. C. 225. Giddings v. Giddings, *ibid.* 241. Fosbrooke v. Balguy, 1 M. & K. 226. Again, where the executor or administrator carries on the trade of the testator or intestate, and buys stock or material for the purpose of such trade, the stock or materials as between the

personal representative and the estate will belong to the estate, subject to the personal representative's right to indemnity, *Re Evans*, 34 C. D. 597 ; and will become part of the general estate even as against trade creditors, unless a testator has expressly directed that the trade shall be carried on, and appropriated a part of his property for the purpose. In such cases the executor doing no more than his duty will be entitled to be indemnified,

and this even though the new lease to the executor may comprise additional property to that included in the testator's lease and at an increased rent (*c*). So if A. covenants with B. to make him a lease of certain land by such a day, and B. dies before the day, and before any lease made, A. is bound to make the lease to the executor of B., and the lease so made shall be assets in his hands; or if A. refuses to grant the lease, he is liable to make the executor a compensation in damages, which are also assets (*d*). So if A. promises, on good consideration, to deliver to B. by such a day certain wares or merchandizes, and this is not performed in the life of B., but delivery is made to his executor, the goods will be assets in his hands, as well as the money recovered in damages, for not performing, would have been (*e*). by contract :

Again, chattels which were never vested in the testator in possession, but accrue to the executor by remainder, will be assets in his hands: Thus, if a lease be made to one for life, remainder to his executor for years (*f*), such remainder will be assets in the hands of the executor, though it were never in the testator (*g*). So where a lease for years is bequeathed to A. for life, and afterwards to B., who dies before A., although B. never had this term in him, it shall be assets in the hands of his executor (*h*). So a remainder in a term for years, though it never vested in the testator's possession, and though it still continue a remainder, shall be assets in the hands of the executor; for it bears a present value, and is vendible (*i*). by remainder :

So goods which have accrued by increase since the testator's death are assets in the hands of the executor: Thus if the sheep or other cattle of the testator bear lambs, &c., by increase :

and the trade creditors will have the benefit of this indemnity. *Ex parte Garland*, 10 Ves. 110. *Re Johnson*, 15 C. D. 548. And see *post*, p. 1682.

(*c*) *Re Morgan*, 18 C. D. 93.

(*d*) *Wentw. Off. Ex.* 188, 14th edit. *Chapman v. Dalton*, *Plowd.*

286. *Com. Dig. Assets*, (C).

(*e*) *Wentw. Off. Ex.* 188, 14th edit. *Com. Dig. Assets*, (C).

(*f*) See *ante*, p. 614 *et seq.*

(*g*) *Went. Off. Ex.* 183, 14th edit. *Com. Dig. Assets*, (C).

(*h*) *Ibid.*

(*i*) *Ibid.*

after the testator's death, these, although never the property of the testator, will be assets (j). So if the executor of a lessee for years enter into the tenements, the profits, over and above the rent, shall be assets (k). Therefore, if an executor has a lease for years of land of the value of 20*l.* a-year, rendering rent of 10*l.* a-year, it is assets in his hands only for 10*l.* over and above the rent (l). Again, if an executor employ the testator's goods in trade, the profits shall be assets (m): And whether the executor takes upon himself to carry on the testator's trade, or does so in pursuance of a provision in articles of partnership entered into by the deceased (n), or by direction of the testator, contained in his Will, or under the direction of the Court of Chancery, the profits of such trade shall be assets, for which he shall be accountable. Thus in *Gibblett v. Read* (o), Lord Hardwicke held, that a share in a newspaper should be considered as the personal property of the deceased, transmissible to his representatives, and that the profits of printing the same subsequent to his death should be distributed accordingly. And his Lordship said, that there were many cases where no part of the property of a testator had been employed or made use of in carrying on the business, and yet the executor

(j) Wentw. Off. Ex. 190, 14th edit.

(k) *Buckley v. Pirk*, 1 Salk. 79. Wentw. Off. Ex. 190, 191, 14th edit. But the profits, as far as the amount of the rent, are received by the executor as tenant, and appropriated to the use of the lessor: 1 Salk. 79. See *post*, p. 1637.

(l) *Body v. Hargrave*, Cro. Eliz. 712. Godolph. Pt. 2, c. 24, s. 1. A leasehold estate though not sold is assets, *ad valorem*: *Jury v. Woodhouse*, Barnes, 333. *Vincent v. Sharpe*, 2 Stark. 507.

(m) Godolph. Pt. 2, c. 24, s. 4. Com. Dig. Assets, (C). See *post*,

p. 1732.

(n) Generally speaking, the death of a partner, of itself, dissolves the partnership: *Vulliamy v. Noble*, 3 Meriv. 614: And even where the partners have covenanted that they and their respective executors shall continue partners for a certain time yet unexpired, the executors of the late partner are entitled to a decree for a dissolution, subject to their liability to damages recoverable in an action by the surviving partners, for a breach of the covenant: *Downs v. Collins*, 6 Hare, 418.

(o) 9 Mod. 459.

had been held accountable for the profits of the business as the testator's personal estate (*p*); as in the instance of physical secrets or nostrums, where everything was carried on with materials purchased after the testator's death, and yet the nostrum was part of the personal estate of the testator (*q*).

(*p*) See also *Moseley v. Rendell*, L. R. 6 Q. B. 338. *Abbott v. Parfitt*, L. R. 6 Q. B. 346.

(*q*) His Lordship further observed that if the house of the testator were a house of great trade, the executor must account for the value of what is called the goodwill of it. See also *Worral v. Hand*, Peake, N. P. C. 74, *Acc.* So an assignment by deed of the good-will of a trade has been held to be a conveyance of "property" within the Stamp Act: *Potter v. Commissioners of Inland Revenue*, 10 Exch. 147. But in *Spicer v. James*, Rolls, M. T. 1830, cited in *Collyer on Partnership*, p. 82, where an attorney having died intestate, another attorney, a friend of the family, by arrangement with the widow, took out administration, and continued the business of the deceased until her son came of age; paying the widow half the profits; Sir J. Leach held, that the goodwill of a trade of a personal nature, as that of an attorney, was not a subject of administration and was not assets in the hands of the administrator. [See, however, *contra*, *Smale v. Graves*, 3 De G. & Sm. 706.] With respect to the goodwill of a business, in which several are partners, it seems that, as to a partnership between professional persons, on the death of one, the good-will shall survive to the other, although the deceased paid a large premium on entering into the partnership: *Farr v. Pearce*, 3 Madd.

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78. But whether this survivorship of the goodwill exists in the case of commercial partnerships, has been questioned. In *Hammond v. Douglas*, 5 Ves. 539, Lord Loughborough determined that the goodwill of a trade carried on in partnership without articles, survives, and is not partnership stock: But in *Crawshay v. Collins*, 15 Ves. 227, Lord Eldon doubted the propriety of that decision: See also *Featherstonhaugh v. Fenwick*, 17 Ves. 298. *Wedderburn v. Wedderburn*, 22 Beav. 84, 104, in which last case it was laid down by Romilly, M. R., that the goodwill does not survive unless by express agreement. See also *Accord. Smith v. Everett*, 27 Beav. 446. But though these cases establish that the goodwill is a valuable and tangible thing in some cases, yet the legatee of the share of the mere goodwill of a deceased partner cannot support a bill against the surviving partner to obtain the benefit of his legacy, even after assent by the executor: *Robinson v. Quiddington*, 28 Beav. 529. In a suit for the general administration of assets, if it be ascertained that the executors have been able so to deal with the business, as to make something of the goodwill, the legatee may have a right to be paid in respect of his interest in it: *Ibid.* Other cases on the subject of the goodwill of a partnership business will be found collected and commented on in the Jurist of Dec. 2, 1865.

So, in *Pitt v. Pitt* (r), the administratrix of a deceased ropemaker in the king's yard at Woolwich was cited in the Prerogative Court of Canterbury, to exhibit an Inventory and account: The deceased had four apprentices; and the question was, whether the administratrix was bound to insert in the Inventory the amount of the wages earned by them, in the yard of the deceased, since his death: And Sir G. Lee was clearly of opinion, that she, who did not belong to the yard, could have apprentices there only as administratrix to the deceased; and the learned Judge accordingly decreed her to charge herself with the profits arising from the apprentices.

by condition :

So chattels, real or personal, to which the executor becomes entitled, after the death of the testator, by force of a condition, will be assets: As where a lease for years, or cattle, plate, or other chattel, was granted by the testator, upon condition that if the grantee did not pay such a sum of money, or do other acts, &c., and this condition is broken or not performed after the testator's death, the chattel will be brought back to the executor, and be assets (s). The law is the same where the condition is, that the testator shall pay money or do any other act to avoid the grant: Accordingly, it has been decided, that chattels, whether real or personal, mortgaged or pledged by the testator, and redeemed by the executor, shall be assets in the hands of the executor, for so much as they are worth beyond the sum paid on their redemption (t). And it was held at N. P. by Abbot, C. J. (u),

(r) 2 Cas. temp. Lee, 508.

(s) Wentw. Off. Ex. 181, 14th edit.

(t) Went. Off. Ex. 182, 14th edit. *Hawkins v. Lawse*, 1 Leon. 155. *Harecourt v. Wrenham*, or *Harwood v. Wrayman*, Moore, 858. 1 Roll. Rep. 56, pl. 32. 1 Brownl. 76. 1 Roll. Abr. 920, (G.) pl. 5. *Alexander v. Lady Gresham*, 1 Leon. 225. A testator being indebted to R., deposited with him

a policy of insurance on the testator's life, as security for the debt, and for a further advance then made by R.; and died, leaving R. and M. his executors: R. still holding the policy, applied to the insurers for the amount due on it (200*l.*), which they refused to pay unless R. & M. gave a receipt for it as executors: They did so, R. making protest that he signed as executor, merely to satisfy the

that a lease which belonged to an intestate, upon which the plaintiff had a lien, on account of which he retained it in his hands, was nevertheless to be considered as assets in the hands of the administrator, who had the power to redeem it. But if the executor redeem with his own money the goods pledged by the testator, he shall be indemnified in respect to the sum he has disbursed out of the effects of the testator, or, if necessary, by the sale of the chattel itself; and in that case the surplus over and above such indemnity shall be assets (x). In case he have no fund as executor, and he advance the money out of his own purse for the redemption, and it be fully equivalent to the value of the chattel, the property is altered by such payment, and shall be vested in the executor as a purchaser in his own right (y). But if the executor redeem the chattel after the time specified for redemption is elapsed, then it is said that the chattel, without any distinction in respect to its value, shall at law belong to the executor in his own right; since in such case it must be deemed to be sold to him by the mortgagee or pawnee, who, after the forfeiture is incurred, has a legal right to dispose of it at his pleasure to him, or to any other person: But in equity, the excess in the value of the thing beyond the money paid for the redemption shall be regarded as assets in the hands of the executor (z).

"Assets in any part of the world," says the author of the *Touchstone* (a), "shall be said to be assets in every part of the world." So it was laid down by Lord Lyndhurst, in delivering the judgment of the Barons of the Exchequer in

property of the testator shall be assets in whatever part of the world they are situate:

insurers: In an action by a judgment creditor, the executors pleaded *plene administraverunt* except as to 4*l.* (the surplus out of the 200*l.* after payment to R.): And the Court of K. B. held, that the executors were not chargeable with the 200*l.* as assets, but only with the surplus after payment to R.: *Glaholm v. Rowntree*, 6 Ad. & Ell.

710.

(u) *Vincent v. Sharpe*, 2 Stark. N. P. C. 507.

(x) *Wentw. Off. Ex.* 182, 14th edit.

(y) *Anon. Dyer*, 2 a. pl. 2. *Wentw. Off. Ex.* 182, 14th edit.

(z) *Wentw. Off. Ex.* 186, 187, 14th edit.

(a) *Touchst.* p. 496.

The Attorney-General v. Dimond (b), that "the effects of the testator are assets wherever situated, whether at home or abroad; and such effects as are in a foreign country at the time of the testator's death, although they remain and are wholly administered there by the executor, are equally assets. Again, it was laid down by Bayley, B., in the case *Re Ewin* (c), that if the testator or intestate dies entitled to stock in the French or other foreign funds, and there is a deficiency of assets in this country to meet the debts of the deceased, it is the duty of the executor or administrator, to sell the stock, and bring the proceeds into this country, in order to satisfy the creditors: and if he neglects to do so, he will be guilty of a *devastavit* (d). Accordingly, as early as the reign of James I., in *Dowdale's Case* (e), where the jury found that assets, within the kingdom of Ireland came to the hands of the executor, it was resolved that the finding the assets to be beyond sea, was surplusage; for that if executors have goods of their testators in any part of the world, they shall be charged in respect of them; since many merchants and other men, who have goods to a great value beyond sea, are indebted here in England: and it would be a great defect in the law, that those goods should not be liable to their debts.

But this doctrine has been questioned. In *Story's Conflict of Laws* (f), that eminent writer, in commenting on the resolution in *Dowdale's Case*, says, "This language, in its broad import, is certainly unmaintainable in our day; for it goes to the extent of making a domestic executor or administrator liable for all assets of the testator or intestate which

(b) 1 Crompt. & Jerv. 370.

(c) *Ibid.*: 151.

(d) So it has been laid down that a leasehold estate for years in Ireland is personal assets in England, and may be sold here by the executor: *Bligh v. Lord Darnley*, 2 P. Wms. 622. And where there was a question as to the quality of an estate in land situate in a

foreign country, the Court of Chancery referred it to a Master, to inquire whether the testator's interest in it was in its nature real or personal: *Gardiner v. Fell*, 1 Jac. & Walk. 24.

(e) 6 Co. 47 b. S. C. Cro. Jac. 55.

(f) Ch. xiii. s. 514, a.

are locally situate abroad; although (as it has appeared in an earlier part of this Work) (g), he has not, in virtue of the domestic letters of administration, any authority to collect them, or to compel payment or delivery thereof to himself."

In *Dowdale's Case*, it will be observed, the foreign assets had actually come to the hands of the executor; so that the more general question, embraced by the terms of the resolution, did not, in truth, arise. But Mr. Justice Story doubts the authority of the case, even in the aspect which the actual facts of it present; observing that according to the doctrine maintained in England in modern times, the executor was not at all liable to be sued in England as executor under letters testamentary taken out in Ireland; and *à fortiori* not for assets received and administered in Ireland under that appointment: And that learned Commentator considers it as at least a doubtful question, whether if an executor or administrator, appointed in the country where the deceased died, should collect assets in a foreign country without obtaining a grant of administration there, the assets so received would constitute a part of the home assets which he would be bound to administer, and for which he would be liable to account under the domestic administration according to the domestic laws.

It has certainly been established (as there has already been occasion to show) (h), that although where different administrations are granted in different countries, that administration is deemed the principal or primary one which is granted in the country of the domicile of the deceased, yet each portion of the estate must be administered in the country in which possession of it is taken and held under lawful authority: And that the administrator under a foreign grant has a right to hold the assets received under it against the home administrator, even after they have been remitted to this country (i). The only mode, it seems, of reaching such assets

Administration granted in different countries: principal administration that granted by country of domicile: estate must be administered in the country where possession is taken.

(g) See *Ante*, pp. 300, 365.

(h) *Ante*, pp. 365, 366.

(i) *Ante*, pp. 365, 366, 1389.

Story's *Confl. ch.* xiii. s. 518. See,

Relation of
principal
administration
to that granted
in foreign
country.

is to require their transmission or distribution, after all the claims against the foreign administration have been duly ascertained or settled (*k*). Again, though the right of the home executor or administrator to an ancillary probate or grant of administration in a foreign country is usually admitted, by the comity of nations, as a matter of course (*l*), yet this new administration is made subservient to the rights of creditors and other claimants resident within the country where it is granted; and the *residuum* is transmissible to the country of the original administration only when a final account has been settled in the proper tribunal where the new administration is granted, upon the equitable principles adopted by its own law, in the application and distribution of the assets found within its jurisdiction (*m*).

Liability of
executor to
account for
assets out of
England.

The liability of an executor or administrator to account for assets out of England would seem to depend upon his relation to the foreign assets. It would seem from the decision in

however, *Sandilands v. Innes*, 3 Sim. 263. In that case it appeared, that Erskine Nimmo died intestate at Madras; and William Fairlie, a creditor of the deceased, took out letters of administration to him in the Supreme Court there: Fairlie afterwards came to England, and obtained letters from the Prerogative Court of Canterbury: Afterwards one of the intestate's next of kin procured the latter administration to be revoked, and letters to be granted to himself: He then filed a bill against Fairlie, praying for an account of the effects of the intestate, both in India and in this country, which had been possessed by Fairlie: It was objected, that the bill being filed by the plaintiff in the character of personal representative only of the deceased, and not also as one of the next of kin, he was not en-

titled to sue for an account of the assets of the deceased possessed by Fairlie in India, but only of the assets possessed by him in this country: Sir L. Shadwell, V.-C., said, that if Fairlie had brought any of the intestate's assets from India to this country, the plaintiff would clearly be entitled to have an account taken as to them; and that the taking of that account would, incidentally, make it necessary to have an account taken of all the assets possessed by Fairlie or his agents in India. See also *Hervey v. Fitzpatrick*, Kay, 421. *Ante*, p. 369. *Maclaren v. Stainton*, 16 Beav. 279.

(*k*) *Story's Conf. ch. xiii. s. 518. Ante*, p. 852.

(*l*) See *ante*, pp. 301, 365 (*h*).

(*m*) *Eames v. Hacon*, 18 C. D. 347. *Story's Conf. ch. xiii. s. 513. Ante*, p. 852.

Ewing v. Orr-Ewing (n), that where the same person has vested in him English and foreign assets, then, whether the English administration be major or minor, principal or ancillary, the English courts of equity, if called upon so to do by a person entitled to claim in the administration, will, if the administrator be within the jurisdiction, judicially administer the whole of the assets vested in him. In a case where one has not only identity of trustees with the legal personal representatives here and abroad and unity of the trust which they have to perform, as was the case in *Ewing v. Orr-Ewing*, there is no difficulty, and the whole estate can be administered, as regards both English and foreign assets, in the English courts; where, however, the only title of the English personal representative is under an English probate or letters of administration to the English assets, the administration, beyond that which is necessary for the payment of English creditors, may not conveniently be conducted by the English courts, especially if the deceased is of foreign domicile and those entitled to the surplus of his estate after the payment of his debts are foreigners; in such a case the surplus of English assets after payment of all debts proved in England, might properly be ordered to be paid over to the administrator in the country of the deceased's domicile. Where, however, the deceased is of English domicile, the English Courts assume the power to make a general decree for administration of the whole estate of any testator or intestate who may have died leaving assets in several countries in respect of which several grants of probate or administration (whether principal or ancillary), might have been obtained, working out such a decree in the best way practicable as to assets not within the local jurisdiction. Lord Selborne in delivering his opinion in the House of Lords in *Ewing v. Orr-Ewing* (o), cited with approval the 589th section of Story on Equity Jurisprudence, Chap. IX.: "Courts of Equity of the country where the ancillary administration is granted

(n) 9 A. C. 34.

(o) 10 A. C. 514.

(and other Courts, exercising a like jurisdiction in cases of administration), are not incompetent to act upon such matters, and to decree a final distribution of the assets to and among the various claimants having equities or rights in the funds, whatever may be their domicile, whether it be that of the testator or intestate, or be in some other foreign country. The question whether the Court, entertaining the suit for such a purpose, ought to decree such a distribution, or to remit the property to the forum of the domicile of the party deceased, is treated, not so much as a matter of jurisdiction, as of judicial discretion, dependent upon the particular circumstances of each case. There can be, and ought to be, no universal rule on the subject. But every nation is bound to lend the aid of its own judicial tribunals for the purpose of enforcing the rights of all persons having a title to the fund, when such interference will not be productive of injustice, or inconvenience, or conflicting equities, which may call upon such tribunals for abstinence in the exercise of their jurisdiction." But, as already stated, wherever there are two sets of personal representatives, one appointed by the tribunal of the country where the testator was domiciled, and another, and a different set of persons, appointed representatives in another country where there happens to be personal estate, questions will arise as to what are the rights of the executors in the country of the domicile as against the ancillary administrator, and when, and at what stage, the trustees and executors of the country of domicile require the ancillary administrator to hand over to them the assets collected under the ancillary administration (*p*). It would seem that wherever you have assets within the jurisdiction, and a person accountable for those assets also within the jurisdiction, a Court of Equity will, if called upon so to do, make a general decree for judicial administration, even though there may be assets abroad and the deceased be of foreign domicile, but that the English courts in the course of the

(*p*) See *per* Cotton, L.J., in *Re Orr-Ewing*, 2^d C. D. 456, 467.

English action will not allow proceedings to be carried further than is convenient according to the comity of Courts, and would adopt the proceedings of the Courts of the country of the domicile of the deceased according to the necessities and exigencies of the case (*q*). The English Court could, of course, if there was pending a suit in the courts of the country of the deceased's domicile, in which all questions, which could arise in the course of the administration, could be decided, stay the English action and prevent it going on here vexatiously and unnecessarily (*r*).

It has sometimes been asserted that the duty of the personal representative of a deceased of foreign domicile acting here under a subsidiary grant of administration is to pay the creditors and duties in the state under whose authority he is acting, and to remit the balance to the personal representative in the state or country of the domicile of the deceased, and an argument is sought to be based on this assertion that the Courts of a country other than that of the domicile of the deceased ought not to judicially administer assets not comprised in the subsidiary grant, even though the administrator or trustee of these goods happen himself to be within the jurisdiction of the Courts of the country from which the subsidiary grant issues and amenable to it. The case, however, of *Re Kloebe* (*s*), seems to shew that the assertion on which the argument is founded is itself without foundation, for it was decided in that case by Pearson, J., that in the administration of the English estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with English creditors. In the case of *Re Boyse* (*t*), it was held by Malins, V.-C., that although judgment has been given for the administration of an estate, the Court has no power to restrain a foreign creditor from proceeding in a foreign Court against the administrator;

Duty of personal representative of person with foreign domicile acting in this country under subsidiary grant of administration.

(*q*) *Stirling Maxwell v. Cartwright*, 11 C. D. 522. Orr-Ewing, 22 C. D. 456, 469.

(*s*) 28 C. D. 175.

(*r*) See *per* Cotton, L.J., in *Re*

(*t*) 15 C. D. 591.

but that if judgment were obtained in the foreign Court against the administrator by default, it would only be treated in the administration action as *prima facie* evidence of the debt.

Generally nothing which is assets can be recovered by process of law, except by the administrator acting under the authority issuing out of the Court whose process is sought to be enforced (*u*) ; but there are some apparent exceptions to that rule : one is where assets have come into the jurisdiction by being remitted to the agent of a foreign administrator : in such a case the foreign administrator may sue his agent without taking out letters of administration in the country to the forum of which he is resorting. Thus, in *Eames v. Hacon* (*x*), where an intestate died domiciled in Ireland, and letters of administration were granted in Ireland, and the Irish administratrix instructed her attorneys to procure letters of administration in India for her use and benefit, and they did so, and having received the Indian assets, and paid the Indian debts, and remitted the net proceeds to their agents in England, it was said by Jessel, M.R., and Baggallay, L.J., that the Irish administratrix would have been entitled to sue the agents in England even if she had not had the Irish letters of administration resealed. Again, in *Re Macnichol* (*y*), it was held that where judgment had been obtained in a foreign Court by the foreign administrator of a creditor against an English debtor who had since died and whose estate was being administered in England, that the foreign administrator could prove without taking out English administration to his intestate.

Law governing
administration
of assets of
deceased
person with
foreign
domicil.

If, however, the English Courts do undertake the judicial administration of assets of a deceased person of foreign domicile, they will administer such assets generally, as far as they can ascertain the law, according to the law of the deceased's domicile the *lex domicilii*, but the priorities of

(*u*) *Fernandes' Executors' case*,
L. R. 5 Ch. 314.

(*x*) 18 C. D. 347.
(*y*) L. R. 19 Eq. 81.

creditors will be governed by the *lex fori*. Thus, in *Blackwood v. The Queen* (2), it was held by the Privy Council that although the law of the testator's domicile governs the foreign personal assets of his estate for the purpose of succession and enjoyment, yet those assets are for the purpose of legal representation, of collection and administration, as distinguished from distribution among the successors, governed by the law of their own locality, and not by that of the testator's domicile.

By the statute 5 Geo. II. c. 7, s. 4 (a), it is enacted, that "the houses, lands, negroes, and other hereditaments and real estates, situate or being within any of the said plantations [British plantations in America] belonging to any person indebted, shall be liable to and chargeable with all just debts, duties, and demands of what nature or kind soever, owing by any such person to his Majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process in any Court of law or equity, in any of the said plantations respectively for seizing, extending, selling, or disposing of any such houses, lands, negroes and other hereditaments and real estates towards the satisfaction of such debts, duties and demands, and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of, for the satisfaction of debts."

In the case of *Thomson v. Grant* (b), Alexander Donaldson devised plantations in Jamaica to several trustees, whom also he appointed his executors: Of these, Thomson alone proved the Will in the Prerogative Court of Canterbury; and Grant, Campbell, Meekin, and Green proved it in Jamaica; Thomson died, and Grant, who was one of his executors,

5 Geo. 2, c. 7.
Land, houses,
negroes, &c.,
in the planta-
tions:

(2) 8 A. C. 82.

(a) This Act has been repealed by Stat. Law Rev. Act, 1887. It had been already repealed as to negroes by stat. 37 Geo. 3, c. 119.

The compensation fund for slaves in Jamaica was held to be legal assets in *Lyon v. Colville*, 1 Coll. 449.

(b) 1 Russ. Chanc. Cas. 540, note to *Player v. Foxhall*.

proved his Will here in the Prerogative Court: Both Thomson and Grant were creditors of Donaldson to a large amount: In a suit which was instituted by Thomson on behalf of himself and other creditors, for the administration of Donaldson's estate, and which was afterwards revived by Grant, the devise of the plantations had been declared fraudulent as against creditors, and Grant had been appointed consignee: Grant then claimed to be entitled to retain, in priority to the other creditors, out of the balances in his hands as consignee, both the debt due from Donaldson to him individually, and also the debt due to him as the executor of Thomson: And Sir Thomas Plumer, M.R., held that Grant was entitled as executor to retain both debts out of the balances in question: His Honor said that the executor's right of retainer over personal property was clear; and by the Act of Geo. II., plantations in Jamaica are converted, with respect to the payment of debts, into personal assets, and, as such, are possessed by the executor: Grant, therefore, was in a situation in which he could not sue either for the debt due to himself personally, or for that which he, as the executor of Thomson, had the sole legal right to demand: His coming over to this country, and acting as consignee, could not take away from him a right which attached on the property in his hands: That property was personal assets, and in all respects to be administered as such: In the character of consignee he retained only the charges incident to that situation: As an executor, he was entitled to retain both debts (c).

It seems that even before this statute, it was held that a foreign plantation, though an inheritance, yet being in a foreign country, was to be looked upon as a chattel to pay debts, and a testamentary thing (d).

It was held, however, in *Charlton v. Wright* (e), that not-

(c) See also *Manning v. Spooner*
3 Ves. 118.

(d) *Noel v. Robinson*, 2 Vent.
358. See also *Blankard v. Galdy*,

4 Mod. 226.

(e) 12 Sim. 274. See also *Lyon*
v. Colville, 1 Coll. 449, 472.

withstanding West India estates are made legal assets by this statute, they may be devised so as to make them equitable assets. But this was afterwards overruled in the Privy Council, in *Turner v. Cox* (f).

By statute 9 Geo. IV. c. 33 (ff), after reciting that doubts have arisen whether and to what extent the real estates of British subjects and others (not being Mahomedans or Gentooes), situate within the jurisdiction of his Majesty's Supreme Courts of Judicature in India, are liable as assets in the hands of executors and administrators, to the payment of the debts of their deceased owners, it is declared and enacted, "That whenever any British subject shall die seised of or entitled to any real estate in houses, lands, or hereditaments, situate within or being under the general civil jurisdiction of his Majesty's Supreme Court of Judicature at Fort William, in Bengal, Fort St. George, and Bombay respectively, or whenever any person (not being a Mahomedan or Gentoo) shall die seised of or entitled to any such real estate, situate within the local limits of the civil jurisdiction of the same Courts respectively, such real estate of such British subject or other person as aforesaid (not being a Mahomedan or Gentoo) is and shall be deemed assets in the hands of his or her executor and administrator, for the payment of his or her debts, whether by specialty or simple contract, in the ordinary course of administration" (g).

Section 2 declares and enacts that the executor, &c., may sell such real estate for the payment of the debts, and make a good title to a purchaser.

By section 3, "In any suit or action to be commenced and prosecuted in any of the said Courts respectively, against such executor or administrator as aforesaid, for the recovery of any debt or demand due and owing by such testator or

Whenever any British subjects or persons not being Mahomedans or Gentooes, shall die, entitled to any real estate in India, such estate shall be deemed assets

Executors may sell such real estate for the payment of debts :

in any action for debt, the executor may be charged with the full amount of such real estate :

(f) 8 Moo. P. C. 288.

(ff) Repealed except as to estates of persons dying before 1 Jan. 1866, by Stat. Law Rev. Act, 1873.

(g) Real estate in India being

made by this statute personal assets, it is unnecessary to make the heir a party to an administration suit : *Story v. Fry*, 1 Y. & Coll. Ch. C. 603.

intestate in his lifetime, and at the time of his death, such executor or administrator shall and may be charged with the full amount in value of such real estate as aforesaid, not exceeding the actual net proceeds of such estate which sold by the sheriff, as assets in the hands of such executor or administrator to be administered."

What assets shall be considered as come to hand so as to charge the executor :

The general rule has long been established, that an executor or administrator shall not be charged with any other goods as assets than those which come to his hands (h). But considerable difficulty exists in ascertaining what is to be esteemed such a coming to the hands of the executor or administrator : It is said in *Wentworth's Office of an Executor* (i) that if the testator at the time of his death has a stock of sheep in Cumberland, bullocks in Wales, fat oxen in Bucks, money, household stuff, and plate in London, and his executor dwells at Coventry, viz., far from all these places, the executor has such an actual possession presently upon the testator's death, that he may maintain trespass against any stranger taking them away or spoiling them ; and, therefore, that author considers it doubtful whether this shall not be such a possession in the executor, and such a coming of these goods to his hands as to charge him with payment of debts and legacies, and make his own goods liable instead of them. However it was laid down by Lord Holt, in *Jenkins v. Plombe* (k), that if an executor live at London, and the goods of which the testator died possessed are at Bristol, although the executor has such an immediate possession of them that he may maintain trover in his own name against any converter of them, and the damages recovered shall be assets in his hands, yet if he do not recover so much in damages as really the goods were worth, and that happens not through any fault of his, he shall answer for no more than he recovers (l).

(h) Read's case, 5 Co. 33, b.
34, a.

(i) P. 227, 14th edit.

(k) 6 Mod. 181.

(l) See also Com. Dig. Assets (D).

Again, upon the supposition that goods come fully into the possession and hands of an executor or administrator, but are afterwards wrongfully taken from him, a question arises whether such goods shall be considered assets in his hands: There are some authorities for asserting that things taken out of the possession of the executor are assets in his hands (*m*), unless they were taken by the Queen's enemies (*n*). But it should seem, that an executor or administrator stands in the condition of a gratuitous bailee; with respect to whom the law is, that he is not to be charged without some default in him (*o*): Therefore, if any goods of the testator are stolen from the possession of the executor, or from the possession of a third person, to whose custody they have been delivered by the executor, the latter shall not be charged with these as assets (*p*).

Again, if a trespasser takes goods out of the possession of an executor or administrator, although he is bound to sue the trespasser, if known, yet the executor or administrator shall not be answerable in assets for more than he recovers in the suit: But if he omits to sell the goods at a good price, and afterwards they are taken from him, then the value of the goods shall be assets in his hands, and not what he recovers; for there was a default in him (*q*). Again, if the goods be perishable goods, and before any default in the executor to preserve them, or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that

(*m*) Read's case, 5 Co. 34, a. Bethell v. Stanhope, Owen, 132.

(*n*) Wentw. Off. Ex. 234, 14th edit.

(*o*) Wentw. Off. Ex. 235, 14th edit. Com. Dig. A sets (D).

(*p*) Jones v. Lewis, 2 Ves. Sen. 240. Job v. Job, 6 C. D. 562. Wentw. Off. Ex. 236, 14th edit. Com. Dig. Assets (D). A contrary rule was said to prevail at law prior to the Judicature Act. See

Crosse v. Smith, 7 East, 258, 259. Now, however, the rule at law and in equity is the same (Judic. Act, 1873, sect. 25, sub-sect. 11), and an executor is not chargeable except in the case of wilful default: Job v. Job, *ubi sup.* See *post*, pp. 1704, 1705.

(*q*) Jenkins v. Plombe, 6 Mod. 181, 182. Wightwick v. Lord, 6 H. L. C. 234, 235, *per* Lord Wensleydale.

matter in evidence to discharge himself (*r*). So if the testator's sheep or other beast die, or if his ships perish by tempest, the executor shall not be charged with them as assets (*s*).

Choses in
action how
far assets.

With respect to that part of the estate of an executor or administrator which consists of *choses in action*, the law has long been settled, that although debts of every description due to the testator are assets, yet the executor or administrator is not to be charged with them till he has received the money (*t*): So if the executor or administrator recovers any damages or compensation for any injury done to the personal estate of the testator before or since his decease, or for the breach of any covenant or contract made with the testator (*u*), or with himself in his representative character (*x*), all such damages thus recovered shall be assets in his hands, the costs and charges of recovering them being deducted (*y*): but he shall not be charged with them until he has reduced them into possession (*z*): Thus in *Williams v. Innes* (*a*), in order to prove assets in the hands of the defendants, who were executors, an account rendered by them was given in evidence, in which they stated that 1,000*l.* had been awarded as due to the testator's estate from a person who had been jointly concerned with him in underwriting policies of insurance: But Lord

(*r*) *Jenkins v. Plombe*, 6 Mod. 181.

(*s*) Wentw. Off. Ex. 236, 14th edit. Com. Dig. Assets (D). *Post*, p. 1704.

(*t*) Com. Dig. Assets (D). Bac. Abr. Exors. (H) 2.

(*u*) Co. Lit. 144, a. 1 Roll. Abr. 920. Exors. (G), pl. 4, 5. Godolph. Pt. 2, c. 24, s. 1, 2. Bac. Abr. Exors. (H) 2. Com. Dig. Assets (C).

(*x*) See *ante*, p. 762 *et seq.*

(*y*) Wentw. Off. Ex. 191, 14th edit. If the testator recover a

judgment for debt and costs, and his executor sue out a *sci. fa.* upon that judgment, the debt and costs due to the testator are assets when received; but the sum due for costs to the executor is only by way of indemnity to himself, and is not assets: *Per* Parke, B., in *Smedley v. Philpot*, 3 M. & W. 586.

(*z*) Godolph. Pt. 2, c. 24, s. 5. *Jenkins v. Plombe*, 1 Salk. 207. 11 Vin. Abr. 239, 240. See also *Lowe v. Peskett*, 16 C. B. 500.

(*a*) 1 Campb. 364.

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Ellenborough held, that this was not sufficient proof of assets, as it did not show that any part of the sum awarded had been received by the executors.

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But such debts or damages will be regarded as assets, although never, in point of fact, received, if they be released by the executor: for the release, in contemplation of law, shall amount to a receipt (*b*). So if the executor take an obligation in his own name for a debt due to the testator, he shall be equally chargeable as if he had received the money; for the new security has extinguished the old right, and is a *quasi* payment (*c*).

And it has been laid down, that where an executor sues for money had and received to his use as executor, the debt or damages is assets immediately: for if the money was had and received by the defendant, by the consent or appointment of the executor, it was assets in his hands forthwith; and if without his consent, yet the bringing the action is such a consent, that, upon judgment obtained, it shall be assets immediately, without execution (*d*).

This subject will be further discussed hereafter, when the nature of a *devastavit* by an executor or administrator is considered (*e*).

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There may be personal property of the testator or intestate, to which his personal representative, as such, is entitled, which is not assets in his hands, by reason of not being vendible: For example, the patron of a church grants to the testator the next avoidance, and the church becomes void; and the testator dies before he presents: After his death his executor presents, and has the benefit of preferring his son or his friend: Yet this shall make no assets in his hands;

Next avoid-
ance of a
church.

24, s. 5.
207. 11
so Lowe

(*b*) *Cocke v. Jenner*, Hob. 66. 419, 420, 421. *Sparkes v. Restal*, 29 Beay. 587.

(*d*) *Jenkins v. Plombe*, 1 Salk. 43.

(*c*) *Norden v. Levit*, 2 Lev. 189. 207. S. C. 6 Mod. 181.

Hosier v. Arundell, 3 Bos. & Pull. (e) *Infra*, Pt. IV. Bk. II. Ch. II.

7. *Partridge v. Court*, 5 Price, § II., p. 1690 *et seq.*

because he could not lawfully take money to present (*f*). But if a stranger presents, and gets his clerk admitted, and the executor recovers damages in a *quare impedit*, the money so recovered will be assets (*g*): And if the testator had died before the church had become void, then, because the executor might lawfully have sold it, it should seem that he will be charged with the value as assets, if he has neglected a proper opportunity to make a sale (*h*).

Office for
years.

A grant for years of an office is assets in the hands of the executor or administrator of the grantee (*i*).

Estates *pur
autre vie*.
Before the
Wills Act.

The Statute of Frauds (29 Car. II. c. 3, s. 12), after enacting that estates *pur autre vie* shall be devisable by a Will in writing, signed by the devisor or by some other person in his presence and by his express directions, and attested and subscribed in the presence of the devisor by three or more witnesses (*k*), proceeds to enact, that if no such devise thereof is made, the same shall be chargeable in the hands of the heir, if it shall come to him by special occupancy, as assets by descent: and in case there shall be no special occupant, it shall go to the executors or administrators of the grantee, and shall be assets in their hands. It must be remarked that this statute does not declare to whom the residue or surplus, which shall remain in the hands of the executors or administrators, shall belong, in case the estate goes to them under the statute: And in the

(*f*) Wentw. Off. Ex. 173, 14th edit. Godolph. Pt. 2, c. 24, s. 8. See also Lord Tenderden's judgment in *Rennell v. Bishop of Lincoln*, 7 B. & C. 195.

(*g*) Wentw. Off. Ex. 173, 14th edit. Godolph. Pt. 2, c. 24, s. 8. *Sale v. Bishop of Lichfield*, Owen, 99. *Smallwood v. Bishop of Lichfield*, 1 Leon. 205.

(*h*) Wentw. Off. Ex. 173, 14th edit.

(*i*) Sir George Reynel's case, 9 Co. 97, a. *Schellinger v. Blackerby*, 1 Ves. Sen. 347.

(*k*) Lands held under leases for lives will pass by a devise under the words "lands and hereditaments;" *Fitzroy v. Howard*, 3 Russ. Chanc. Cas. 223: See also *Weigall v. Brome*, 6 Sim. 99; and the Wills Act, 1 Vict. c. 26, s. 26.

case of *Oldham v. Pickering* (l), it was determined, that such residue was *not* distributable amongst the next of kin; for, notwithstanding the alteration by the statute, the estate remained freehold. This gave occasion to the passing of the stat. 14 Geo. II. c. 20, s. 9, which, after reciting the statute of Car. II., and that doubts had arisen, where no devise was made of such estates, to whom the surplus of such estates, after the debts of such deceased owners thereof are fully satisfied, shall belong, enacts, "that such estates *pur autre vie*, in case there be no special occupant thereof, of which no devise shall have been made according to the said Act for Prevention of Frauds and Perjuries, or so much thereof as shall not have been so devised, shall go, be applied and distributed, in the same manner as the personal estate of the testator or intestate."

Neither of these statutes, however, provides expressly for the case of a tenant *pur autre vie* dying intestate as to that estate, but having made a valid Will of his personalty: or in other words, the statutes omit to state whether the surplus shall in such case go according to the personal estate disposed of by the Will, or as undisposed of personal estate (m). Nor is any provision made by these statutes for the surplus which may be in the hands of an executor or administrator as special occupant. Both these points were fully considered by Lord Eldon in the case of *Ripley v. Waterworth* (n). There lands had been limited to a man, his executors, administrators, and assigns, *pur autre vie*: He died, having published his Will (not attested according to the Statute of Frauds), and appointed an executor, and made a residuary bequest of his personal estate: There were four distinct claimants, the heir-at-law, the residuary legatee, and the next of kin; and a claim was made by the executor for his own benefit: For the heir-at-law it was urged, that it was real estate, *viz.*, a descendible freehold; that it would not

(l) 2 Salk. 464. S. C. Carth. 378.

anncing, 71, note by Morley and Coote.

(m) See Watkins on Convey-

(n) 7 Ves. 425.

pass by an unattested Will, and an executor could not at common law take as special occupant; and therefore, the heir-at-law was entitled: For the residuary legatees and next of kin it was urged, that an executor might at common law take an estate *pur autre vie*, as special occupant; and that even prior to the Statute of Frauds, it was assets in his hands; and that it would be strange if (the statute providing, that where there is no special occupant, it shall go to the executor) it should not go to the executor where it is expressly given to him; and that the executor would, as special occupant, take it as personal estate, chargeable with debts, and subject to application as personal estate after debts paid: The Lord Chancellor was of opinion, that it could in no event go to the heir; that it did not belong to the executor; and that, as between the next of kin and residuary legatee, the executor was in equity a trustee for those to whom the testator had given the personal estate, by a Will sufficient to pass personal estate, and therefore he must be considered as holding it for the residuary legatee (o).

Since the
Wills Act.

With respect to estates *pur autre vie* of any deceased person, who shall not have died before the 1st day of January, 1838, the statute 1 Vict. c. 26, after repealing the above-mentioned statutes of Car. II. and Geo. II., and enacting, by section 3, that the power of every person to devise his estate shall extend to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be a corporeal or incorporeal hereditament, proceeds to enact, by section 6, that "if no disposition by Will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall

1 Vict. c. 26,
s. 6.

(o) Watk. Convey., edition by 392: and the observations of Lord Morley and Coote, p. 71, note. Lyndhurst, in Fitzroy v. Howard, See also James v. Dean, 11 Ves. 3 Russ. Chanc. Cas. 230.

be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant-right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant, and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate" (p).

The effect of these statutes is not to convert estates *pur autre vie* in land into pure personalty or moveables. It is merely that such estates are in some cases to be applied in the same manner as personal estate. The result is that exemption from the duties imposed by the legacy duty Acts cannot be claimed in respect of such estates when they form part of the estate of a person having a foreign domicile on the ground that "*mobilia sequuntur personam*:" neither can exemption be claimed on the ground that such estates are real property and therefore not within the Legacy Duty Acts, for by the Wills Act (s. 6) it is provided that such estates shall be assets in the hands of the executor or administrator and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate; and by 36 Geo. III. c. 52, s. 20, estates *pur autre vie* applicable by law in the same manner as personal estate shall be charged with the duties thereby imposed as personal estate (q).

In the case above cited of *Ripley v. Waterworth*, Lord Eldon observed, with respect to the claim of the executor for his own benefit, that he doubted whether an executor or administrator ever takes anything as such which he will not

Property to which an executor is entitled as *persona designata*.

(p) See, as to the construction *Ante*, p. 602, note (a).

(q) See *Chatfield v. Berchtoldt*, 2 De G. F. & J. 590. 25 Beav. 100. L. R. 7 Ch. 192.



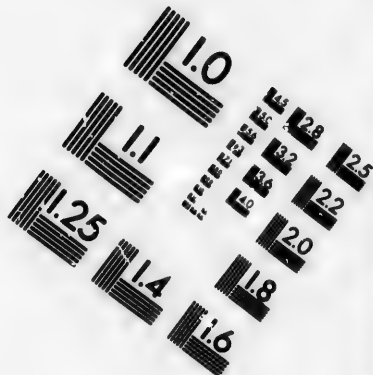
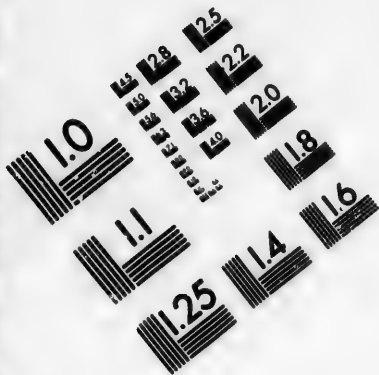
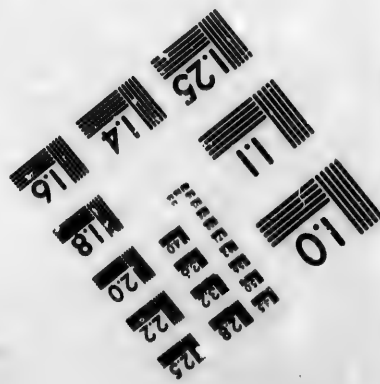
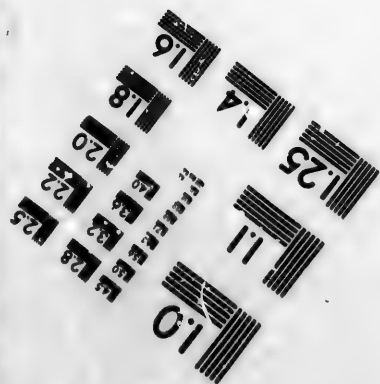
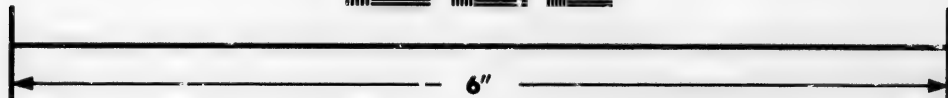
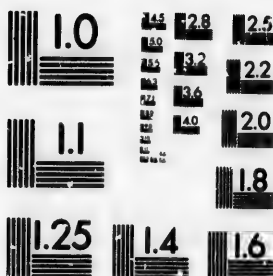


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be bound to apply as personal estate of the testator or intestate (r): And in *Milner v. Harewood* (s), his Lordship, recurring to his decision in *Ripley v. Waterworth*, said, "I have determined, and I see no reason to dissent from it, that, where the executor is the special occupant, taking as executor, he must hold that as all other property taken by an executor, and therefore distributable in this Court." From this principle it seems to be a necessary deduction, that whenever personal estate is limited to executors or administrators, as purchasers, they will take for the benefit of the persons entitled to the personal estate. There has already been occasion, in a previous part of this Treatise (t), to state, at some length, the authorities which are connected with this question.

Property in
testator as
trustee.

The absolute property of the goods must have been vested in the testator, in order to make them assets in the hands of the executor (u). Therefore, if the testator takes a bond for another in trust, and dies, this is not assets in the hands of his executor: So if the obligee assigns over a bond, and covenants not to revoke, and dies, that bond is not assets in the hands of the executor of the obligee (v).

So, too, all property vested in the testator as sole trustee which may have been devised or bequeathed by his Will to his executors will not of course be assets in their hands. The amount of such trust property which will come to the hands of the executor in cases of the death of a sole trustee after the 31st December, 1882, has been much increased by sect. 80 of the Conveyancing Act, 1881, which provides that:—"Where an estate or interest of inheritance, or

(r) 7 Ves. 438.

(s) 18 Ves. 259, 273.

(t) *Ante*, pp. 991, 1002 *et seq.*

(u) Bac. Abr. Exors. (H) 1.
See *Parker v. Baylis*, 2 B. & P.
78.

(v) *Deering v. Torrington*, 1

Salk. 79. But in *Byrn v. Godfrey*, 4 Ves. 6, it was held that a promissory note given to the testator was assets, notwithstanding his declaration to his executor that he never meant to call for payment of it.

limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust or by way of mortgage, in any person solely, the same shall on his death notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and, accordingly, all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns within the meaning of all trusts and powers" (x).

It is necessary in this place to advert to the nature of terms attendant on the inheritance (y). When a term for years before December 31, 1845, was created for a particular purpose, as for raising money for payment of debts, or portions for younger children, and the purpose for which the term was created was satisfied, the termor was considered in equity as a trustee for the owner of the inheritance; and though at law the term was deemed a term in gross in such

Terms attendant on the inheritance of testator. [Prior to Dec. 31, 1845.]

(x) By sect. 45 of the Copyhold Act, 1887 (50 & 51 Vict. c. 73), it is provided that: "The thirtieth section of the Conveyancing and Law of Property Act, 1881, shall not apply to land of copyhold or customary tenure vested in the tenant on the Court Rolls of any manor upon any trust or by way of mortgage."

(y) But by stat. 8 & 9 Vict. c. 112, after Dec. 31, 1845, all terms attendant on the inheritance shall determine, unless for the purpose of protection in certain cases, against incumbrances. See *Cottrell v. Hughes*, 15 C. B. 532. *Plant v. Taylor*, 7 H. & N. 211. *Owen v. Owen*, 3 H. & C. 88.

trustee, yet in equity it followed the fee, and was looked upon as completely consolidated with it (z): Hence it was not regarded as personal assets in the hands of the executor of the person entitled to the fee, but as real assets which went to his heir (a). Yet this must not be understood of every term which attended the inheritance: for where a termor purchased the freehold and inheritance, and took a conveyance thereof in the name of a trustee, although the term in himself was attendant on his equitable fee-simple, yet, at his death, it was assets in the hands of his personal representatives (b).

Fund for
specific
purposes not
general assets.

It must be observed, that executors or administrators cannot be in a better condition, with respect to the estate of the deceased, than he himself would have been in; and therefore they cannot employ as general assets, property which he would have been bound to apply to a particular purpose (c): Thus, in *Hassall v. Smithers* (d), a remittance in bills and notes for a specific purpose, viz., to answer acceptances, was received by an administrator, in consequence of the death of the party to whom the remittance was made: and it was held, that the special purpose operated as a lien, and that the sum remitted could not be applied by the administrator as general assets.

Other instances may occur, where personal property may be in the hands of the executor, and yet not applicable to any but a special purpose: Thus, in *Parry v. Ashley* (e), the testator charged his real estate, which consisted of one house only, with an annuity to his widow, and subject to that

(z) See *Watk. Convey.* 48, note by Morley and Coote.

(a) *Tiffin v. Tiffin*, 1 Vern. 1. *Thraxton v. Atty.-Gen.*, 1 Vern. 341.

(b) *Dowse v. Percival*, 1 Vern. 134. *Thraxton v. Atty.-Gen.*, 1 Vern. 341. *Gunter v. Gunter*, 23 Beav. 571. See also *Belaney v.*

Belaney, L. R. 2 Eq. 210. L. R. 2 Ch. 138.

(c) See *Acc., per Lord Ellenborough* in *Taylor v. Plumer*, 3 M. & S. 578: and *per Littledale, J.*, in *Ashby v. Ashby*, 7 B. & C. 453.

(d) 12 Ves. 119.

(e) 3 Sim. 97.

annuity he devised it to Sarah Ashley in fee, and appointed her his executrix: The testator had insured the house; and on the expiration of the policy a few months after his death, it was renewed by Sarah Ashley: The house was afterwards burnt down: And Sir L. Shadwell, V. C., held, that as she, being executrix, renewed the policy, it must be taken that she did so in the character of executrix (*f*): But his Honor was of opinion, that the proceeds of the policy could not be considered as part of the testator's personal estate, but that they were affected with a trust for the benefit of the parties interested in the real estate (*g*).

Where a deed is set aside as fraudulent against any of the creditors of the deceased, the property becomes assets, and subsequent creditors are let in (*h*). An assignment within the statute 13 Eliz. c. 5, is utterly void against creditors, and the property assigned is assets in the hands of the executor (*i*). The question as to what is, and what is not, a fraudulent conveyance against creditors, does not fall within the scope of this Work.

Hitherto the subject has been confined to the consideration of assets, such as may be reached at law, and such as a creditor, suing the executor in an action at law for a debt, due from the testator, might bring forward in evidence on an issue joined on the executor's plea of *plene administravit*: But there are, besides, various interests frequently forming part of the estate of an executor or administrator, which are not recognized as assets at law; and which, therefore, if

Property
assigned in
fraud of
creditors.

Equitable
assets in the
hands of an
executor.

(*f*) It may here be mentioned, that it has been held that an executor in trust has a sufficient interest to enable him to make an insurance in his own name, on the life of a person who has granted an annuity to the testator: *Tidswell v. Ankerstein*, Peake, N. P. C. 151.

(*g*) See also *Cruikshank v. Roberts*, Madd. & Geld. 104. *Thacker v.*

Wilson, 3 A. & E. 142. *Smedley v. Philpot*, 3 M. & W. 573, for other instances of assets in the hands of executors not being regarded as part of the general personal estate.

(*h*) *Richardson v. Smallwood*, 1 Jac. 552.

(*i*) *Shears v. Rogers*, 3 B. & Ad. 362. *Shee v. French*, 3 Drew. 716.

administered at all, must be administered in equity: This latter portion of the estate in the hands of an executor or administrator is called *equitable assets*, in contradistinction to the former, which is called legal assets. In other words, Legal assets are such as are liable to debts in the temporal courts, and were formerly liable to legacies in the spiritual, by the course of law: Equitable assets are such as are liable only, by the help of a Court of Equity.

Distinction
between legal
and equitable
assets.

Until quite recently a most important distinction existed with respect to the administration of these two kinds of assets: If they were legal, they must have been administered by the executor or administrator of the deceased in a due course of administration, having regard to those rules of priority among creditors which have already been investigated in this Treatise (k); But if the assets in the hands of an executor are equitable, then, although the precedence in payment of debts to legacies must be respected, yet, as among creditors, the assets must be applied in satisfaction of all the claimants, *pari passu*, without any regard to the priority in rank of one debt to another: The principle of this distinction is, that in natural justice and conscience, and in the contemplation of a Court of Equity, all debts are equal, and the debtor is equally bound to satisfy them all, whether by specialty or by simple contract: Therefore, since a claimant upon equitable assets is under the necessity of going to a Court of Equity in order to reach them, that Court will act only according to the rule of doing justice to all creditors, without any distinction as to priority (l).

Distinction
less important
since 1869.

The importance, however, of the distinction between legal and equitable assets has been greatly diminished by two statutes.

(k) *Ante*, p. 850 *et seq.*

(l) *Plunket v. Penson*, 2 Atk. 294. It seems that the separate estate of a married woman, under the Married Women's Property Act, 1870, becomes upon her death

equitable assets, and divisible amongst her creditors *pari passu*: *Re Poole's Estate*, 6 C. D. 739. The contrary opinion was, however, expressed in the case of *Shattock v. Shattock*, L. R. 2 Eq. 182, 194.

By stat. 32 & 33 Vict. c. 46, it is enacted (m), that—

32 & 33 Vict.
c. 46.

"In the administration of the estate of every person who shall die on or after Jan. 1st, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond deed or other instrument under seal or is otherwise made or constituted a specialty debt, but all creditors of such person as well specialty as simple contract shall be treated as standing in equal degree and be paid accordingly out of the assets of such deceased person whether such assets are legal or personal any statute or other law to the contrary notwithstanding: Provided also that this Act shall not prejudice or affect any lien or charge or other security which any creditor may hold or be entitled to for the payment of his debt."

And by Stat. 38 & 39 Vict. c. 77, sect. 10 (Judicature Act, 1875), it is enacted that—

38 & 39 Vict.
c. 77, s. 10.

In the administration by the Court of the assets of any person who may die after the commencement of this Act (Nov. 1. 1875), and whose estate may prove to be insufficient for the payment in full of his debts and liabilities . . . the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to the debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt.

It should be noticed that with regard to persons who died before January 1st, 1870, the old rules as to priority in administration remain applicable, and as to persons dying after that date and before November 1st, 1875, the old rules would still apply except that specialty and simple contract creditors stand on the same footing.

It must be observed that the true test, as to whether the assets are legal or equitable, is not whether the executor or

Test whether
assets are
legal or
equitable.

(m) *Ante*, p. 869.

administrator, but whether the *claimant* can reach them without resorting to a Court of Equity.

Whether the equity of redemption of a term for years is equitable or legal assets in the hands of an executor or administrator has been much discussed, and the reader is referred to the cases in the note below (*n*).

Equities of redemption not necessarily equitable assets.

It appears to be the better opinion at this day, that equities of redemption are not necessarily equitable assets (*o*): And in the view of an eminent writer (*p*), the more accurate statement of the doctrine is, that legal assets are such as come into the hands and power of an executor or administrator, or such as he is intrusted with by law, *virtute officii*, to dispose of in the course of administration; or in other words, whatever an executor or administrator takes, *qua* executor or administrator, or in respect to his office, is to be considered as legal assets. So, in the case of *Cook v. Gregson* (*q*), Kindersley, V.-C. (applying the test whether the executor or administrator would take simply *virtute officii*), held that an equity of redemption on a mortgage of a sum of money charged on a real estate, was legal assets: And his Honor said, that he thought the cases above cited as to mortgages for terms for years could not be supported. In the later case of *Shee v. French* (*r*), the same learned judge laid down that the question whether assets are legal or equitable depends on this, whether, if the case were before a Court of Law, on an issue of *plene administravit*, that Court would treat the property as assets, and the principle on which a Court of Law proceeds is to inquire whether the property came to the hands of the executor *virtute officii*: If it did, the Court of Law regards it as assets, applicable to the payment of the testator's debts; and then a Court of Equity treats it as legal assets (*s*).

- (*n*) The Creditors of Sir Charles edit. 623. Story on Equity, Ch. ix.
Cox, 3 P. Wms. 342. Hartwell v. s. 551, note (1).
Chitters, Amb. 308. Sharpe v. (*p*) Story on Equity, Ch. ix.
Scarborough, 4 Ves. 541. Clay v. s. 551.
Willis, 1 B. & C. 364. Wentw. (*q*) 20 Jur. 510. 3 Drewr. 547.
Off. Ex. 14th edit. p. 186. (*r*) 3 Drewr. 716.
(*o*) See 2 Jarman on Wills, 4th (*s*) See *Accord.* Atty.-Gen. v.

With respect to that portion of the property in the hands of an executor or administrator, which consists of the proceeds of the sale of real estate, it was long ago settled that such proceeds were *equitable* and not legal assets (*t*).

Proceeds of sale of real estate equitable assets.

And it is quite clear that the testator cannot alter the legal character of the property, by directing that it shall be considered as part of his personal estate (*u*). But it is a mistake to treat the price of an estate contracted by the testator to be sold and afterwards received by the executor as proceeds of the real estate in the hands of an executor in the sense that makes the proceeds of real estate equitable assets (*x*).

Rights of legal preference are, however, controlled by a rule which formerly, before the stat. 32 & 33 Vict. c. 46 put specialty and simple contract creditors on an equality, was of great importance, and which is even now occasionally applicable, as for instance where a creditor executor has partly paid himself by retainer. The rule is that where the assets are partly legal, and partly equitable, though equity cannot take away the legal preference on legal assets, yet if one creditor has been partly paid out of such legal assets, when satisfaction comes to be made out of equitable assets, the Court will postpone him until there is an equality in satisfaction to all the other creditors out of the equitable assets, proportionable to so much as the legal creditor has been satisfied out of the legal assets (*y*).

Marshalling of assets, partly legal and partly equitable.

Bunning, 8 H. L. C. 243, 256, 264, 265. *Christy v. Courtenay*, 26 Beav. 140. *Mutlow v. Mutlow*, 4 De G. & J. 539.

(*t*) *Clay v. Willis*, 1 B. & C. 364. *Barker v. May*, 9 B. & C. 489. *Bain v. Sadler*, L. R. 12 Eq. 570. The case of *Lovegrove v. Cooper*, 2 Sm. & G. 271, is not law.

(*u*) See *per* Lord Tenterden, in *Barker v. May*, 9 B. & C. 489.

(*x*) *Atty.-Gen. v. Bunning*, 8 H. L. C. 243, reversing the decision of the Exchequer, 4 H. & N. 94.

Where a testator devised a freehold house to A., whom he appointed one of his executors charged with a sum of money payable within twelve months, this was held *equitable* assets in the hands of the executors: *Lowe v. Peskett*, 16 C. B. 500. *Ante*, p. 1180, note (*e*).

(*y*) *Morrice v. Bank of England*, Cas. temp. Talb. 220, by Lord Talbot. *Chapman v. Esgar*, 1 Sm. & G. 575. *Bain v. Sadler*, L. R. 12 Eq. 570.

Beneficial
interest under
a power.

Where a man has a general power of appointment over a fund, and he actually exercises his power, whether by deed or Will, the property appointed shall form part of his assets, so as to be subject to the demands of his creditors at his death, in preference to the claims of his legatees or appointees (2).

(2) *Thompson v. Towne*, 2 Vern. 319. *Hinton v. Toye*, 1 Atk. 465. *Bainton v. Ward*, 2 Atk. 172. *Townshend v. Windham*, 2 Ves. Sen. 9. *Pack v. Bathurst*, 3 Atk. 269. *Troughton v. Troughton*, 3 Atk. 656. *George v. Milbanke*, 9 Ves. 190. *Jenny v. Andrews*, 6 Mad. 264. *Fleming v. Buchanan*, 3 De G. M. & G. 976. *Williams v. Lomas*, 16 Beav. 1. *Platt v. Routh*, 6 M. & W. 789. Moreover, it has been held that resort cannot be had, in any case to the appointed property, till all the testator's own property has been exhausted: *Fleming v. Buchanan*, 3 De G. M. & G. 976. How far this doctrine applies to the case of an appointment by Will of a married woman of property settled to her separate use for life, unless she has been guilty of fraud in her contracts, and how far the application of the doctrine has been affected by the Married Women's Property Act, 1882, has been left in doubt by the decided cases. The cases of *Vaughan v. Vanderstegen*, 2 Drew. 165. *Blatchford v. Woolley*, 2 Dr. & Sm. 204. *Shattock v. Shattock*, L. R. 2 Eq. 182, go to show that where a married woman has property settled upon her for her separate use, she is capable of charging and making it liable to her general debts as if she were a *feme sole*; but if she has only a power she is not capable of charging or making it liable to her general debts, at all events,

if the power is one which can be exercised only by Will. These cases seem to have been disapproved in the London Chartered Bank of Australia *v. Lempiere*, L. R. 4 P. C. 572; in *Mayd v. Field*, 3 C. D. 587; and in *Re Harvey's Estate*, 13 C. D. 216, which was followed in *Hodges v. Helges*, 20 C. D. 749. *Kay, J.*, however, in *Re Roper*, 39 C. D. 482, treats these cases as good law, and held that an appointment by a married woman by Will, in the exercise of a general power of appointment by deed or Will or by Will only, does not make the appointed property liable to engagements entered into by her on the credit of her separate estate prior to the commencement of the Married Women's Property Act, 1882, and that the exercise of the power did not make the appointed property liable as assets of the appointor. The learned Judge, after stating that there is no doubt that in the case of a man who has a general power of appointment, and exercises it by Will in favour of volunteers, the property so appointed will be considered assets for the payment of his debts, goes on to put to himself the question, Does this law apply to the case of a married woman? And says, speaking of the law before the Married Women's Property Act, 1882, "It would be strange if the law was that only the separate property which a married woman

But in order to raise this equity, the power must be actually executed; for equity never aids the non-execution of a

had at the time (of her engagement) should be liable to the exclusion of separate property acquired afterwards, but that nevertheless the exercise by Will of a general power of appointment would make the appointed fund, which never was her separate property, liable. Even if it could be said to become her separate property by the appointment, this would only be so at her death long after the engagement entered into, and therefore, according to *Pike v. Fitzgibbon*, 17 C. D. 454, the appointed property could not be made liable. Suppose she had a general power to appoint by deed or Will, and exercised it by a deed to take effect upon her death, would the appointment be void against her creditors or be an appointment for their benefit under 13 Eliz. c. 5? Or suppose she survived her husband, and exercised the power by Will after his death, would the property then become liable for her engagements during coverture? I think not. A married woman could not contract debts like a person completely *sui juris*. Her engagements only bound her to the extent of her separate property at the time which might be reached by judgment and execution. It follows that when she afterwards exercised the general power, whether by deed or Will, she had no debts which could be made available against it." And the learned Judge concludes: "My opinion is that in cases not within the Married Women's Property Act, 1882,

whether the power of appointment be by deed or Will, or by Will only, an appointment by the Will of a married woman does not make the property appointed liable to engagements entered into with her on the credit of her separate estate. What the law may be as to cases falling within that Act, I express no opinion save this: that to make property appointed by the Will of a married woman liable to her engagements under that Act, it seems necessary to hold that the appointment by her Will makes the property appointed her separate property, because it is only 'all separate property which she may thereafter acquire' which is by that Act rendered liable." In *Ex parte Gilchrist*, 17 Q. B. D. 521, it was held that the expression "separate property" in the Married Women's Property Act, 1882, does not include a general power of appointment by deed or Will of which she is the donee, but which she has not exercised. But this decision leaves open the question whether the exercise of such power makes the property appointed assets of the appointor, and liable to her debts. It is to be observed in this judgment that Kay, J., was dealing with a case not within the Married Women's Property Act, 1882, and does not, therefore, take into consideration the effect of sect. 4 of that Act, which provides that: "The execution of a general power by Will by a married woman shall have the effect of making the property appointed liable for her debts and

power (a). And although creditors in these cases prevail over volunteers, yet if a party taking under voluntary appointment sell to a person *bonâ fide*, and for a valuable consideration, such person, in analogy to the decisions on the statute of voluntary conveyances, will be preferred to the creditors, as having a preferable equity to them (b).

other liabilities in the same manner as her separate estate is made liable under this Act."

As to an unexercised power to bequeath a death allowance out of funds of a friendly society not being assets, see *Ashby v. Costin*,

21 Q. B. D. 401.

(a) *Holmes v. Coghill*, 7 Ves. 499. 12 Ves. 206.

(b) *George v. Milbanke*, 9 Ves. 190. *Hart v. Middlehurst*, 3 Atk. 377. 2 Sugd. Pow. 29, 6th edit.

CHAPTER THE SECOND.

OF REAL ASSETS: AND OF THE EXONERATION OF THE REAL
ESTATE BY THE PERSONAL: AND HEREWITH OF THE MAR-
SHALLING OF ASSETS.

SECTION I.

*Of Real Assets, and therewith of the Exoneration of the
Real Estate by the Personal.*

BESIDES the liability of the executor or administrator in respect of the personal assets in his hands, the heir of the deceased is liable, at the common law, to the extent of the real assets descended, for the payment of his ancestor's debts of a certain quality; *viz.*, those due on bonds, covenants, or other specialties, in cases where the deceased bound himself and his heirs (a).

Real assets in
the hands of
the heir:

It is not thought necessary to discuss, in this place, what portion of the real property of the deceased the law regards as assets by descent; nor to investigate the circumstances under which the real assets are to be considered as legal or equitable: Questions of this nature are rather matters between the heir and the creditors, than relative to the office of an

(a) The heir is also liable on a judgment recovered against his ancestor, or a recognizance acknowledged by him: but he is chargeable only as *tenant of the land* and not as heir: and therefore an action of debt does not lie against him on the judgment or recognizance, as it does on the bond of his ancestor, but a *scire*

facias only to have execution of the lands in his hands: 2 Saund. 7, note (4) to *Jeffreson v. Morton*. Although *scire facias* is not in terms abolished by the Judicature Act, yet Ord. XLII. r. 23 is apparently intended to be substituted for it, at all events it is an alternative remedy.

executor or administrator, and therefore appear foreign to the subject of this Treatise.

of the devisee : Creditors by specialties which affected the heir, provided he had assets by descent, had not, at common law, the same remedy against the devisee of their debtor. To obviate this mischief, the statute of 3 Wm. & M. c. 14, passed : which has been repealed and re-enacted with additional provisions calculated to remedy certain omissions in the former statute.

1 W. 4, c. 47. By statute 1 Wm. IV. c. 47, after reciting that "it is not reasonable or just that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts, and nevertheless it hath often so happened, that where several persons having, by bonds, covenants (b), or other specialties, bound themselves and their heirs, and have afterwards died seised in fee-simple of and in manors, messuages, lands, tenements, and hereditaments, or had power or authority to dispose of or charge the same by their Wills or testaments, have, to the defrauding of such their creditors, by their last Wills or testaments, devised the same or disposed thereof in such manner as such creditors have

(b) The former statute, giving the specialty creditor a remedy against the devisee, (3 W. & M. c. 14,) did not extend to damages for breaches of covenant or contracts under seal made by the testator ; and it was therefore held, that an action of covenant did not lie upon the statute against the heir and devisee to recover damages for a breach of covenant made by the deviser, but the remedy thereby given was confined to cases where debt lies : *Wilson v. Knubley*, 7 East, 128. It was further held, in the construction of the old statute, that it applied only where a debt, in the ordinary sense of the word, existed between the parties in the lifetime of both ; and therefore that an action of

debt did not lie against the devisee of a surety in respect of breaches of covenant which did not occur in the lifetime of the testator, even though the damages were liquidated so that in form they might be sued for in an action of debt : *Farley v. Briant*, 3 A. & E. 839. But such damages, though not a debt within this statute, are a debt payable out of the real estate of the testator under a charge of debts thereon created by his Will : *Morse v. Tucker*, 5 Hare, 79. And a debt due on a covenant, though it be *debitum in presenti solvendum in futuro*, was held to be within the statute ; *Coope v. Cresswell*, L. R. 2 Eq. 106, *coram Kindersley*, V. L. R. 2 Ch. 112.

lost their said debts;" it is, by section 2, enacted, "that all Wills and testamentary limitations, dispositions, or appointments, already made by persons now in being, or hereafter to be made by any person or persons, whomsoever, of or concerning any manors, messuages, lands, tenements, or hereditaments, or any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his, her or their decease, shall be seised in fee-simple, in possession, reversion, or remainder, or have power to dispose of the same (c) by his, her or their last Wills or testaments, shall be deemed or taken (only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators and assigns, and every of them, with whom the person or persons making any such Wills or testaments, limitations, dispositions, or appointments, shall have entered into any bond, covenant or other specialty, binding his, her or their heirs), to be fraudulent, and clearly, absolutely and utterly void, frustrate, and of none effect (d); any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding."

Sect. 3. "For the means that such creditors may be enabled to recover upon such bonds, covenants, and other specialties, be it further enacted, that in the cases before mentioned every such creditor shall and may have and maintain his, her and

1 W. 4, c. 47.

For remedying
frauds committed on
creditors by
Wills.

Enabling
creditors to
recover on
bonds, &c.

(c) This statute extends to cases of devisees not only where the devisee is seised in fee, but where he has the power to dispose of the subject-matter of the devise, which in terms includes every beneficial interest which he may possess. And the devisee of an equitable estate seems liable to an action of debt by the creditors of the devisee under the 3rd section of the Act, where the words "such devisees and devisees" can only refer to the 2nd section, which applies

to devisees of every description of estate, legal or equitable; and upon a judgment obtained in such an action, execution may be taken out against the equitable devisee by the 10th section of the Statute of Frauds; *Coope v. Cresswell*, L. R. 2 Ch. 112, 121, *per* Ld. Chelmsford.

(d) It is not necessary to make the devise void that the intent of the devise was to defraud or hinder or delay creditors: *Coope v. Cresswell*, L. R. 2 Eq. 106.

1 W. 4, c. 47. their action and actions of debt or *covenant* upon the said bonds, covenants and specialties against the heir and heirs-at-law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees (e), or the devisee or devisees of such first-mentioned devisee or devisees jointly by virtue of this Act: and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended" (f).

If there is no heir-at-law, action may be maintained against the devisee.

Sect. 4. "If in any case there shall not be any heir-at-law against whom, jointly with the devisee or devisees, a remedy is hereby given, in every such case, every creditor to whom by this Act relief is given, shall and may, have and maintain his, her and their action and actions of debt or covenant, as the case may be, against such devisee or devisees solely; and such devisee or devisees shall be liable for false plea as aforesaid" (g).

Heir-at-law to be answerable for debts

Sect. 6. "In all cases where any heir-at-law shall be liable to pay the debts or perform the covenants of his ancestors in

(e) Equitable estates are within the statute, and the devisees, who as trustees have the legal estate, must be made defendants, but if there has been no alienation by them, they, personally, will not be liable, but upon a judgment obtained against them execution may be had against the whole estate. Alienation by the person having the beneficial interest will not prevent the action, but upon a judgment obtained against the legal devisees execution may be had against the whole estate, but if any beneficial interest in it has been *bond fide* aliened before action (or rather judgment), equity would prevent the interest so aliened being affected by the execu-

tion; *Coope v. Cresswell*, L. R. 2 Ch. 112.

The right of a specialty creditor under Wm. 4, c. 47, seems to be a legal right. But his right is, until judgment, liable to be postponed to that of a prior alienee, even with merely an equitable title; *British Mutual Investment Co. v. Smart*, L. R. 10 Ch. 567.

(f) The mere liability of the devisee to be sued under this Act does not make the debt his debt: *Re Taylor's Estate*, 8 Exch. 384.

(g) Under the stat. of Wm. & M., the specialty creditor could not maintain an action against the devisee alone, there being no heir: *Hunting v. Shelldrake*, 9 M. & W. 256.

regard of any lands, tenements, or hereditaments descended to him, and shall sell, alien, or make over the same, before any action brought or process sued out against him, such heir-at-law shall be answerable for such debt or debts, or covenants, in an action or actions of debt or covenant to the value of the said lands so by him sold, aliened, or made over, in which cases all creditors shall be preferred, as in actions against executors and administrators, and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts; saving that the lands, tenements and hereditaments, *bonâ fide* aliened (*h*) before the action brought, shall not be liable to such execution."

Sect. 8. "All and every the devisee and devisees made liable by this Act shall be liable and chargeable in the same manner as the heir-at-law by force of this Act, notwithstanding the lands, tenements and hereditaments to him or them devised, shall be aliened before the action brought" (*i*).

Sect. 9 made the real property of a deceased trader

1 W. 4, c. 47.

although he may sell the estate before action brought.

Devisees to be liable the same as heirs-at-law.

Traders' estates

(*h*) A conveyance by old to new trustees is not such an alienation as would prevent the action: nor is a mortgage by an equitable tenant for life such an alienation, though a Court of Equity would protect the mortgaged interests against execution: *Coope v. Crosswell*, L. R. 2 Ch. 112.

(*i*) The liability under this Act of a devisee of land, who alienates the land, to the unpaid debts of the testator, is such that on the alienation the debts become his own debts to the extent of the land alienated. Consequently where a woman to whom land had been devised, settled it on her marriage, after the passing of the Married Women's Property Act, 1870, the first trust being for

herself absolutely until the marriage, and after its solemnization on trust for herself for life without power of anticipation, with remainder on trusts for the issue of the marriage; it was held that the testator's personal estate being insufficient to pay his debts, the life interest of the settlor was notwithstanding the restraint on anticipation, liable to make good the deficiency to the extent of the value of the devised land: her liability to satisfy the debts of the testator, which arose on her alienation of the land by the settlement, being a debt "contracted by her before marriage" within the meaning of section 12 of the Married Women's Property Act, 1870. *Re Hedgeley*, 34 C. D. 379.

shall be assets to be administered in Courts of Equity.

3 & 4 W. 4, c. 104.

Freehold and copyhold estates of persons dying after 29th August, 1833, in all cases to be assets for the payment of simple contract or specialty debts.

assets to be administered in Courts of Equity for the benefit of creditors by simple contract or by specialty as they are for the benefit of creditors by specialty where the heirs were bound.

The principle was extended further, by the stat. 3 & 4 Wm. IV. c. 104, which after reciting that it is expedient that "the payments of the debts of all persons shall be secured more effectually," it is enacted, "that from and after the passing of this Act (29th Aug. 1833), when any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customary-hold, or copyhold, which he shall not by his last Will have charged with or devised subject to the payment of his debts (*ii*), the same shall be assets to be administered in Courts of Equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty (*j*); and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity (*k*), at the suit of any of the

(*ii*) See *Ball v. Harris*, 4 My. & Cr. 268.

(*j*) Freeholds, over which a testator has a general power of appointment, and which he appoints by a last Will, are within this Act (but are only applicable as assets after all the testator's own property has been previously so applied): *Fleming v. Buchanan*, 3 De G. M. & G. 976.

(*k*) A simple contract creditor cannot get a judgment giving him a priority; he can only get a judgment as against the heir-at-law, which will put the Court in a position to administer the real estate for the benefit of all the creditors, and under that judgment all the simple contract creditors would rank *pari passu* amongst

themselves. That being so, the foundation of the rule allowing retainer to an heir-at-law when he was a specialty creditor, or allowing retainer to an executor (*Walters v. Walters*, 18 C. D. 182) out of personal estate is gone, but an heir-at-law or devisee may retain a debt to which he is entitled by specialty in which the heirs are bound, because the legal right of action of creditors by specialty in which the heirs are bound continues notwithstanding *Hinde Palmer's Act*, 32 & 33 Vict. c. 46: and such creditor could thereby obtain priority over the heir or devisee if the right of retainer were not allowed to him: *Re Illidge*, 27 C. D. 478; *Ferguson v. Gibson*, L. R. 14 Eq. 379.

creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heir-at-law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this Act liable to in respect of such freehold estates, at the suit of creditors by specialty in which the heirs were bound: Provided always, that in the administration of Assets by Courts of Equity, under and by virtue of this Act, all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands" (l).

It was held by Sir L. Shadwell, V.-C., in *Spackman v. Timbrell* (m), that the repealed statutes (3 W. & M. c. 14, and 47 Geo. III. sess. 2, c. 74) did not specifically charge the real assets descended or devised with the debts of the ancestor, but made the heir or devisee liable, *personally*, to answer for the value of the assets descended or devised: Therefore where H., who was a trader at his death, and indebted by specialty and simple contract, devised freehold estates to his son in fee; and the son, on his marriage, settled the estates on his wife and children, and afterwards died, his Honor decided that the son's widow and children were entitled to hold the estates discharged from the debts of the father. So in *Richardson v. Horton* (n), a settlement by the heir, upon his marriage, of the ancestor's estates was supported against the claims of the specialty creditors of such ancestor: And Lord Langdale, M. R., laid down that, though by taking

The statutes
1 W. 4, c. 47,
and 3 & 4
W. 4, c. 104,
do not specifically
charge
the real assets,
but make the
heir or devisee
personally
liable.

(l) It was held formerly that by virtue of this proviso a creditor by bond, in which the heirs are named, must be paid before a creditor by bond in which they are not named: *Richardson v. Jenkins*, 1 Drewr. 477; *Foster v. Handley*, 1 Sim. N. S. 200. *Re Burrell*, L. R. 9 Eq. 443; but this proviso would seem in effect to be repeated by

Hinde Palmer's Act, 32 & 33 Vict. c. 46, which, however, would seem to leave untouched the rights of a specialty creditor on a specialty binding the heir who has obtained judgment prior to the commencement of the administration action: *Re Illidge*, 27 C. D. 478.

(m) 8 Sim. 253.

(n) 7 Beav. 112.

proper proceedings, the specialty creditors may obtain payment out of the descended or devised real estate in the hands of the heir or devisee, yet if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee, the land is not liable, though the heir or devisee remains personally liable, to the extent of the value of the land alienated. And there does not appear to be any reason why these decisions should not be applied to the construction of the statutes now in operation (1 Wm. IV. c. 47, and 3 & 4 Wm. IV. c. 104) (o).

(o) See the observations of Lord Cottenham in *Pimm v. Insall*, 1 Mac. & G. 449, 458; and of Romilly, M. R., in 22 Beav. 21, 22. See also *Lilkes v. Broadmead*, 2 Giff. 113. A covenant by an infant heiress and her intended husband, in marriage articles, to settle the descended estate on the issue of the marriage, is not an alienation such as to withdraw the estate from the claim of the ancestor's creditors: *Pimm v. Insall*, 1 Mac. & G. 449, 7 Hare, 193. Nor is a judgment entered up against an heir such an alienation: *Kinderley v. Jervis*, 22 Beav. 1. An equitable deposit with memorandum of charge by a legal devisee is an alienation, which *pro tanto* prevents a creditor of a testator from subsequently obtaining a charge on the estate as assets under 3 & 4 Wm. 4, c. 104. *British Mutual Investment Co. v. Smart*, L.R. 10 Ch. 567. It has been held that the stat. 3 & 4 Wm. 4, c. 104, makes the lands themselves, and not merely the estate or interest of the deceased, assets for the payment of his debts: Therefore if he dies without heirs, they are made assets against the lord claim-

ing by escheat, notwithstanding his right is by title paramount: *Evans v. Brown*, 5 Beav. 114. *Downe v. Morris*, 3 Hare, 399. *Hughes v. Wells*, 9 Hare, 749. It has also been held, that the Act charges the real estate of the deceased owner (where no such charge has been made by Will), not only with debts of every description actually due at his death, but also with all liabilities which may result out of the obligations entered into by him during his life: *Hamer's Devises' Case*, 2 De G. M. & G. 366, overruling the decision in 3 De G. & Sm. 279. See also *Eale v. Symonds*, 16 Beav. 406. In order to obtain a decree for a sale for payment of the debts it is not necessary that the bill should be filed by a creditor: *Dinning v. Henderson*, 2 Coll. 330. *Price v. Price*, 15 Sim. 484. *Rodney v. Rodney*, 16 Sim. 307. But the legal personal representative ought not to be sole plaintiff: *Tubby v. Tubby*, 2 Coll. 136. *Catley v. Sampson*, 33 Beav. 551. The widow's right to dower is not affected by the Act: *Spyer v. Hyatt*, 20 Beav. 621.

Neither at law nor in equity is any charge created until judgment is obtained and the claim of a creditor under 3 & 4 Will. IV. c. 104, being a claim under an administration in equity, a prior equitable alienee will take precedence over the equitable judgment creditor (*p*).

It is, however, a well-known rule, that, as between the real and personal representatives of all persons deceased, the personal estate in the hands of the executor or administrator is the primary and natural fund, which must be resorted to in the first instance for the payment of debts, of every description, contracted by the testator or intestate.

Primary liability of personal estate to debts of every description :

But it is clear, that this principle can only regulate the equitable administration of assets, and does not extend to the legal control of the creditor of the deceased; for it is discretionary with him, if his debt is of a nature to bind both the real and personal estate, whether he will resort to the personal estate in the hands of the executor, or to the real estate descended or devised: Hence, if the obligee of a bond bring an action of debt against the heir, he cannot plead that there is an executor who has assets (*q*).

In order, therefore, to support and enforce the primary liability of the personal estate, as between the representatives of the deceased debtor, it is an established rule in equity, that if the creditor proceeds against the real estate, descended or devised, the heir or devisee, who has sustained the loss, shall be allowed to stand in the place of the specialty creditor, to

(*p*) *British Mutual Investment Co. v. Smart*, L. R. 10 Ch. 567.

(*q*) *Bro. Assets per Descent*, 33 *Davy v. Pepys*, Plowd. 439 *b*. *Quarles v. Capell*, Dyer, 204 *b*. *Davies v. Churchman*, 3 Lev. 189. *Galton v. Hancock*, 2 Atk. 426. And since as against the executor personal estate is the primary fund for the payment of debts, it follows

that, in a case where the specialty debts exceed the personal estate, the executor can have no right of retainer in respect of a simple contract debt, even though the specialty debts may in fact have been paid out of the proceeds of real estate administered under 3 & 4 Wm. 4, c. 104: *Walters v. Walters*, 18 C. D. 182.

consequent
right of heir
or devisee to
have the real
estate exoner-
ated by the
personal;

reimburse himself out of the personal estate in the hands of the executors (r): Provided such reimbursement will not prejudice any of the creditors, or any other party having an equal or more favoured claim than the heir or devisee respectively.

Thus, if the testator enters into a bond for himself and his heirs, and dies, and the obligee proceeds against the heir, and compels him to pay the debt out of the real assets, the heir may recover it out of the assets in the hands of the executor (s). And this exoneration is extended not only to the *heres natus*, the heir-at-law, but also to the *heres factus*, the general devisee (t), or a particular devisee (u).

Again, it is discretionary with a mortgagee, whether he will proceed, for the recovery of his mortgage debt, against the mortgaged land which has come to the heir or devisee of the mortgagor, or against his executor: But if the mortgagee recovers against the land, the heir or devisee shall (unless the case is within the operation of the stat. 17 & 18 Vict. c. 113 (uu)), be reimbursed out of the personal estate of the mortgagor (x).

(r) Treat. Eq. B. 3, c. 2, s. 1. Accordingly, where a person domiciled in England, who was indebted in money upon bond, died intestate leaving real estate in Scotland, and the bond debts were paid by the heir out of the produce of the real estate in Scotland; Lord Langdale, M. R., held, that the right of relief or demand against the personal estate, which, by the law of Scotland is given to the heir who has paid moveable debts, is capable of being made available in England: Lord Winchelsea v. Garetty, 2 Keen, 293. And in all cases, where, in the course of administrations in different countries, the question arises whether

particular debts are properly and ultimately payable out of the personal estate, or are chargeable on the real estate of the deceased, the law of his domicile will govern, in cases of intestacy, and, in cases of testacy, his intention. Story's Conf. Ch. xiii. s. 528.

(s) Armitage v. Metcalfe, 1 Chanc. Cas. 74. Anon. Chanc. Cas. 5. Treat. Eq. B. 3, c. 2, s. 1.

(t) Lutkins v. Leigh, Cas. temp. Talb. 54.

(u) Pockley v. Pockley, 2 Chanc. Cas. 84. Galton v. Hancock, 2 Atk. 436. Fonbl. Treat. Eq. B. 3, c. 2, s. 3, note (s).

(uu) Post, p. 1570.

(x) Cope v. Cope, 2 Salk. 449.

But the land cannot be exonerated out of the personal estate to the prejudice of any person having a prior claim to be satisfied: And therefore the heir or devisee shall not stand in the place of the mortgagee against the personal assets, if by so doing he would disappoint any creditor (y) or any legatee, except the residuary legatee (z), or the widow's claim to paraphernalia (a).

but not to prejudice a person having prior claim to satisfaction.

Howell v. Price, 1 P. Wms. 292. Johnson v. Milksopp, 2 Vern. 112. Lutkins v. Leigh, Cas. temp. Talb. 54. Galton v. Hancock, 2 Atk. 436. And it will make no difference, that the devise is of the lands subject to the incumbrances thereon; for such a qualification is no more than what is implied, since the testator could not devise them otherwise: Serle v. St. Eloy, 2 P. Wms. 386. Bickham v. Cruttwell, 3 Mylne & Cr. 769. Hickling v. Boyer, 3 Mac. & G. 643, by Lord Truro. Accordingly where a testator directed estates to be sold, and the produce to be applied in payment of the mortgages due from him, and the residue of the produce to be considered and applied as part of the residue of his personal estate; and he gave and devised the residue of his real and personal estate upon trust, after payment of his just debts, for the benefit of all his children; and the testator afterwards by a codicil, confined the residuary gift of the produce of the estates directed to be sold to his younger children; it was held, that the devisees of the produce of the real estate directed to be sold were entitled to have the personal estate applied in payment of the mortgages; because the gift was in effect a gift of the estates, subject to the mort-

gages; and the gift of an estate subject to a mortgage, does not deprive the devisee of the right to satisfaction of the mortgage out of the personal estate: Wythe v. Henniker, 2 M. & K. 635. But where a testator having an estate subject to a mortgage of 4,460*l.* created by himself, devised it to A. B. in fee, "he paying the mortgage thereon;" and devised his residuary real and personal estates to trustees for the payment of his debts, and he gave to the mortgagees, through the medium of his executors, 2,000*l.* to exonerate the estate; it was held that the words "he paying the mortgage thereon," imposed a duty on the devisee and amounted to a direction or condition that he should pay the mortgage, or take the estate subject to the burden upon it, so far as the same exceeded 2,000*l.*: Lockhart v. Hardy, 9 Beav. 379. See also Goodwin v. Lee, 1 Kay & J. 377. Hatch v. Skelton, 20 Beav. 453.

(y) Bartholomew v. May, 1 Atk. 487.

(z) Oneal v. Mead, 1 P. Wms. 693. Lutkins v. Leigh, Cas. temp. Talb. 53. Davis v. Gardiner, 2 P. Wms. 190. Rider v. Wager, 2 P. Wms. 335. *A fortiori*, a specific

Note (a) See next Page.

It has, indeed, been laid down, as a general proposition, that the equity, to have the personal estate applied to the exoneration of the real, subsists only between the heir or devisee, and the residuary legatee, and not against specific or general legatees (*b*). And this is unquestionably true with respect to the exoneration of the heir (*c*). But it appears to be clear that if a creditor, with a *general* lien on the land, as a mere bond creditor, recovers the bond debt against the real estate *devised*, the devisee will be entitled to exoneration out of the personal estate, to the disappointment of general legacies (*d*). Whether he would also be entitled to exoneration to the disappointment of *specific* legacies, is a question which, for some time, was doubtful (*e*). But it seems to be now settled, that the devisee would be entitled to compel the specific legatees to *contribute* to the payment of the debt, but not wholly to exonerate the land (*f*).

legatee of a mortgaged leasehold shall not have contribution towards his mortgage from other specific legatees of leasehold: *Halliwell v. Tanner*, 1 Russ. & M. 633. *Wythe v. Henniker*, 2 M. & K. 635. *Johnson v. Child*, 4 Hare, 87; *Secus*, where a contrary intention is apparent: *Middleton v. Middleton*, 15 Beav. 450.

(a) *Tipping v. Tipping*, 1 P. Wms. 736. *Ante*, p. 678, note (*q*).

(b) *Hamilton v. Worley*, 2 Vcs. Jun. 65. *Fonbl. Treat. Eq. B. 3*, c. 2, s. 3, note (*e*).

(c) *Lutkins v. Leigh*, Cas. temp. Talb. 54. *Snelson v. Corbett*, 3 Atk. 369.

(d) It is clear that general legatees cannot marshal the assets so as to stand in the place of a mere bond creditor against the land *devised*: See *post*, p. 1588: And therefore it seems to follow, that the devisee shall be exonerated

out of the general legacies; besides if it were otherwise, it would have the effect of making a devisee of land, who in every case is as much a specific devisee as a legatee of a specific legacy, bear the burden of the debt before the general pecuniary legatees. †

(e) See *Cornwall v. Cornwall*, 12 Sim. 298.

(f) *Tombs v. Roch*, 2 Coll. 490. *Gervis v. Gervis*, 14 Sim. 654. *Hensman v. Fryer*, L. R. 3 Ch. 420. But the terms of the Will may show that as between the devisee and a specific legatee the testator intended that legatee to have priority. Thus in *Re Saunders-Davies*, 34 C. D. 482, a testator devised his real estate to the use of his wife during her life or widowhood, with remainder to the use of trustees for a term of five hundred years, on trust to raise by mortgage of the real estate or out

Before the Wills Act a residuary devise of real estate was treated as specific. It was at one time supposed that the effect of section 24 of that Act, in making Wills speak and take effect with reference to the real and personal estate comprised in them as if executed immediately before the death of the testator, was to alter this and to prevent a residuary devise of real estate being treated as specific (g), but it is now established that there is nothing in the Act to alter the well settled rule of law as to the effect of a residuary devise, namely, that for the purpose of payment of debts it is to rank *pari passu* with specific devises (h).

Residuary
devise of
real estate a
specific devise.

It must be further observed that the exoneration of the real estate out of the personal is confined to cases, where the claim in question is the *proper debt* of the deceased; for if it be not so, his heir or devisee must take the land *cum onere*: Thus if a settlor of real estate in contemplation of marriage covenants for payment of the portions of children, or widow's jointure (i), or if a person makes a voluntary gift,

of the rents and profits, portions of 5,000*l.* apiece for each of his younger children with remainder in strict settlement, the testator's eldest son taking the first life estate. The testator's general personal estate was insufficient for the payment of his debts and consequently the specifically bequeathed personal estate, and the real estate had to contribute, and it was held that as between the portioners and the persons entitled to the real estate on which they were charged, the former were not bound to contribute to make good the deficiency. The decision in this case seems on this point to be inconsistent with *Long v. Short*, 1 P. Wms. 403, but North, J., in his judgment points out, referring to the judgment of Lord Chancellor Brady in *Jack-*

son v. Hamilton, 9 Ir. Eq. 430, that the report of *Long v. Short* is inaccurate. See *post*, p. 1589, note (o).

(g) *Dady v. Hartridge*, 1 Dr. & Sm. 236. *Barnwell v. Iremonger*, *Ibid.* 242. *Rotheram v. Rotheram*, 26 Beav. 465. *Bethell v. Green*, 34 Beav. 302. *Rodhouse v. Mold*, 35 L. J. Ch. 67.

(h) *Hensman v. Fryer*, L. R. 3 Ch. 420. *Lancefield v. Iggulden*, L. R. 10 Ch. 136. *Gibbins v. Eyden*, L. R. 7 Eq. 371.

(i) *Lanoy v. Athol*, 2 Atk. 441. *Edwards v. Freeman*, 2 P. Wms. 438. *Coventry v. Coventry*, 2 P. Wms. 222. *Loosemore v. Knapman, Kay*, 123. But see *Field v. Moore*, 7 De G. M. & G. 691, where the provision was first secured by a covenant creating a

by way of charge, and covenants for the payment of the money (*k*), the land will be the primary fund for payment; for in these cases the charge is in its nature real and the covenant only an additional security. Accordingly in *Graves v. Hicks* (*l*), a father having agreed to secure a marriage portion for his daughter, mortgaged part of his estates for that purpose, and covenanted to pay the money: By his Will he directed his debts to be paid, first out of the residue of his personal estate, then, out of his money in the funds, and lastly, out of his residuary real estates: And Sir L. Shadwell, V.-C., held, that the mortgaged estate was not to be exonerated from the portion out of the personal estate; his Honor being of opinion that, by the plain intention of the parties, the covenant of the father was meant to be auxiliary only to the charge upon his land; and that what he contracted to do, was to give security for the marriage portion (*m*).

Again, if a man buys an estate, subject to an existing mortgage, the land remains the proper fund for its discharge, and the heir or devisee of the purchaser cannot throw the debt on the personal estate, as the primary fund for payment (*n*). So if an estate descends on an heir-at-law (*o*), or is devised (*p*), charged with a mortgaged debt, and the heir or devisee dies, leaving the debt unpaid, the land will be the fund for its payment, and not the personal estate of the deceased heir or devisee (*q*): In other words, the principle

debt to which the covenant for securing the charge was manifestly auxiliary.

(*k*) *Wilson v. Darlington*, 1 Cox, 172. *Ex parte Digby*, 1 Jac. 253.

(*l*) 6 Sim. 398.

(*m*) See also *Ibbetson v. Ibbetson*, 12 Sim. 206. *Jenkinson v. Harcourt, Kay*, 688.

(*n*) Coote, *Mortg.* 1016 *et seq.*, 5th edition.

(*o*) *Noel v. Lord Henley*, 7

Price, 241. S. C. in *Dom. Proc.* 12 Price, 213. Coote, *Mortg.* 1047, 5th edition. *Re Leeming*, 3 De G. F. & J. 43.

(*p*) *Perkins v. Baynton*, 2 P. Wms. 664, note to *Evelyn v. Evelyn*. Coote, *Mortg.* 1047, 5th edition.

(*q*) *Scott v. Beecher*, 5 Madd. 96. See also *Acc. Lord Ilchester v. Lord Carnarvon*, 1 Beav. 209. *Lord Clarendon v. Barham*, 1 Y. &

only extends to incumbrances created by the testator or ancestor himself.

And even a direct and original mortgage made by the person to whom land has descended or been devised, will not operate to make his personal estate the primary fund for the discharge of the mortgage debt, if the money borrowed was for the purpose of paying off the debts (*r*) or legacies (*s*) of the ancestor or devisor; and the law will be the same, if a bond (*t*) or note of hand (*u*) is given by the heir or devisee for the payment of debts or legacies charged on the land. However, in the case of *Barham v. Lord Thanet* (*x*), a mortgage was made of the manor and lands of Silsden and other valuable estates, to secure a debt of 80,000*l.* and interest: The mortgagor died intestate, leaving the debt wholly unpaid; and his heir, being pressed to pay off 80,000*l.* part of the 80,000*l.*, procured a person to advance the sum required for the purpose, and the original mortgagee thereupon joined with the heir of the mortgagor in a deed conveying the manor and lands of Silsden to the person making the advance, subject to a proviso for redemption at the end of five years, being an equity of redemption, altogether different from the prior

C. Ch. C. 688. *Re Taylor's* Estate, 1 Exch. 384. *Swainson v. Swainson*, 6 De G. M. & G. 648. *Hepworth v. Hill*, 30 Beav. 484, *per Romilly, M. R.* But in *Bond v. England*, 2 K. & J. 44, James E. mortgaged real estate and died intestate in 1850, leaving his father, Edward E., his heir-at-law and sole next of kin: Edward E. also died intestate, and without ever having obtained letters of administration to his son James: And it was held by Wood, V.-C., that the personal estate of James was liable, as between the heir and personal representative of Edward and James, to be applied in discharge of the mortgage debt.

(*r*) *Tankerville v. Fawcett*, 1 Cox, 237. *Perkins v. Baynton*, 2 P. Wms. 664 (note to *Evelyn v. Evelyn*), Coote, Mortg. 1049, 5th edition.

(*s*) *Basset v. Percival*, 1 Cox, 268. S. C. 2 P. Wms. 664, note. Coote, Mortg. 1049, 1050, 5th edition.

(*t*) *Billinghurst v. Walker*, 2 Bro. C. C. 604. *Woods v. Huntingford*, 3 Ves. 131, by Lord Alvanley. Coote, Mortg. 1050, 5th edition.

(*u*) *Mattheson v. Hardwicke*, 2 P. Wms. 665, note.

(*x*) 3 M. & K. 607. This case was followed by *Romilly, M. R.*, in *Bagot v. Bagot*, 34 Beav. 134.

equity of redemption, and the interest reserved being five per cent. instead of four and a half per cent., which was the rate reserved in the original mortgage: And it was held by Sir J. Leach, M. R., that it was in effect a new mortgage by the heir, and the 30,000*l.* was thereby constituted his personal debt. In *Townsend v. Mostyn* (y), the rule was laid down by Romilly, M. R., that where the owner of property adds mortgages of his own to other mortgages created by his ancestor and unites them together, and makes himself personally liable for the payment of the aggregate sum, the whole mortgage debt then becomes his debt.

It must here be observed, that although the debt is not originally the debt of the party, yet it is optional in him, by sufficient testimony of intention, to render the debt *his own*: in which case his personal estate will, as between his real and personal representatives, become primarily liable to discharge the debt (z).

But it requires clear evidence of intention to make the debt his own: Thus a charge by Will of debts, generally, on his real and *personal* estate, will not be sufficient of itself to shift the *onus* from land which came to him already mortgaged, whether by descent, or by devise, or by sale (a). So, in cases where the lands came to the deceased by descent or devise, his concurrence in the deed, and his personal covenant for payment of the money, on assignment or transfer of the mortgage, being only by way of additional security to the mortgagee, will not alter the burthen, as between his real and personal representatives (b). The same principle

(y) 26 Beav. 76.

(z) See *Bruce v. Morice*, 2 De G. & Sm. 389.

(a) *Lawson v. Hudson*, 1 Bro. Chanc. Cas. 58. *Ancaster v. Mayer*, 1 Bro. Chanc. Cas. 454. *Hamilton v. Worley*, 2 Ves. 62. *Butler v. Butler*, 5 Ves. 534. *Lord Ilchester v. Lord Carnarvon*, 1 Beav. 290. See *infra*.

(b) *Bagot v. Oughton*, 1 P. Wms. 347. *Evelyn v. Evelyn*, 2 P. Wms. 664. *Leman v. Newnham*, 1 Ves. Sen. 52. *Barham v. Lord Thanet*, 3 M. & K. 607, 622. *Lord Ilchester v. Lord Carnarvon*, 1 Beav. 209. *Hedges v. Hedges*, 5 De G. & Sm. 330. So where there had been a mortgage of gavelkind lands, which, upon the death of

applies, if other estates are added to the security on a further sum being lent (*c*), or if there be a covenant on his part for increasing the rate of interest (*d*). And it seems that if the sums borrowed by him, and added to the original mortgage, be comparatively small, equity will not consider that he had different intentions as to the different sums, but will charge the real estate with the whole (*e*). In case the deceased was a purchaser of the equity of redemption, the rule may, perhaps, be stated to be, that unless the mortgage money form part of the consideration money for the estate, or the purchaser, by communication with the mortgagee, clearly take the mortgage debt on himself, it will be considered, as between his real and personal representatives, a charge on the land (*f*): And the mere covenanting with the mortgagor to pay the debt will not make it his personal debt (*g*): If,

the mortgagee intestate, descended to his two brothers as coparceners, and the elder brother, who was the common law heir of the mortgagor, purchased of the other brother his moiety of the gavelkind lands, and covenanted with him to pay the whole mortgage money; it was held that he did not thereby make the mortgage money his personal debt: *Barham v. Lord Thanet*, 3 M. & K. 607.

(*c*) *Ancaster v. Mayer*, 1 Bro. Chanc. Cas. 454, 464.

(*d*) *Shafto v. Shafto*, 1 Cox, 607, 2 P. Wms. 664, note.

(*e*) *Lewis v. Nangle*, Ambl. 150. S. C. 2 P. Wms. 664, note. Coote, *Mortg.* 1049, 5th edition. This latter doctrine must, it should seem, be received with much caution: *ibid.*

(*f*) 1 Sugd. V. & P. 310, 10th edit. Where, however, the deceased described himself, in his Will, as having purchased a pro-

perty, subject to a mortgage, but it appeared, on an examination of the history of the transaction, that he was the person who owed the money, although, as between himself and the mortgagee, he did not appear as the party who contracted the debt, Lord Cottenham held, that the personal estate was primarily liable: For that if a man borrows money in the name of a trustee, the debt is, in one way or other, his from the commencement, either to the person who advances the money, or to the trustee in whose name it is borrowed: *Bickham v. Crutwell*, 3 My. & Cr. 763.

(*g*) 1 Sugd. V. & P. 310, 10th edit. "I entirely concur," said Sir John Leach, M. R., in *Barham v. Lord Thanet*, 3 M. & K. 624, "in the opinions expressed by Lord Alvanley and Sir William Grant, that the purchaser of an estate subject to a mortgage, who

however, the purchaser *borrow*s a sum of money to enable him to complete his contract, and the estate is, on the purchase, limited to the lender either for a term of years, or in fee, by way of mortgage, the debt is the proper debt of the purchaser, and his personal estate will be primarily liable, even although part of the money borrowed be applied in discharge of an existing mortgage (*h*).

[Mr. Locke King's Act.]
17 & 18 Vict.
c. 113: After
Dec. 31, 1854,
heir or devisee
of real estate
not to claim
payment of
mortgage out
of personal
assets.

By stat. 17 & 18 Vict. c. 113, it is enacted that "when any person shall, after Dec. 31st, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his Will or Deed, or other document, have signified any contrary or other intention (*i*), the

has no contract or communication with the mortgagee, and who merely covenants with the vendor to pay the mortgage debt, does not thereby make the mortgage-money his personal debt; and that his covenant is to be considered simply as an indemnity to the vendor, who has permitted the amount of the mortgage-money to be deducted from the price." A distinction has been made between the case of a man contracting to purchase a mere equity of redemption, and a contract for the purchase of an estate for a given sum, of which the mortgage debt forms part, and which, on the purchase, is discounted out of the consideration money; in which latter case it has been considered, the personal estate of the purchaser will be the primary fund: *Parsons v. Freeman*, 2 P. Wms. 864, note (1). *Belvidere v. Rochfort*, 5 Bro. P. C. 299. Toml. edit. But see *Coote*, *Mortg.* 1045, 1046, 5th edition. 2

Jarman on Wills, 4th edition, 641 *et seq.*

(*h*) *Waring v. Ward*, 5 Ves. 670. S. C. 7 Ves. 332. *Coote*, *Mortg.* 1045, 5th edition. See also *Marquis of Bute v. Cunynghame*, 2 Russ. Chanc. Cas. 275. So where A. B. purchased an estate in consideration of an annuity, which was thereupon charged on the purchase, and also upon another estate, and A. B. covenanted to pay it, his personal estate was held primarily liable for the payment: *Yonge v. Furze*, 20 Beav. 380.

(*i*) As to what amounts to a signification of a "contrary or other intention," there were, after the passing of the Act, a series of cases in which it was held that directions by a testator that his debts should be paid out of his personal estate might be sufficient indication of intention on the part of the testator that land should not, under the Act, be primarily liable to the payment of the mortgage debt.

heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mort-

The following are some of such cases: *Stone v. Parker*, 1 Dr. & Sm. 212. *Smith v. Smith*, 3 Giff. 263. *Eno v. Tatham*, 4 Giff. 181. 32 L. J. Ch. 311. *Moore v. Moore*, 1 De G. J. & S. 603. *Rodhouse v. Mold*, 35 L. J. Ch. 67. These decisions led to the passing of 30 & 31 Vict. c. 69, expressly enacting that such direction shall not be a sufficient indication, and the cases are therefore of no importance except in the case of testators dying prior to or on Dec. 31st, 1867. Moreover, Locke King's Act Amendment Act, 1877, 40 & 41 Vict. c. 34, enacts that in the case of any testator or intestate dying after Dec. 31st, 1877, that such contrary intention shall not be deemed to be signified by a charge of, or a direction for payment of, debts upon or out of residuary real or personal estate or residuary real estate. Lord Romilly, in *Brownson v. Lawrance*, L. R. 6 Eq. 1, decided that the fact that one of two properties comprised in the same mortgage is specifically devised was sufficient to exclude the principal Act, and make the estate which passed under the residuary devise *prima facie* liable to the whole of the mortgage debt; but this case cannot, it seems, now be regarded as good law, and Jessel, M. R., in *Sackville v. Smyth*, L. R. 17 Eq. 153, refused to follow it; and in a case where a testator dying after 30 & 31 Vict. c. 69, who was entitled to an estate subject to a mortgage, devised part of it to his widow for life, and the remainder to his residuary devisee,

and bequeathed his personal estate subject to debts, and directed that the deficiency should be charged on his residuary real estate, he held that no contrary or other intention was shown within the meaning of Locke King's Act, so as to exonerate the widow's life interest from keeping down a proportionate part of the interest on the mortgage. And Malins, V.-C., in *Gibbins v. Eyden*, L. R. 7 Eq. 371, pointed out that Lord Romilly, in *Brownson v. Lawrance*, had probably overlooked the fact that *Hensman v. Fryer*, L. R. 3 Ch. 420, had decided that a residuary devise, notwithstanding the Wills Act, was specific. And North, J., in *Re Smith*, 33 C. D. 195, dissented from *Brownson v. Lawrance*, and followed *Sackville v. Smyth* and *Gibbins v. Eyden*. In the case of *Re Newmarch*, 9 C. D. 12, Jessel, M. R., after the passing of 30 & 31 Vict. c. 69, decided that a charge of debts on a part of a testator's real estate, *viz.* his residuary real estate, in exoneration of the rest, without specially referring to his mortgage debts, is not an expression of a contrary intention sufficient to exonerate the mortgaged estate; and that, as Locke King's Act applies to a mortgaged estate, different portions of which are devised to different persons, the devisees, in the absence of a sufficient expression of a contrary intention, must contribute according to the value of their respective portions. And where a testator by his Will, dated in 1877, directed his executors "to pay all my just debts,

gage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or here-

funeral and testamentary expenses, out of my personal estate in exoneration of my real estate," it was held that a debt due from the testator at the time of his death on a mortgage of part of his real estate must be borne primarily by the mortgaged estate: *Re Rossiter*, 13 C. D. 355. It is to be observed that where real and personal estate are comprised in the same mortgage, there is nothing in Locke King's Act to make the real estate the primary fund to bear the whole mortgage debt: this must depend on the intention of the mortgagor: *Trestrail v. Mason*, 7 C. D. 655. *Leonino v. Leonino*, 10 C. D. 460. See also *Marquis of Bute v. Cunynghame*, 2 Russ. 275. *Lipscomb v. Lipscomb*, L. R. 7 Eq. 501. *De Rochefort v. Dawes*, L. R. 12 Eq. 540. The principal Act was held to apply to equitable mortgages: *Pembroke v. Friend*, 1 Johns. & H. 132. *Coleby v. Coleby*, 12 Jur. N. S. 496. But only where there was a defined and specified charge on a specified estate: *Hepworth v. Hill*, 30 Beav. 476. The Act was also held to apply to copyholds: *Piper v. Piper*, 1 Johns. & H. 91; but not to leaseholds: *Solomon v. Solomon*, 33 L. J. Ch. 473. *Re Wormsley's Estate*, 4 C. D. 665. To remedy which the Act of 1877 (40 & 41 Vict. c. 34) was passed, *post*, p. 1574, by which the statutes 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69, as to any testator or intestate dying after Dec. 31st, 1877, were held to extend to any land or other heredita-

ments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money. And it has been expressly decided in *Re Kershaw*, 37 C. D. 674, that the effect of this Act is to include leaseholds within the principal Act, and render them subject to a lien for unpaid purchase-money in exoneration of the general personal estate. It was held in *Dacre v. Patrickson*, 1 Dr. & Sm. 182, in a case where personalty went to the Crown, there being no next of kin, that the Act applied, and the devisee of a mortgaged estate was not entitled to be exonerated out of the personalty notwithstanding the words of the statute "as between the different persons claiming through or under the deceased person." See further as to what is an "interest in land" within the meaning of the statute, *Lewis v. Lewis*, L. R. 13 Eq. 218, in which case Malins, V.-C., decided that land devised upon trusts for conversion, and taken in its converted state, is not an interest in land. It is to be observed, however, that his judgment is partly based on the words "heir or devisee" being inapplicable to such a subject-matter, and that now, by 40 & 41 Vict. c. 34, the words "devisee or legatee or heir" are substituted. Personal estate of a testator may *pro tanto* be converted into realty by a contract to pur-

ditaments so charged shall, as between the different persons claiming through or under the deceased person be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof (*k*): Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid, or otherwise: Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any Will, Deed or document already made, or to be made before Jan. 1, 1855" (*l*). And by stat. 30 & 31 Vict. c. 69, ^{30 & 31 Vict. c. 69.} sect. 1 (*m*), it is enacted that "in the construction of the

chase real estate, but if he dies without paying the purchase-money, leaving it equitably charged by way of lien on the land, no such conversion is effected, because by 40 & 41 Vict. c. 34, the devisee or heir is not entitled to have the purchase-money discharged or satisfied out of any other estate of the testator or intestate: *Re Cockcroft*, 24 C. D. 94. In the case of *Hudson v. Cook*, L. R. 13 Eq. 417, the purchaser had died intestate in 1869, and the case was not therefore affected by 40 & 41 Vict. c. 34, which did not apply the law as to vendor's lien to the case of an intestate dying before Dec. 31st, 1877.

(*k*) See *Evans v. Wyatt*, 31 Beav. 217. *Trestrail v. Mason*, 7 C. D. 655. *Leonino v. Leonino*, 10 C. D. 460.

(*l*) The heir of an intestate, who before January 1, 1855, executed a mortgage reserving the equity of redemption to himself and his

heirs, is not within this saving clause; for the heir claims by descent and not under any instrument: *Piper v. Piper*, 1 Johns. & H. 91. But a Will executed before January 1, 1855, is a Will "already made" within the meaning of the clause, notwithstanding the testator died after that day. Nor does a mere republication by codicil, giving no new operation to the material dispositions of the Will, deprive it of that character: *Rolfe v. Perry*, 32 L. J. Ch. 471. This proviso only extends to a devisee; an heir at law taking by descent from an intestate is not within the proviso: *Nelson v. Page*, L. R. 7 Eq. 25.

(*m*) "The meaning of sect. 1, though not so happily expressed as it might be, appears to be this, that if a testator wishes to give a direction which shall be deemed a declaration of an intention, contrary to the rule laid down in *Locke King's Act*, it must be a

In construing Wills general direction for payment of debts out of personality not to include mortgage debts unless such intention expressly implied.

Will of any person who may die after the 31st December, 1867, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate (n) shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act (i.e., Locke King's Act, 1854), unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt, charged by way of mortgage (o) on any part of his real estate." And by sect. 2 it is enacted that "in the construction of this Act or of the said Act (i.e., Locke King's Act, 1854), the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator."

40 & 41 Vict.
c. 34.

And by Locke King's Act Amendment Act, 1877 (40 & 41 Vict. c. 34), it is enacted that the above-mentioned statutes shall "as to any testator or intestate dying after the 31st of December, 1877, be held to extend to a testator or intestate

direction applying to his mortgage debts in such terms as distinctly and unmistakably to refer to or describe them": *per* Giffard, V.-C., in *Nelson v. Page*, L. R. 7 Eq. 25.

(n) Although the Act only refers to a direction to pay debts out of personal estate, and says that such a direction shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the Act, yet Jessel, M. R., in *Re Newmarch*, 9 C. D. 12, 18, said: "It is impossible consistently with the Act to hold that a direction to pay them out of real estate, or out of a mixed estate of realty and personality, does evince such a contrary intention." And this view seems to be embodied in the amending Act, 40 & 41 Vict. c. 34. See also

Elliott v. Dearsley, 16 C. D. 322.

(o) It is not necessary that the debt or debts should be referred to as mortgage debts: all that is required is that the debt should be specifically described and identified in some way. Therefore where a testator directed his private debts to be paid out of the proceeds of certain life policies, and bequeathed the residue of his personality subject to the payment of his trade debts, and after the date of his Will deposited the title deeds of real estate with his banker to secure an overdrawn trade account, it was held that the direction as to the payment of his trade debts amounted to a declaration of an intention contrary to or other than the rule established by the Act: *Re Fleck*, 37 C. D. 677.

dying seised or possessed of or entitled to any land or other hereditament of *whatever tenure*, which shall at the time of his death be charged (*p*) with the payment of any sum or sums of money by way of mortgage, or any other equitable charge including any lien for unpaid purchase-money (*q*) : and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall, within the meaning of the said Acts [*i.e.*, Locke King's Act, 1854, and the Act of 1867 above set forth] have signified a *contrary intention* : and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real or personal estate or residuary real estate.

It frequently occurs that the deceased has devised his real estate for the payment of his debts, or of his debts and legacies, or has charged his real estate with their payment (*qq*). With respect to the exoneration of the real estate from legacies, the general rule is equally clear as it is with respect to debts, that the personal estate is the first and natural fund for the payment of them ; and the real estate is only to be resorted to in aid of the personal. Therefore, even in cases where there is no doubt as to debts and legacies being effectually charged by the testator on the real estate, yet the personal estate remains undischarged from its primary liability to those claims (*r*).

Exoneration
of real estate
charged with
debts and
legacies :

(*p*) Land, which has been delivered in execution under a writ of elegit to the judgment creditors of a testator, is charged within the meaning of this Act : *Re Anthony*, [1892] 1 Ch. 450.

(*q*) See *Re Cockcroft*, 24 C. D. 94.

(*qq*) As to what shall be sufficient to charge the real estate with debts and legacies, see 1 Rop. Leg. 571 *et seq.*, 3rd edit. 2 Pow. Dev. 644 *et seq.*, Jarman's edit. 2 Jarman

on Wills, 4th edit. 582 *et seq.* See *ante*, p. 578.

(*r*) *Davies v. Ashford*, 15 Sim. 42. *Roberts v. Roberts*, 13 Sim. 336. The rule that a charge of debts on real estate does not of itself exonerate the personal estate, applies to a case where a charge for payment of debts is created by deed : *French v. Chichester*, 2 Vern. 568. But no such rule applies to specific personal estate similarly charged, and therefore

Exoneration of
personal
estate :

Accordingly it has long been the settled rule of Courts of Equity, that the direction of the testator to sell or mortgage his real estate for the payment of his debts and legacies, is not alone evidence of the intention of the testator that the personal estate should be exempt from those charges, and amounts only to a declaration that the real estate shall be so applied to the extent in which the personal estate, which by law is the primary fund, shall be insufficient for those purposes (*s*).

Testator may
expressly
exonerate
personal
estate.

Nevertheless, it is clear, that a testator may, if he pleases, give the personal estate, as against his heir or any other real representative, discharged from the payment of his debts and legacies (*t*) : And in such case the rules of exoneration in favour of the heir or the devisee, which have hitherto been the subject of this chapter, altogether fail of application.

What expres-
sion by testator

A most important question, therefore arises, *viz.*, what is

the charged personal estate must be applied in the first instance to the payment of the debts of the deceased chargor, to the exoneration of his general personal estate in the hands of his personal representative : *Trott v. Buchanan*, 25 C. D. 446.

(*s*) *Rhodes v. Rudge*, 1 Sim. 84, 85. *Walker v. Hardwicke*, 1 M. & K. 396. *Forrest v. Prescott*, L. R. 10 Eq. 545. See also *Re Ovey*, 31 C. D. 113. *Heron v. Poole*, 42 L. J. Ch. 348.

(*t*) *Ancaster v. Mayer*, 1 Bro. Chanc. Cas. 462. In *Dacre v. Patrickson*, 1 Dr. & Sm. 182, Kindersley, V.-C., says : "It is a general rule, in the absence of any expression of intention to the contrary, that if a testator charges real estate with payment of debts in exoneration of his personal estate, and bequeaths the personal

estate to particular individuals, he is held to have intended to exonerate his personal estate for the benefit only of those legatees, and therefore if the bequest of the personal estate fails, whether by the death of the legatees in the lifetime of the testator or by reason of the *Statute of Mortmain*, so that the personal estate goes to other persons than those intended by the testator, those persons are not entitled to the benefit of the exoneration." And Fry, L. J., in his judgment in *Kilford v. Blaney*, 31 C. D. 56, 66, expresses the same view, that where the gift to the person intended to be benefited by the exoneration fails, the exoneration itself fails, and that this principle applies *whether the property dealt with be realty or personally*. See also *Fisher v. Fisher*, 2 Keen, 610.

the mode of expression, on the part of the testator, which will give the personal estate exempt from such payment, in contravention of the ordinary rule that such estate is first liable.

sufficient to
exonerate
personal
estate.

In the earlier cases, it was laid down, that express words of exemption were necessary (*u*): But this rule has been relaxed by subsequent decisions: and it is now settled that the personal fund will be exempted, if the intention of the testator in its favour can be collected from a sound interpretation put upon the whole Will; in other words, if there appears from the whole testamentary disposition taken together, an intention on the part of the testator so expressed, as to convince a *judicial* mind, that it was meant, not merely to charge the real estate, but so to charge it as to exempt the personal (*x*).

It is obvious, therefore, that it is impossible to lay down any general rule as a guide upon this question; since the construction of every Will, in which the point arises, must depend merely upon the individual circumstances of the particular case: and in these, as in all other cases of inference or implication, except necessary or logical implication, there may be a difference of opinion between the most eminent Judges who are called on to consider the circumstances. The difficulty with which the whole subject is surrounded is demonstrated by the following observations of Lord Eldon, in *Boote v. Blundell* (*y*): "On a comparison of all the cases which have arisen, it is scarcely possible to find any two in which the Court altogether agrees with itself; there being scarcely a single circumstance that is considered in one case as a ground of inference in favour of the intention, but it is considered in other cases as against the same inference; and I can find no rule deducible from all that has been said on the subject, but this (which appears to be a rule supported by

(*u*) *Fereyes v. Robertson*, Bunb. 302. *Dolman v. Smith*, Prec. Chanc. 458.

Blundell, 1 Meriv. 230. *Dawes v. Scott*, 5 Russ. 32.

(*y*) 1 Meriv. 219.

(*x*) By Lord Eldon, in *Boote v.*

all the cases taken together), namely, that since it has been laid down that express words are not necessary to exempt the personal estate, there must be in the Will that which is sometimes denominated 'evident demonstration,' sometimes 'plain intention,' and 'necessary implication,' to operate that exemption" (z).

In some of the earlier cases, evidence *dehors* the Will was received, to show the testator's intention: But on this point, Lord Eldon expressed his clear opinion, in *Bootle v. Blundell* (a), that with regard to circumstances *dehors* the Will, which have been sometimes called in to assist in explaining it, such as the respective amount of the real and personal estate, the greater or less degree of personal favour which the testator may be presumed to have entertained towards this or that object of his bounty, and others of that nature, they ought all to be set aside in the consideration of a question depending on a Will, such question being fit to be decided only by an examination of the whole Will taken together (b).

The principle which has the greatest influence on the determination of this question, and which has been uniformly supported by all the cases is, that it is not enough for the testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts and legacies: The rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged (c). In other words, it is not by an intention to charge the real, but by a plain intention to discharge the personal estate, that the question is to be decided (d).

(z) See the observations made on this passage by Knight-Bruce, V.-C., in *Collis v. Robins*, 1 De Gex & Sm. 141, and by Lord Halsbury, L. C., in *Kilford v. Blaney*, 31 C. D. 56, 61.

(a) 1 Meriv. 216.

(b) See also *Inchiquin v. French*,

1 Cox, 9. *Stephenson v. Heathcote*, 1 Eden, 39. *Andrews v. Emmot*, 2 Bro. Ch. C. 297. *Standen v. Standen*, 2 Ves. 589. *Coote v. Coote*, 3 J. & Lat. 175.

(c) *Bootle v. Blundell*, 1 Meriv. 220.

(d) *Ibid.*: 230. *Bickham v.*

Thus it has been held, that a mere bequest of residuary personal estate by the term "residue" (*e*), or "all my personal estate" (*f*), or a like bequest, after previous sums or articles given out of it (*g*), or as of personal property "not otherwise disposed of" (*h*), is not singly sufficient to exempt the personal fund from its natural primary obligation to pay debts and legacies, although the real estate be also subjected to their payment by the Will. Again, charging the real estate ever so anxiously for the discharge of debts, will not of itself exempt the personal (*i*): And whether the whole real estate be charged with debts and legacies (*k*), or a sufficient part of it (*l*), or a specific part of it (*m*), or it be given in trust to pay debts and legacies by sale of it (*n*), or a term of years be created out of it for those purposes (*o*), still the personal estate must be *first* applied. Again, neither a devise for payment of debts and legacies out of the rents of real estates (*p*), nor a devise on condition of the devisee paying the debts (*q*), nor a mere charge of funeral and testamentary expenses, as well as debts, on the land (*r*), nor

Cases where no sufficient expression by testator of intention to exonerate personal estate.

Crutwell, 3 My. & Cr. 763. Collis v. Robins, 1 De G. & Sm. 131, 141. Trott v. Buchanan, 28 C. D. 446, 453.

(*e*) Samwell v. Wake, 1 Bro. Chanc. Cas. 144. Tait v. Lord Northwick, 4 Ves. 824.

(*f*) Harewood v. Child, cited Cas. temp. Talb. 204. Haslewood v. Pope, 3 P. Wms. 324. Brummel v. Prothero, 3 Ves. 111. Aldridge v. Wallscourt, 1 Ball & Beat. 312: but see *post*, 1581.

(*g*) Brydges v. Phillips, 6 Ves. 567.

(*h*) Hartley v. Hurle, 5 Ves. 540.

(*i*) By Lord Loughborough, in Tait v. Lord Northwick, 4 Ves. 824.

(*k*) Dolman v. Smith, Prec. Chanc. 456.

(*l*) Inchinquin v. French, Amb.

33, 37. S. C. 1 Cox, 1. Rhodes v. Rudge, 1 Sim. 79.

(*m*) White v. White, 2 Vern. 43. Bridgman v. Dove, 3 Atk. 201. Fitzgerald v. Field, 1 Russ. Chanc. Cas. 428.

(*n*) Inchinquin v. French, 1 Cox, 1. Hancox v. Abbey, 11 Ves. 186.

(*o*) Tower v. Rous, 18 Ves. 132.

(*p*) Hartley v. Hurle, 5 Ves. 540.

(*q*) Bridgman v. Dove, 3 Atk. 201.

(*r*) Walker v. Jackson, 2 Atk. 626. Stephenson v. Heathcote, 1 Eden, 38. Brydges v. Phillips, 6 Ves. 570. See also Gray v. Minnethorpe, 3 Ves. 103. Hartley v. Hurle, 5 Ves. 540. M'Clelland v. Shaw, 2 Scho. & Lef. 538. Bootle v. Blundell, 1 Meriv. 228, 229: but see *post*, pp. 1580, 1581.

an express charge of only *some* of the debts upon the *personalty* (s), will exempt the personal fund from its legal primary liability (t).

A very strong inference against the claim of exemption of the personal estate, appears to be the circumstance of its falling to the executor for his benefit *virtute officii* (u), prior to the statute 1 Wm. IV. c. 40 (x), or in an instance of the gift of the personal estate to the executor as a legacy, and the appointment of him to be executor, being in one and the same sentence (y) : but the converse of the proposition above stated, *i.e.* the gift of the legacy, and the appointment of the legatee to be executor, being in distinct sentences, will not of itself afford an inference for the exemption of the personal estate. Cases are, however, to be found, in which the executor has been held to take the personal estate, or residue of a personal estate, as a specific legacy, exempt from the payment of debts (z).

Again, the circumstance of the *same persons* being appointed trustees and executors, has had considerable weight in inducing Judges to draw an inference, that the personal estate is not to be exempted (a) : and Lord Alvanley has remarked (b), that the circumstance of the trustees not being the executors, affords a strong inference as to the real intention, and is always favourable to the exemption of the personal estate (c).

It has been already stated, that a *mere charge* of funeral expenses upon the real estate will not exempt the personal fund from its primary liability to debts, &c. However, such

(s) *Watson v. Brickwood*, 9 Ves. 447.

(t) 1 Rep. Leg. 609, 3rd edit.

(u) *Gray v. Minnethorpe*, 3 Ves. 106. *Coote, Mortg.* 1028, 5th edit.

(x) See *ante*, p. 1343.

(y) *Bromhall v. Wilbraham*, Cas. temp. Talb. 274. *Rhodes v. Rudge*, 1 Sim. 79. *Coote, Mortg.* 1028, 5th edit.

(z) *Hall v. Brooker*, Gilb. Eq. Rep. 73. *Coote, Mortg.* 1029, 5th edit.

(a) *Dolman v. Smith*, Prec. Chanc. 456. *Coote, Mortg.* 1027, 5th edit.

(b) *Burton v. Knowlton*, 3 Ves. 108.

(c) *Coote, Mortg.* 1027, 5th edit.

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a charge, in concurrence with other circumstances, has, in some cases, had importance attached to it, in exempting the personal estate from debts, &c., upon the reasoning, that, as funeral expenses primarily attach themselves to the personal fund in the hands of executors, the testator, by transferring that duty from them to the trustees of the real estate, must have intended to give the whole of the personalty to the legatee, specifically discharged from every obligation to which it was naturally liable (*d*). On the other hand, in some instances, the omission to charge funeral expenses on the real estate has been considered a circumstance of some weight, to show that the personal estate is not to be exempt, because it shows that the testator intends the personal estate to be charged beyond the particular legacies or charges mentioned in the Will, and being once broken in upon, the argument of its being specific is destroyed (*e*).

Again there has been occasion to state that the personalty is not exempted by the facts of the debts, &c., being charged upon the real estate, and a mere concomitant bequest of all the personal estate (*f*). However, in several instances, the circumstance of such a bequest, as distinguished from a gift of the *residue*, has been treated as having weight (*g*).

The limits of this Treatise will not allow that the different instances, in which the intention of the testator in favour of the exemption of the personal estate has been established, should be stated at large. The principal decisions of that nature will be found collected in the note below (*h*), and the

(*d*) *Burton v. Knowlton*, 3 Ves. 108. See also *Greene v. Greene*, 4 Madd. 157. *Michell v. Michell*, 5 Madd. 69.

(*e*) *Brydges v. Phillips*, 6 Ves. 570. *Crote, Mortg.* 1028, 5th edit.

(*f*) *Ante*, p. 1579.

(*g*) *Tower v. Rous*, 18 Ves. 139. *Bootle v. Blundell*, 1 Meriv. 228. *Greene v. Greene*, 4 Madd. 148. *Michell v. Michell*, 5 Madd. 69.

Gilbertson v. Gilbertson, 34 Beav. 354. *Trott v. Buchanan*, 28 C. D. 446.

(*h*) *Waise v. Whitfield*, 8 Vin. Abr. 437, tit. Devise, (Z. d.) pl. 19. *Adams v. Meyrick*, 1 Eq. Cas. Abr. 271, pl. 13. *March v. Fowke*, Finch, Rep. 414. *Wainwright v. Bendlowes*, 2 Vern. 718. S. C. Prec. Chanc. 451. *Anderton v. Cooke*, cited 1 Bro. Ch. Cas. 457.

attention of the reader is particularly directed to the case of *Bootle v. Blundell* (i), in which almost every circumstance occurred which had been the subject of judicial observations in preceding cases, and upon which different judges had formed different opinions as to their effect singly to exonerate the personal estate: and Lord Eldon, after going through a review of those cases, and making full observations upon every part of the Will, determined that the personal estate was exonerated from the primary liability to pay debts.

Legacies given
out of a parti-
cular fund:

It is necessary, before leaving this subject, to advert to a distinction which exists with respect to it, between debts and legacies. It has already appeared, that a pecuniary legacy, given generally, without specification of a particular fund for its payment, is primarily chargeable upon the personal estate, although in other parts of the Will, the real estate is made expressly liable to it; the rule of law considering the per-

Bamfield v. Wyndham, Prec. Chanc. 101. Bicknel v. Page, 2 Atk. 79. Kynaston v. Kynaston, 1 Bro. Ch. Cas. 457, *in notis*. Holliday v. Bowman, cited 1 Bro. Ch. Cas. 145. Gaskill v. Hough, cited 31 Ves. 110. Atty.-Gen. v. Barkham, cited Cas. temp. Talb. 206. Stapleton v. Colvile, Cas. temp. Talb. 202. Phipps v. Annesley, 2 Atk. 57. Bicknel v. Page, 2 Atk. 79. Walker v. Jackson, 2 Atk. 624. S. C. 1 Wils. 24. Williams v. Bishop of Llandaff, 1 Cox, 254. Webb v. Jones, 1 Cox, 245. S. C. 2 Bro. Ch. Cas. 60. Burton v. Knowlton, 3 Ves. 107. Hancox v. Abbey, 11 Ves. 179. Bootle v. Blundell, 1 Meriv. 193. Gittins v. Steele, 4 Swanst. 24. Greene v. Greene, 4 Madd. 148. Michell v. Michell, 5 Madd. 63. Noel v. Noel, 12 Price, 213. Welby v. Rockcliffe, 1 Russ. & M. 571. Driver v. Ferrand, *ibid.* 681. Clut-

terbuck v. Clutterbuck, 1 M. & K. 15. Blount v. Hipkins, 7 Sim. 43. Vandeleur v. Vandeleur, 9 Bligh. 157. Jones v. Bruce, 11 Sim. 221. And see the cases stated 1 Rep. Leg. 610 *et seq.* 3rd edit. 2 Pow. Dev. 681 *et seq.* Jarman's edit. Coote, Mortg. 1025 *et seq.* 5th edit. 2 Jarm. Wills, 4th edit. 652 *et seq.* Ashby v. Ashby, 1 Coll. 549. Bateman v. Roden, 1 J. & Lat. 356. Lamphier v. Despard, 2 Dr. & Warr. 59. Coote v. Coote, 3 J. & Lat. 175. Collis v. Robins, 1 De G. & Sm. 131. Onseley v. Anstruther, 10 Beav. 453. Lomax v. Lomax, 12 Beav. 285. Quennell v. Turner, 13 Beav. 240. Woodhead v. Turner, 4 De G. & Sm. 429. Evans v. Evans, 17 Sim. 102. Whieldon v. Spode, 15 Beav. 537. Plenty v. West, 16 Beav. 173. Forrest v. Prescott, L. R. 10 Eq. 545.

(i) 1 Meriv. 193.

personal estate as the natural fund to bear such a charge (*k*): But if the pecuniary legacy be not given generally, but given only out of a particular fund, there the legatee can have recourse only to the particular fund (*l*): and in this, there is an essential difference between debts and legacies (*m*).

Further, it may be stated as a rule that where a testator gives a certain portion of his personal estate and expressly directs that it shall be liable and applicable to the payment of his debts, it is an exoneration of the general personal estate (*n*).

exoneration of the general personal estate.

Where the testator directs a sale of his real estate, and the proceeds and the personal estate are thrown into one mass, which he subjects to the payment of debts and legacies, the real and the personal estate must contribute, in proportion to their relative amounts, to the payment of the debts and legacies (*o*): But this rule is not applicable where the real

Mixed fund of real and personal estate in one mass directed to be applied to payment of debts and legacies:

(*k*) *Ante*, p. 1575, 1578.

(*l*) *Kirke v. Kirke*, 4 Russ. Chanc. Cas. 435, 449. See *Spurway v. Glynn*, 9 Ves. 483. *Hancox v. Abbey*, 11 Ves. 179. *Gittins v. Steele*, 1 Swanst. 24. *Rickets v. Ladley*, 3 Russ. Chanc. Cas. 418. *Roberts v. Roberts*, 13 Sim. 336. *Dickin v. Edwards*, 4 Hare, 273, 276. *Fream v. Dowling*, 20 Beav. 624. *Ion v. Ashton*, 28 Beav. 379. *Sinnett v. Herbert*, L. R. 12 Eq. 201. But see also *Mann v. Copeland*, and the other cases cited, *ante*, p. 1032. See further *Colville v. Middleton*, 3 Beav. 570.

(*m*) *Kirke v. Kirke*, 4 Russ. Chanc. Cas. 449. See *Noel v. Lord Henley*, 7 Price 241. S. C. in Dom. Proc. 12 Price, 213, *nomine* *Noel v. Noel*.

(*n*) *Webb v. De Beauvoisin*, 31 Beav. 576. *Vernon v. Manvers*, 31 Beav. 623. *Coventry v. Coventry*, 2 Dr. & Sm. 470. *Trott v.*

Buchanan, 28 C. D. 446.

(*o*) *Roberts v. Walker*, 1 Russ. & M. 572. *Dunk v. Fenner*, 2 Russ. & M. 557. *Fourdrin v. Gowdey*, 3 M. & K. 383. *Stocker v. Harbin*, 3 Beav. 479. *Salt v. Clattaway*, 3 Beav. 576. *West v. Cole*, 4 Y. & Coll. 460. *Young v. Hassard*, 1 Jones & Lat. 466. *Barry v. Harding*, *ibid.* 475. *Atty.-Gen. v. Southgate*, 12 Sim. 77. *Shallcross v. Wright*, 12 Beav. 505. *Robinson v. Governors of London Hospital*, 10 Hare, 19. See also *Falkner v. Grace*, 9 Hare, 282. *Lord v. Wightwick*, 1 Drewr. 576. *Tatlock v. Jenkins*, Kay, 654. *Bentley v. Oldfield*, 19 Beav. 225, 228. *Simmons v. Rose*, 21 Beav. 37. 6 De G. M. & G. 411. *Allan v. Gott*, L. R. 7 Ch. 439. The fact, however, that a mixed fund of personality and proceeds of sale of realty is created will not exonerate the personality from its primary

and personal estate are not thrown into one mass, notwithstanding they are both given to the same persons, in trust therewith to pay debts and legacies; for in such case each fund retains its original character and its original liabilities (*p*). In order that the rule should apply there must be a direction for the sale of the real estate (*q*).

specific
bequests not
affected by a
general charge
of legacies on
real and per-
sonal estate.

It may here be mentioned that where there is a specific devise or a specific legacy, the presumption is that the testator intended that the devisee or legatee should have it in its integrity: Therefore a general charge of particular legacies on the whole real and personal estate will not be allowed to operate as a charge in derogation of such specific devises or legacies (*r*).

"All my just
debts," mean-
ing of.

The expression in a Will "all my just debts" includes all the testator's debts whenever and wherever contracted, and therefore includes a debt contracted by him after the making of the Will, and contracted in a country other than that of his domicile, and secured upon property in that country (*s*).

liability in the absence of a direction to pay the debts and legacies out of the mixed fund. *Elliott v. Dearsley*, 16 C. D. 322.

(*p*) *Boughton v. Boughton*, 1 H. L. C. 406. *Blann v. Bell*, 5 De G. & Sm. 658. *Tidd v. Lister*, 3 De G. M. & G. 857. *Tench v. Cheese*, 6 De G. M. & G. 453.

(*q*) But in *Allan v. Gott*, L. R. 7 Ch. 439, it was held by L. J. James and Mellish that in order to bring the case within the rule of *Roberts v. Walker*, 1 Russ. & M. 572, *ante*, note (*o*), it is not neces-

sary that the testator should have directed an absolute conversion of the real estate; it is sufficient that he has shown an intention of creating a mixed fund of realty and personalty out of which the legacies are to be paid.

(*r*) *Spong v. Spong*, 1 Dow. & C. 365. *Asst.* p. 1033, note (*h*). *Conron v. Conron*, 7 H. L. C. 168. See also *Bianco v. Greener*, L. R. 14 Eq. 456.

(*s*) *Maxwell v. Maxwell*, L. R. 4 H. L. 506.

SECTION II.

Of Marshalling the Assets in favour of Creditors and Legatees.

It is a general principle of equity, that if a claimant has two funds to which he may resort, a person, having an interest in one only, has a right to compel the former to resort to the other; if that is necessary for the satisfaction of both (*t*). This principle is not confined to the administration of the estate of a person deceased, but applies wherever the election of a party having two funds will disappoint the claimant having the single fund: And accordingly, a Court of Equity will, if necessary, control that election, and compel the one to resort to that fund, which the other cannot reach (*u*). But the more general practice is, to protect the claimant on the single fund by marshalling the assets.

Thus if the deceased died before the passing of the stat. 3 & 4 Wm. IV. c. 104 (*x*), *i.e.*, before the 29th of August, 1833, and there were creditors of the deceased by specialty, and creditors by simple contract, and the specialty creditors, instead of resorting to the real assets, which they alone could reach, proceeded against the personal estate, to the exclusion of the simple contract creditors, who had no other fund, a Court of Equity would marshal the assets by permitting the simple contract creditors to stand in the place of the specialty creditors against the real assets, so far as the latter should have exhausted the personal (*y*): And the rule

In favour of
creditors.

(*t*) Aldrich *v.* Cooper, 8 Ves. 388. Tidd *v.* Lister, 3 De G. M. & G. 857, 872. Haynes *v.* Forshaw, 11 Hare, 93. Legh *v.* Legh, 15 Sim. 135. Finch *v.* Shaw, 19 Beav. 500. Gibson *v.* Seagrim, 20 Beav. 614. South *v.* Bloxham, 2 Hemm. & M. 457.

(*u*) See Fonbl. Treat. Eq. B. 3,

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c. 2, s. 6, note (*i*).

(*x*) See *ante*, p. 1558.

(*y*) But they shall not stand in the place of the specialty creditors as to the interest which would have accrued on the specialty debts if they had remained unsatisfied; Cradock *v.* Piper, 15 Sim. 301.

was the same with respect to real assets devised, as those descended (z).

So in the case of *Aldrich v. Cooper* (a), the testator died seised of freehold and copyhold estate, both of which were subject to mortgage: The personal estate was exhausted in payment of the mortgage and of two bonds upon which the testator was indebted to the mortgagee: And Lord Eldon held, that the simple contract creditors were entitled to stand in the place of the mortgagee *pro tanto*, against both the freehold and copyhold estate. So in another case (b), the specialty creditors of a deceased mortgagor of copyhold and freehold estate were allowed to stand in the place of the mortgagee against the copyholds, to the extent of the sum which the mortgagee had received from the freehold estate (c).

Again, if the vendor of an estate, the contract for which was not completed in the lifetime of the testator, who was the purchaser, is afterwards paid his purchase-money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor, with respect to his lien on the estate sold, against the devisee of that estate (d).

(z) *Selby v. Selby*, 4 Russ. Ch. C. 341. So covenantees, who claim under a merely voluntary covenant, have been held entitled, as against devisees, to stand in the place of mortgagees, who have exhausted the fund provided by the testator for the payment of debts; *Lomas v. Wright*, 2 M. & K. 769. *Hales v. Cox*, 32 Beav. 118. But the assets shall not be marshalled against judgment creditors: *Sharpe v. Lord Scarborough*, 4 Ves. 538. Now, however, it would seem that the Courts would not give any priority to a judgment creditor until he has obtained a charge by getting the land delivered in

execution.

(a) 8 Ves. 381, overruling *Robinson v. Tonge*, 1 P. Wms. 679, note.

(b) *Gwynne v. Edwards*, 2 Russ. Ch. C. 289, *in notis*.

(c) The specialty creditors could not otherwise have reached the copyhold; for copyhold estates previous to the passing of the stat. 3 & 4 Wm. IV. c. 104 (see *ante*, p. 1558), were not liable either at law or equity to the testator's debts, further than he had subjected them thereto.

(d) *Selby v. Selby*, 4 Russ. Ch. C. 336.

Formerly there was a doubt (e) as to how far this principle of equity could be applied to prevent a secured creditor from proving under a decree in a creditor's suit for the full amount of his debt, but now this question cannot arise, since by the Judicature Act, 1875, sect. 10, the rules of bankruptcy on this point are imported into the administration of insolvent estates (f).

A similar equity will be extended in favour of legatees: In favour of
legatee. Thus where a specialty creditor, who has a general lien on the real estate, as a creditor by bond in which the deceased bound himself and his heirs, receives satisfaction out of the personal estate, and thereby exhausts it so as to leave nothing for the payment of legacies, a legatee shall stand in the place of such specialty creditor as against the real assets which have descended to the heir (g). "In the case of legatees," said Lord Eldon, in *Aldrich v. Cooper* (h), "against assets descended, a legatee has not so strong a claim to this species of equity as a creditor: but the mere bounty of the testator enables the legatees to call for this species of marshalling; that if those creditors, having a right to go to the real estate descended, will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not."

And on the same principle it seems to be clear, that if, since the passing of the stat. 3 & 4 Wm. IV. c. 104 (i), by

(e) *Greenwood v. Taylor*, 1 Russ. & M. 185. *Mason v. Bogg*, 2 M. & Cr. 443.

(f) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), 2nd Sched. rules 9—11.

(g) *Bowman v. Reeve*, Prec. Chanc. 578. *Lutkins v. Leigh*, Cas. temp. Talb. 54. *Hanby v. Roberts*, Amb. 128. Therefore where the executor of a testator is a mortgagee of the real estate, as to which there was an intestacy, and also a legatee under his Will, he is not

bound to satisfy the mortgage debt out of the first sufficient sum of personal assets that comes to his hands, the reason being, that if he were compelled to do so, and thus to exhaust the personal estate, he would be entitled to come against the real estate to the extent to which the legacy remained unsatisfied: *Binns v. Nicholls*, L. R. 2 Eq. 256.

(h) 8 Ves. 396.

(i) *Ante*, p. 1558.

which the real estate is made liable to simple contract debts, a simple contract creditor should receive satisfaction out of the personal estate and thereby exhaust it, the legatees would be allowed to stand in his place against the real assets which have descended.

But where the real estate does not descend to the heir, but is *devised* to a stranger, or to the heir taking as devisee (*k*), the assets are not marshalled in favour of general legatees, so as to throw the creditors on the real assets *devised* (*l*). And this rule is not confined to specific devises of land, but extends to lands which pass under a residuary devise (*m*). If, indeed, the lands devised are *charged with debts*, the assets will be marshalled; for lands so charged are

(*k*) See the MS. note of Serjeant Hill, in Blunt's edition of Ambler, p. 383, on the question, whether a devise of land to the heir, which is void as to passing the estate, shall not exempt the lands from the legatees' right to stand in the place of specialty creditors. It has been held by Sir L. Shadwell, V.-C., that since the stat. 3 & 4 Wm. IV. c. 106 (*Act for the Amendment of the Law of Inheritance*), wherever there is a devise to the heir, he must be considered to all intents and purposes as taking by devise and not by descent; for the third section of that statute (whereby it is provided that when any land shall have been devised by any testator, who shall die after Dec. 31, 1833, to his heir, such heir shall be considered to have acquired the land as devisee and not by descent) is not to be considered as relating exclusively to the law of inheritance, but has also application with regard to assets: *Strickland v. Strickland*, 10 Sim. 374. And even in cases where the

testator died before Dec. 31, 1833, so as not to be within the operation of this Act, the estates devised to the heir are not in equity to be applied to the payment of the testator's debts in priority to other parts of his estate devised to other persons: *Biederman v. Seymour*, 3 Beav. 368.

(*l*) *Clifton v. Burt*, 1 P. Wms. 678. *Scott v. Scott*, Ambl. 383. *Hanby v. Fisher*, Ambl. 128. *Keeling v. Brown*, 5 Ves. 359. *Aldrich v. Cooper*, 8 Ves. 397.

(*m*) *Mirehouse v. Scaife*, 2 M. & Cr. 695. But it must be remembered that, notwithstanding sect. 24 of the Wills Act, a residuary devise is still specific and therefore a general pecuniary legatee has no right to have the assets marshalled as against the residuary devisee: *Hensman v. Fryer*, L. R. 3 Ch. 420. *Gibbins v. Eyden*, L. R. 7 Eq. 371. *Lancefield v. Iggulden*, L. R. 10 Ch. 136: the effect of which would be to throw the whole deficiency of the pecuniary legacy on the devised estate. It will be seen,

applicable to the payment of debts before general pecuniary legacies (n).

With respect to specific legatees, the assets shall be so far marshalled against the specific devisees of real estate, upon failure of the general personal estate, that the devisee and specific legatee shall each, in proportion to their respective gifts, contribute to the payment of the specialty debt (o).

Before the passing of Locke King's Act and the Acts amending it, much discussion occurred as to the rights of general legatees in cases, where a creditor having a specific lien on the real estate resorted to the personalty, to have the assets marshalled against real assets, and also as to the law in the case of a vendor having an equitable lien for unpaid

however, that Lord Chelmsford, in *Hassman v. Fryer*, whilst deciding that the pecuniary legatee had no right, by marshalling in the sense above mentioned, to throw upon the devisee the whole deficiency, yet decided that the residuary real estate devised and the pecuniary legacies were respectively liable to contribute to the debts of the testator, which his general personal estate was insufficient to satisfy, *pro rata*. But this decision is contrary to the settled rule that personal estate not specifically bequeathed must be first applied in payment of debts before the real estate which passes under a residuary devise can be resorted to, and accordingly has not been followed. *Collins v. Lewis*, L. R. 8 Eq. 708. *Dugdale v. Dugdale*, L. R. 14 Eq. 234. *Tomkins v. Colthurst*, 1 C. D. 626. *Farquharson v. Floyer*, 3 C. D. 109.

(n) *Foster v. Cook*, 3 Bro. C. C. 347. *Paterson v. Scott*, 1 De G. M. & G. 531. *Surtees v. Parkin*, 19 Beav. 406. The law on this

subject is not affected by the stat. 3 & 4 Wm. IV. c. 104: *Rickard v. Barrett*, 3 Kay & J. 289.

(o) *Long v. Short*, 1 P. Wms. 403. *Tombs v. Roch*, 2 Coll. 490. *Gervis v. Gervis*, 14 Sim. 654. But a testator may by the terms of his will exclude this rule if his intention be clear. Thus in *Bateman v. Hotchkin*, 10 Beav. 426, where a testator directed all his debts in the first place to be paid out of his personal estate, except his leaseholds, if sufficient, and if not, he charged his real estate therewith, it was held by Lord Langdale that the specific legacies were liable to the payment of the debts in priority of the real estate. And in *Raikes v. Boneton*, 29 Beav. 41, *Romilly, M. R.*, held that as between a portion charged on real estate and the person to whom the real estate was devised subject to the portion, the latter alone were liable to make good the deficiency of the testator's general personal estate. See also *Re Saunders-Davies*, 34 C. D. 482.

purchase-money. The general result of the authorities was in favour of the right of pecuniary legatees; but it is apprehended that no such discussion can arise hereafter in cases falling within the operation of the above Acts, since by them the real estate subject to the lien is made the primary fund for the payment of the debts secured by the lien; and the right of the pecuniary legatee, as well as that of residuary legatees and the next of kin, to marshal, can no longer be questioned, and it is not thought necessary to deal with the cases in which these questions were discussed, in this edition of this Work.

Another instance of marshalling the assets in favour of legatees occurs where one or more legacies are charged on the real estate, and there is another legacy which is not so charged. There the legatee, whose legacy is not so charged, shall stand in the place of the former legatees, to be satisfied out of the real assets (*p*).

It is clearly established that the Court will not marshal assets in favour of a charitable bequest, so as to give it effect out of the personal assets, when it would be void by touching an interest in land (*q*).

(*p*) *Bligh v. Lord Darnley*, 2 P. Wms. 620. *Bonner v. Bonner*, 13 Ves. 379. 2 M. & Cr. 700. There is no distinction between the case of a class of legacies and a case of individual legacies; for the Court presumes that the testator's intention in charging the land is that all the legacies shall be paid in full: *Scales v. Collins*, 9 Hare, 656.

(*q*) *Robinson v. Geldard*, 3 Mac. & G. 735, 744, by Lord Truro. But where the testator (so to speak) marshals his own assets by directing that a charitable legacy shall be paid out of pure personality, the result of such a direction is that such legacy is payable in full out

of pure personality, in priority to other legacies. *Robinson v. Geldard*, 3 Mac. & G. 735. In this case Lord Truro said that he considered the charitable legacies so directed to be paid as being analogous to, if not strictly identical with, demonstrative legacies. This direction, however, does not exempt the charitable legacy from bearing its proportion of debts, funeral and testamentary expenses, as it would do if it made the legacy strictly *demonstrative*. *Tempest v. Tempest*, 7 De G. M. & G. 470. *Beaumont v. Oliveira*, L. R. 4 Ch. 309, affirming the decision of *Stuart, V.-C.*, L. R. 6 Eq. 534. But it should be noted

It seems convenient in reference to marshalling to set forth the order in which, in the absence of a contrary intention sufficiently expressed, assets are applied in the payment of debts :

- (1.) The general or residuary personalty, not specifically bequeathed or exonerated or exempted (r).
- (2.) Real estates appropriated to, and not merely charged with, the payment of debts (s).

that in the case of testators dying after August 5th, 1891, attempts to marshal for the benefit of a charity are rendered unnecessary, for by sect. 3 of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), impure personalty has been exempted from the provisions of the Mortmain and Charitable Uses Act, 1888 (the statute now in force) : and by sect. 3 land may be assured by will for any charitable use, but must be, except as otherwise provided by the Act, sold within a year of the testator's death. Leaseholds apparently fall within the definition of land in sect. 3. See *Re Kershaw*, 37 C. D. 674, where the similar words "any land or other hereditaments of whatever tenure" in 40 & 41 Vict. c. 34, were construed to include leaseholds.

(r) *Manning v. Spooner*, 3 Ves. 117. *Harmood v. Oglander*, 8 Ves. 124. As to the primary liability of mortgaged or charged lands to bear their own charges by Locke King's Acts, see *ante*, p. 1570 *et seq.*

As to the exoneration of personal estate as against the heirs or devisees of real estate, see *ante*, p. 1576 *et seq.* The principle was laid down in *Fisher v. Fisher*, 2 Keen, 610, and followed by *Wood v. Ordish*, 3 Sm. & G. 125,

that as between the heir-at-law, the next of kin, and the residuary devisees and legatees, a lapsed share of real and personal estate ought to be applied in the same order as if the legatee had survived. *Ryves v. Ryves*, L. R. 11 Eq. 539. See also *Stead v. Hardaker*, L. R. 15 Eq. 175. *Blann v. Bell*, 7 C. D. 382. In *Gowan v. Broughton*, L. R. 19 Eq. 77, Malins, V.-C., seems to have considered that a lapsed share of residuary personal estate should exonerate the other shares and be the primary fund for the payment of the costs of an administration suit, but the Vice-Chancellor in *Re Jones*, 10 C. D. 40, said that all he intended to decide in *Gowan v. Broughton* was that where the residuary personalty is given to a person who dies in the life of the testator such personalty is no less the primary fund than it would have been if the legatee had survived. And the cases of *Trethewy v. Helyar*, 4 C. D. 53, and *Fenton v. Wills*, 7 C. D. 33, are direct authorities that what Malins, V.-C., appeared to decide in *Gowan v. Broughton* cannot be supported.

(s) *Manning v. Spooner*, 3 Ves. 117. *Harmood v. Oglander*, 8 Ves. 124. *Phillips v. Parry*, 23 Beav. 279.

Order in which assets are applied in payment of debts.

- (3.) Real estates descended, whether acquired before or after the making of the Will (*t*).
- (4.) Real estates devised, charged with the payment of debts (*u*).
- (5.) General pecuniary legacies *pro rata* (*x*).
- (6.) Specific and residuary devises and specific legacies *pro rata* (*y*).
- (7.) Real and personal property which the testator has power to appoint, and which he has appointed, by his Will (*z*).
- (8.) The wife's paraphernalia are assets for her deceased husband's debts (*a*).

(*t*) *Wride v. Clarke*, 2 Bro. C. C. 261, n. *Harmood v. Oglander*, *ubi sup.* *Row v. Row*, L. R. 7 Eq. 414. Freeholds escheating to the lord are assets for payment of debts, but whether in priority to or *pari passu* with lands specifically devised is doubtful. *Evans v. Brown*, 5 Beav. 114.

(*u*) *Harmood v. Oglander*, *ubi sup.* *Davis v. Topp*, 1 Bro. C. C. 554.

(*x*) *Clifton v. Burt*, 1 P. W. 680. *Lord Chelmsford*, in *Hensman v. Fryer*, L. R. 3 Ch. 420, decided that pecuniary legatees and residuary devisees must contribute *pro rata*, but this decision has not been followed. See *ante*, p. 1589 (*m*). *Kay, J.*, in *Re Bate*, 43 C. D. 600, seems to have held that the classification of general pecuniary legacies after real property devised charged with debts is wrong, but it is not quite clear in what position in the

series the learned Judge would put pecuniary legacies. If such legacies come before real property charged with debts there seems no reason why pecuniary legacies should not be placed between classes 1 and 2.

(*y*) *Manning v. Spooner*, *ubi sup.* *Lancefield v. Iggulden*, L. R. 10 Ch. 136. *Tombs v. Roch*, 2 Coll. 490. *Jackson v. Pease*, L. R. 19 Eq. 96. Demonstrative legacies are specific only so far as the funds appropriated to them by the testator are sufficient to meet them. *Sellon v. Watts*, 9 W. R. 847.

(*z*) *Fleming v. Buchanan*, 3 D. M. & G. 976. *Holmes v. Coghill*, 7 Ves. 499. 12 Ves. 206. As to property over which married women have a testamentary power, see *ante*, p. 1550 (*z*).

(*a*) *Parker v. Harvey*, 4 Bro. P. C. 609. *Ridout v. Earl Plymouth*, 2 Atk. 104.

BOOK THE SECOND.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR, IN
RESPECT OF THE ACTS OF THE DECEASED; AND OF THE
LIABILITY OF AN EXECUTOR OR ADMINISTRATOR, IN RESPECT
OF HIS OWN ACTS.

CHAPTER THE FIRST.

OF THE LIABILITY OF THE EXECUTOR OR ADMINISTRATOR IN
RESPECT OF THE ACTS OF THE DECEASED.

SECTION I.

*The general question as to what Claims upon the Deceased
survive against the Executor or Administrator.*

THE general rule has been established from very early times, with respect to such personal claims as are founded upon any obligation, contract, debt, covenant, or other duty that the right of action, on which the testator or intestate might have been sued in his lifetime, survives his death, and is enforceable against his executor or administrator (*a*). In matters of contract:

(*a*) Touchat. 482. 1 Saund. 216, *a. note* (1) to Wheatley *v.* Lane. It was said by Willes, C. J., in *Sollers v. Lawrence*, Willes, 421, that "actions on the case for all sorts of debts and duties are now daily brought against executors, though this was formerly doubted: But the law has been now so settled at least 150 years." And therefore, notwithstanding the rule *actio personalis moritur cum persona*, if an injury has been done

to personal property of the plaintiff for relief arising out of which *assumpsit* could have been brought as in the case of actions against carriers and bailees, the executors of the deceased may be sued; that is to say, the executor may be sued on the obligation implied by law on which *assumpsit* would have lain against his testator. *Phillips v. Homfray*, 24 C. D. 439. *Batham v. Walford*, 36 C. D. 269.

Therefore, it is clear that the executors or administrators are answerable, as far as they have assets, for debts of every description due from the deceased, either debts of record, as judgments, statutes, or recognizances; or debts due on special contract, as for rent, or on bonds, covenants, and the like, under seal; or debts on simple contract, as notes unsealed, and promises not in writing, either expressed or implied (*b*). So an executor may be sued by the lord of a manor for a relief due from the testator (*c*).

In the case of *Eton College v. Beauchamp* (*d*), there was a rent issuing out of lands, and the tertenant died, leaving arrears due to Eton College: And it was decreed that though the person of the tertenant was not chargeable with the rent at law, but only the land by way of distress, yet his executor should pay the arrears as far as he had assets. So it is said, that where a man binds himself and his heirs, and leaves real assets, the heir, taking the profit, becomes so far a debtor, that his executor shall be charged (*e*).

In the case of *Wilson v. Tucker* (*f*), an action was sustained against the executor in attorney for negligence by the deceased, in transacting the business of the plaintiff.

And there is no difference between a promise to pay a debt certain, and a promise to do a collateral act, which is uncertain, and rests only in damages, as a promise by the testator to give such a fortune with his daughter, to deliver up such a bond, &c.: For, wherever in those cases the testator himself is liable to an action, his executors shall be liable also (*g*).

(*b*) Bac. Abr. Exors. (P.) 1 Com. Dig. Admon. (B. 14).

(*c*) *St. John v. Bawdripp, Noy*, 43. Com. Dig. Admon. (B. 14).

(*d*) 1 Chanc. Cas. 121.

(*e*) Wentw. Off. Ex. 249, 256, 14th edit. Henningham's case, Dyer, 344, *b*. As to the power of an executor or administrator, liable as such to the rent, covenants, or agreements contained in any con-

veyance on chief rent, or rent-charge granted or assigned to or made and entered into with the testator or intestate, to escape future liability thereunder, see the provisions of Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 28.

(*f*) 3 Stark. N. P. C. 154. See also *Dutton v. Tayley*, 18 Hill, MS. 285.

(*g*) Bac. Abr. Exors. (P.) 2.

Ch. I. § 1.] *Upon the Acts of the Deceased.*

It must be observed, however, that certain *forms* of action do not, at the common law, survive against the executor or administrator, as will hereafter be shown in the investigation of the subject of Remedies generally (*h*): But other actions were substituted in their room upon the very same cause which do survive and lie against the executor or administrator (*i*).

The executors or administrators so completely represent their testator or intestate, with respect to the liabilities above mentioned, that every bond, or covenant, or contract of the deceased includes them, although they are not named in the terms of it (*k*): for the executors or administrators of every person are implied in himself (*l*).

In *Harwood v. Hilliard* (*m*), a sale was to be made of a parcel of land, and it was agreed, between the plaintiffs and the defendant's testator, that if it should not produce a certain sum, then they should repay each other proportionably to the abatement; and the defendant's testator covenanted for himself and his executors, to pay his proportion to the plaintiffs, so as the plaintiffs gave him notice in writing of the said sale, by the space of ten days; but it was not said, that such notice was to be given to his executors or administrators; And the whole Court agreed, that, as the covenant ran in interest and charge, the executor was bound to pay the testator's proportion, although the notice was given to the executor and not to the testator.

It is clear, also, that in many cases a liability may accrue against the executor or administrator, after the death of the testator or intestate, upon a contract made in his lifetime although the executor or administrator be not named therein: Thus the executor is liable upon a bond which becomes due, or a note payable, subsequently to the death of the testator (*n*).

(*h*) *Infra*, Pt. v. Bk. II. Ch. I.

(*i*) *Hambly v. Trott*, Cowp. 375, by Lord Mansfield.

(*k*) *Wentw. Off. Ex.* c. 11, pp. 239, 243, 14th edit. *Bradbury v.*

Morgan, 1 H. & C. 249, 255.

(*l*) By Lord Macclesfield in *Hyde v. Skinner*, 2 P. Wms. 197.

(*m*) 2 Mod. 268.

(*n*) *Toller*, 463.

So where a man covenanted that A. should serve B. as an apprentice for seven years, and died, it was holden, that if A. departs within the term, a writ of covenant lies against the executor of the covenantor, without naming him (o). So if A. is bound to build a house for B. before such a time, and A. dies before the time, his executors are bound to perform this contract (p). And in cases of this kind the executors will be liable even where the heir is named, and the executors are not named, in the contract (q).

Hence, it appears, that executors or administrators more actually represent their testator or intestate, than the heir does the ancestor: for if a man binds himself, his executors or administrators are bound, though not named; but it is not so of the heir by the common law, however large an amount of real assets may have descended to him (r): but now by 3 & 4 Wm. IV. c. 104, real estate of a deceased owner is chargeable with all liabilities which may arise out of obligations entered into by him during his life (s).

The proposition, however, that executors or administrators are liable upon every contract of the deceased, although they be not named, must be understood as not extending to cases where the contract is *personal* to the testator or intestate: for

If contract is personal to testator, no liability of executor.

(o) Bro. Covenant, 12. Bac. Abr. Exors. (P.) 1.

(p) Quick v. Ludborrow, 3 Bulstr. 30, by Coke, C. J. In the case of Gordon v. Calvert, 2 Sim. 253. 4 Russ. Chanc. Cas. 581, A. on taking B. as a clerk, took a bond, from him and a surety, to secure his duly accounting for his receipts: No time was fixed for the continuance of the service, but it was to be determinable at the option of either party: The surety died: His executrix gave notice to

that she should no longer consider herself liable on the bond: A. read the notice to B., and re-

quired him to execute a new bond, with another surety, which was done: Then B. died, and deficiencies were found in his accounts, subsequent to the notice: And it was held that the executrix of the surety had no equity to support an injunction to restrain an action on the bond.

(q) Williams v. Burrell, 1 C. B. 402.

(r) Co. Lit. 209, a. Wentw. Off. Ex. c. 11, 239, 240, 14th edit.

(s) Hamer's Devisees' case, 2 De G. M. & G. 368. Ante, p. 1560, note (o).

in such instances no liability attaches upon the executors or administrators, unless a breach was incurred in the lifetime of the deceased (t). Thus, if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract: for the undertaking is merely personal in its nature, and, by the intervention of the contractor's death, has become impossible to be performed (u). So a covenant by a master for the instruction of his apprentice is personal to the master, and his executors are not liable upon it (v).

On a covenant that in consideration of a weekly payment to A. and his executors for a term certain A. shall not exercise a particular trade, the executors of A. are not bound to abstain from exercising it after his death (x).

So it is said, that if a lessee for years covenants for himself to repair the houses demised, omitting other words, he is bound to repair only during his life, and the executors or administrators are not bound (y). And it is also said, that if a lessor covenants, for himself only, to discharge the lessee of

(t) *Hyde v. the Dean of Windsor*, Cro. Eliz. 533. *Siboni v. Kirkman*, 1 M. & W. 418, 423, *per Parke, B.* An action for breach of promise of marriage, where no special damage is alleged, does not survive against the personal representatives of the promisor. The special damage which would cause the right of action to survive must be damage to the property, and not to the person, of the promisee, and must be within the contemplation of both parties at the date of the promise, and the action can be brought against the executors for such special damage only, and not for general damages: *Finlay v. Chirney*, 20 Q. B. D. 494.

(u) *Marshall v. Breadhurst*, 1 Tyrwh. 349, by Lord Lyndhurst.

In *Wentworth v. Cock*, 10 A. & E. 45, *Patteson, J.*, said that there was a case at Liverpool where a contract to build a lighthouse was held to be personal, on the ground of its being a matter of personal skill and science. So a contract to play a piano at a concert has been held to be one requiring personal skill, and to be conditional on the contractor being well enough to perform: *Robinson v. Davison*, L. R. 6 Exch. 269, 274.

(v) *Baxter v. Burfield*, Bott. P. L. pl. 696, 6th edit. S. C. 2 Stra. 1266. *Infra*, p. 1640.

(x) *Cooke v. Colcraft*, 2 W. Bl. 856. 3 Wils. 380.

(y) *Touchet*, 178: but see *Wentw. Off. Ex. p. 250*, 14th edit. *contra*.

all quit-rents out of the land, this covenant is only personal, and will bind the covenantor only during his life (z). But if in these cases the words "during the term" be added in the covenant, as on a covenant by a lessee for himself to repair the houses during the term, or on a covenant by a lessor for himself to discharge the lessee of all quit-rents during the term: in these cases, it appears, the executors and administrators also will be charged after his death (a).

In *Wentworth v. Cock* (b), the plaintiffs had entered into an agreement with one Cock to supply him with a certain quantity of slate immediately; and with a certain other quantity, monthly, at a fixed price; and with any further quantity, monthly, that he might require: He engaged to receive the slate, not exceeding 200 tons per month, and the agreement was to be in force till January 1st, 1838: An action having been brought against his administrator, for refusing to receive slate sent, in pursuance of the contract, after his death, and before January 1st, 1838, it was contended that the contract was personal to the deceased, and was not obligatory on his representatives: But the Court of Queen's Bench held that the plaintiff might well sue the administrator: And Lord Denman said, it was like any ordinary case of goods ordered by a testator, which the executor must receive and pay for: And Littledale, J., observed, that the administrator was bound to pay damages, out of the assets, if he did not take the contract upon himself. In *Cooper v. Jarman* (c), where a person contracted with a builder to erect a house on a piece of freehold land belonging to him, and died intestate before the house was finished, it was held by Lord Romilly, M.R., that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate.

But it must be borne in mind that the authority of an

(z) Touchst. 178. *Ingery v. Williams v. Burrell*, 1 C. B. 402.
Hyde, Dyer, 114, a.: but see (b) 10 A. & E. 42.
Wentw. Off. Ex. ubi supra. (c) L. R. 3 Eq. 98.

(a) Touchst. 178, 482. See also

agent is revoked by the death of his principal: consequently the agent cannot, generally speaking, sue the executor of the principal in respect of services as agent after his death, though performed in pursuance of a contract made with him in his lifetime. Thus, in *Campanari v. Woodburn* (d), where A. had agreed with B. that he would endeavour to sell a picture belonging to B., and that if he succeeded in selling the same, B. should pay him 100*l.*; and B. died before his picture was sold; it was held that A. could not recover the 100*l.* from B.'s executor.

It must here be observed, that in the case of *Perrot v. Austin* (e), it is said to have been resolved by the Court that if one covenants that his executors shall pay 10*l.*, no action lies for this against them. But Lord Mansfield, in *Plumer v. Marchant* (f) said that *Perrot v. Austin* was an extraordinary case, and there is a query in the very report (g). And in *Powell v. Graham* (h), it was held that an action might be sustained against an executor, upon a promise by the testator, that his executor should pay to the plaintiff the sum of 20*l.* in consideration that the plaintiff would continue in the service of the testator till his death; and that it was not necessary to aver any promise by the executor to pay it.

(d) 15 C. B. 400.

(e) Cro. Eliz. 382.

(f) 3 Burr. 1383.

(g) In fact it appears from the statement of the case in Wentw. Off. Ex. p. 250, 14th edit., that the decision of *Perrot v. Austin* was merely as to the form of action. "In some cases," says that author, "no action of debt lieth upon a covenant to pay money; as if A. covenant that his executor shall within a year, or such a time after his death, pay 10*l.* to B.; now for that no action of debt was maintainable against A. himself, it lieth

not against his executor, but only an action of covenant; as was held in the late Queen's time." See *Randall v. Rigby*, 4 M. & W. 132, per Parke, B.; and *Ex parte Tindal*, 3 Bing. 402. S. C. 1 M. & Scott, 607, where Tindal, C. J., and Littledale, J., expressed their opinion, in which Lord Brougham concurred, that if a man covenants that his executors shall pay a sum of money after his death, this creates a debt just as much as if he himself had covenanted to pay it.

(h) 7 Taunt. 580.

in matters of
tort :

With regard to the liability of an executor in respect of the tortious acts of the deceased, it was a principle of the common law, that if an injury was done either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person by whom the wrong was committed (*i*) : and at this day (unless the case falls within the statute 3 & 4 Wm. IV. c. 42, s. 2, hereafter to be mentioned) (*j*), where the cause of action is founded upon any *malfeasance* or *misfeasance*, is a tort, or arises *ex delicto*, such as trespass for taking goods, &c., trover, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, obstructing lights, and in many other cases of the like kind, where the *declaration* imputes a tort done either to the person or property of another, and the *plea* must be not guilty, the rule is *actio personalis moritur cum personâ* ; and if the person by whom the injury was committed dies, no action of that kind can be brought against his executor or administrator (*k*).

(*i*) 1 Saund. 216, *a.*, note (1) to Wheatley *v.* Lane. Kirk *v.* Todd, 21 C. D. 484, 489.

(*j*) *Post*, p. 1807.

(*k*) 1 Saund. 216, *a.*, note (1). An action for compensation for losses occasioned by misrepresentations contained in a prospectus of a company is like an action at law for deceit, and is therefore of a personal character, and the estate of a deceased director, not being alleged and proved to have received benefit from the deceit, his executors cannot be made liable to compensate the person who asserts that he has been injured by it : Peek *v.* Gurney, L. R. 6 H. L. 377. In the case of New Sombreiro Phosphate Co. *v.* Erlanger, 5 C. D. 73 (affd. 3 App. Cas. 1218), the estate of a deceased member of on a syndicate was held liable,

the ground that he was a partner, and that the action therefore did not die with him. Nor can the executors of a deceased director be made liable in any proceeding which is of the nature of an action of negligence (*e.g.* where it is sought to charge them for loss beyond the amount of the money placed in the directors' hands) : Overend, Gurney & Co. *v.* Gurney, L. R. 4 Ch. 701. L. R. 5 H. L. 480. It has been held that the executors of a deceased director, not being officials of a company, cannot be proceeded against by summons taken out under the provisions of the 25 & 26 Vict. c. 89, sect. 165 (Companies Act, 1862) : *Re* British Guardian Life Assurance Co., 14 C. D. 335, following Felton's Executors' case, L. R. 1 Eq. 219.

Accordingly, no action lies against an executor or administrator on a penal statute (*l*). So if a man, served with a *subpœna*, and having had his expenses tendered to him, neglects to appear as a witness, and dies, no action lies against his executor or administrator (*m*). Again, if a sheriff, gaoler, or keeper of a prison, suffered one in execution for debt or damages to escape, though hereby the party, at whose suit the execution was, was entitled not only to an action upon the case against such officer by the common law, but also to an action of debt by the statutes Westm. 2, and 1 Rich. II. c. 12; yet if the officer died, no action lay against his executor for the same; because the suffering the escape was a wrong of the nature of a trespass (*n*). So at the common law, if a man was appointed executor, and committed a *devastavit* and died, the executor of such executor was not liable for the *devastavit*, upon the principle that it was a personal tort in his testator, which died with the person (*o*). But now, by the statute 30 Car. II. c. 7, explained and made perpetual by 4 & 5 Wm. & M. c. 24, s. 12, the executors or administrators of any executor or administrator, whether rightful or of his own wrong, who shall waste or convert to his own use the estate of his testator or intestate, shall be liable and chargeable in the same manner as their testator or intestate would have been if they had been living (*p*).

(*l*) Wentw. Off. Ex. 255, 14th edit.

(*m*) Wentw. Off. Ex. 255, 14th edit.

(*n*) Anon. Dyer, 271, *a*. Whitacres v. Onsley, Dyer, 322, *a*. Perkinson v. Gilford, Cro. Car. 540. Bro. Escape, 28 Exors. 100. Execution, 86 Parliament, 80. Wentw. Off. Ex. 254, 14th edit. Berwick v. Andrews, Lord Raym. 973, by Lord Holt. Hambly v. Trott, 1 Cowp. 375. 1 Saund. 216, *a*. note

(*l*). But debt lies against the executors of a sheriff, &c., upon

a judgment obtained against the testator for an escape: See *post*, p. 1614.

(*o*) Sir Brian Tucke's case, 3 Leon. 241. Browne v. Collins, 1 Vent. 292. But he was liable in Equity: Price v. Morgan, 2 Chanc. Cas. 217.

(*p*) 1 Saund. 219, *d*. note to Wheatley v. Lane. Coward v. Gregory, L. R. 2 C. P. 153. In the case of Hammond v. Gatcliffe, Andr. 254, the Court were strongly inclined to be of opinion that an executor *de son tort* of an executor

In some, however, of the cases above mentioned, a remedy may be had against the executor or administrator in another form: Thus, although, at the common law, an action of trover upon a conversion of the testator dies with him, yet if the goods, &c., taken away, continue still *in specie*, in the hands of the executor or administrator of the wrong-doer, replevin or detinue will lie against such executor or administrator to recover them back (*q*): or trover, laying the conversion to have been by the executor (*r*): or, in case they are sold, an action for money had and received to recover their value (*s*). Again, an action on the custom of the realm

de son tort is not liable at common law for a *devastavit* committed by the first; and that such an executor is not within the statute of Car. II.; because (as Probyn, J., said) in the first part of the Act, executors *de son tort* are not named, though afterwards they are expressly mentioned.

(*q*) *Le Mason v. Dixon*, W. Jones, 173, 174. 1 Saund. 217, note (1).

(*r*) *Hambly v. Trott*, 1 Cowp. 373.

(*s*) *Ibid.*, 377. 1 Saund. 217, note (1). The only cases outside the statute 3 & 4 Will. IV. c. 42, hereinafter referred to, in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done

to him are unliquidated and uncertain, the executors of a wrong-doer cannot be sued merely because it was worth the wrong-doer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby. The profits, arising from a wrong done by a deceased man, which can be followed against his estate, are only such profits as take the shape of property, or the proceeds or value of property, withdrawn from the rightful owner and acquired by the wrong-doer. See the judgment of Bowen, L.J., and Cotton, L.J., in *Phillips v. Homfray*, 24 C. D. 439, in which case Baggallay, L.J., dissented from the other members of the Court, expressing his opinion thus: "The general result of these cases, and of others to the like effect, may be thus stated, that a Court of Equity will give effect to a demand against the estate of a deceased person in respect of a wrongful act done by him, if the wrongful act has resulted in a benefit capable of being measured pecuniarily, and if the demand is of such a nature as can be properly entertained by the Court." *Ibid.*, p. 476.

against a common carrier is for a tort and supposed crime ; and the plea is not guilty ; therefore, at the common law, it will not lie against the carrier's executors : But an action of assumpsit will lie against them, upon the very same cause (t). So if a man take a horse of another, and bring him back again, an action of trespass will not lie, at the common law, against his executor, though it would against him : but an action for the use and hire of the horse will lie against the executor (u). So if a man deals as agent for another without authority, his executor, though he cannot be sued for the tort, may be made liable upon an implied contract (v).

So in the case of *Perkinson v. Gilford* (x), debt was brought against the executors of a sheriff, for money which he had levied under a *fi. fa.* and had not paid over : the not paying over the money was a misfeasance as well as a nonfeasance, yet it was determined, that by the receipt of the money, the sheriff became debtor, and that debt might be maintained for it ; that is to say, though he was guilty of a breach of his duty as sheriff, and though no action could be maintained for that breach of duty after his death, yet for the money so recovered his executors were chargeable.

Again, at the common law, an action of trespass for mesne

(t) Cowp. 375, by Lord Mansfield. S. P. by Sir J. Mansfield, C. J., in *Powell v. Layton*, 2 New Rep. 370.

(u) *Hambly v. Trott*, 1 Cowp. 375, by Lord Mansfield.

(v) *Collen v. Wright*, 7 E. & B. 301. S. C. in Error, 8 E. & B. 647. So, though the executor of an innkeeper cannot be sued in tort for the loss of a guest's goods (unless under stat. 3 & 4 Will. IV. c. 42, s. 2, *post*, p. 1607), he may be sued on an implied assumpsit : *Morgan v. Rarey*, 2 Fost. & F. 283.

(x) Cro. Car. 539. Where an

under-sheriff (since deceased) acting as sheriff during the vacancy of the shrievalty, under 3 Geo. I. c. 15, s. 8 (see 50 & 51 Vict. c. 55, s. 25), wrongfully retained the proceeds of an execution, it was held by the Court of Appeal, affirming the Divisional Court, that an action for money had and received was maintainable against the executor of the under-sheriff by the execution creditors to recover the sum so wrongfully recovered : *Gloucestershire Banking Co. v. Edwards*, 20 Q. B. D. 107. See also *Packington v. Culliford*, 1 Roll. Abr. 921, tit. Exors. H. pl. 2.

profits cannot be maintained against an executor or administrator (*y*): yet he is, perhaps, liable in an action for use and occupation for the rent up to the day of the demise in the action of ejectment (*z*). But if there has been a recovery in ejectment, it is clear that no action will lie against the executor for use and occupation for the rent subsequent to the day of demise laid in the declaration; because, having treated the holding as founded on trespass, the plaintiff cannot afterwards treat it as founded on contract (*a*): And in such instances the simple case of the death of the occupier will not sustain a bill in equity for an account of mesne profits under the head of accident (*b*): However, an account of mesne profits, since the title accrued, was decreed against executors, upon a special ground, that the plaintiff was prevented from recovering in ejectment by a rule of the Court of Law, and by an injunction at the instance of the occupier; who ultimately failed both at law and in equity (*c*): And in the case of *Monypenny v. Bristow* (*d*), the widow of a testator, with the acquiescence of his heir, was let into possession of certain freehold houses, under an erroneous supposition that they passed by the Will along with other property, in which a life interest was devised to her; and before the error was discovered or her right disputed, she died: On a bill filed by the heir against her personal representative, praying the delivery of title deeds and an account, it was held by Sir J. Leach, M.R., and

(*y*) *Pulteney v. Warren*, 6 Ves. 72, 86. See per Bowen and Fry, L.JJ., in *Phillips v. Homfray*, 24 C. D. 439, 458.

(*z*) 6 Ves. 86. *Turner v. Cameron's Coalbrook Company*, 5 Exch. 932.

(*a*) *Birch v. Wright*, 1 Term Rep. 378. See also *Pulteney v. Warren*, 6 Ves. 72, 87; and *Bridges v. Smyth*, 5 Bing. 410. S. C. 2 Moo. & P. 740. However, the mere bringing of an ejectment

and laying the demise before the time of the rent accruing, is no bar to an action for use and occupation; *Cobb v. Carpenter*, 2 Campb. 14, note to *Balls v. Westwood*: *Secus, semble*, if the ejectment has been served on the lessee: *Jones v. Carter*, 15 M. & W. 718.

(*b*) *Pulteney v. Warren*, 6 Ves. 88.

(*c*) *Ibid.* 72.

(*d*) 2 Russ. & M. 117

afterwards by Lord Brougham on appeal, that the suit was maintainable for the rents received during her continuance in possession (e).

So an action of waste does not lie, at the common law, against an executor, for waste committed by his testator; it being a tort which dies with the person (f): Nor shall an

(e) See also *Caton v. Coles*, L. R. 1 Eq. 581.

(f) 2 Inst. 302. 2 Roll. Abr. 828, pl. 7. 2 Saund. 252, note to *Green v. Cole*. A bill was brought against the executors of a jointress, to have satisfaction out of assets for permissive waste upon the jointure of the testatrix: But by Cowper, C., "The bill must be dismissed; for here is no covenant that the jointress shall keep the jointure in good repair, and in the common case, without some particular circumstances, there is not remedy in law or equity for permissive waste after the death of the particular tenant:" *Turner v. Buck*, 22 Vin. Abr. p. 523, pl. 9, tit. Waste (s. a.). The produce, proceeds, or value of waste equitable or legal, committed by a tenant for life, can be followed into the hands of his executors, and retaken from them. If he has wrongly cut timber, the timber or its proceeds or value can be followed. But no action for waste—permissive or voluntary—as such lies against the executors of a tenant for life. By non-repairing a house, or by ploughing up ancient meadow, the tenant for life may have indirectly benefited himself or saved his own pocket. But neither law nor equity recognize in this indirect benefit which he may have received any ground for proceedings against his execu-

tors: *Phillips v. Homfray*, 24 C. D. 439, 455. The liability of a tenant for life for permissive waste seems to have been for a long time an open question. It was supposed that there was a passage by Lord Coke, 2 Inst. 145, affirming the liability, and Parke, B., in *Yellowly v. Gower*, 11 Exch. 274, 294, says, speaking of permissive waste: "We conceive that there is no doubt of the liability of tenants for term of years, for they are clearly put on the same footing as tenants for life, both as to voluntary and permissive waste, by Lord Coke, 1 Inst. 53." But Kay, J., in *Re Cartwright*, 41 C. D. 532, points out that Coke's words, 2 Inst. 145, only include permissive waste where there is an obligation to repair; and that in effect he says that where the grantor imposes the obligation to repair, it is waste to allow the property to go out of repair. And the learned Judge further refers to the case of *Powys v. Blgrave*, 4 De G. M. & G. 448, where Lord Cranworth, L. C., said that in the case of a tenant for life even legal liability for permissive waste was very doubtful, and decided most certainly that in equity no interference whatever would be made on the ground of permissive waste by a tenant for life. This view was followed by Kay, J., in the above mentioned case, who expressly held that the estate of a

executor be chargeable for the injury done by his testator in cutting down another man's trees: But for the benefit arising to his testator from the sale or value of the trees, he shall (g). Accordingly, in *Powell v. Rees* (h), it was held that an executor is liable to an action for money had and received by his testator, for coal tortiously taken by him from the plaintiff's land, if the testator had sold it, and received the money: And this although no direct evidence be given of the actual sum received on the sale, if the jury believe the fact of the sale. So Lord Chancellor Cowper held, in the case of *The Bishop of Winchester v. Knight* (i), that the lord of a manor might bring a bill for an account of ore dug, or timber cut by the defendant's testator: And his Lordship observed, that it would be a reproach to equity, to say, where a man has taken my property, as my ore or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy: And his Lordship further remarked that it was true, as to the trespass of breaking up meadow, or ancient pasture ground, it died with the person; but as to the property of the ore or timber, it would be clear, even at law, if it came to the executor's hands, that trover would lie for it; and if it had been dis-

legal tenant for life is not liable for permissive waste, after having had cited to him *Davies v. Davies*, 38 C. D. 499, in which Kekewich, J., held that a tenant for years is liable for permissive waste, and apparently therefore would have held that a tenant for life was in the same position. The liability of a tenant for life for permissive waste where there is an obligation to repair has never been doubted, and thus in *Woodhouse v. Walker*, 5 Q. B. D. 404, where a devise of premises for life provided that the tenant for life should keep the premises in repair, it was held that

an action of tort for permissive waste by non-repair of the premises would have lain at common law against the tenant for life in her lifetime, and consequently lay under 3 & 4 Will. IV. c. 42, s. 2, if brought within the period of limitation, against her executor after her death. See also *Bathynany v. Walford*, 36 C. D. 269.

(g) *Hambly v. Trott*, 1 Cowp. 376, by Lord Mansfield.

(h) 7 A. & E. 426.

(i) 1 P. Wms. 406. See *Powell v. Aiken*, 4 K. & J. 352, per Wood, V.-C.

posed of in the testator's lifetime, the executor, if assets are left, ought to answer for it. So if a man commits equitable waste, and dies, as where tenant for life without impeachment of waste, and as such having a right at law to cut timber on the estate, and a property in the trees, abuses that power, by cutting ornamental trees, or trees not ripe for cutting, a Court of Equity has jurisdiction to make the personal representatives of the party, who has committed such waste, accountable for the produce of it (*k*). But a Court of Equity will not direct an account, against the executor or administrator of tenant for life without impeachment of waste, of dilapidations permitted by him in and about the mansion-house (*l*).

Again, an action would not lie against the executor of a parishioner, by whom tithes were subtracted, to recover the treble value under the statute of Edward the Sixth, even although the testator were a lessee for years so that his estate came to his executor; for, being founded on a personal tort, it died with the person (*m*). But the executor would have been liable in another form of proceeding; for the tithes, when severed, belonged to the tithe-owner; and the case, therefore, fell within the principle that where property is acquired which benefits the testator, an action for the value of the property shall survive against the executor (*n*).

It may here be mentioned that the personal representative of the mother of a bastard child is not liable for necessaries supplied to the child after her death (*o*).

And now by stat. 3 & 4 Wm. IV. c. 42, s. 2, after reciting 3 & 4 Will. 4, c. 42: that there is no remedy provided by law for certain wrongs done by a person deceased in his lifetime to another, in

(*k*) *Lansdowne v. Lansdowne*, 1 Madd. 116.

(*l*) *Lansdowne v. Lansdowne*, 1 J. & W. 522.

(*m*) *Wentw. Off. Ex.* 254, 14th edit. *Holl v. Bradford*, 1 Sid. 88. *Weekes v. Trussell*, 1 Sid. 181.

Moreton v. Hopkins, 2 Keb. 502. *Com. Dig. Admon.* (B. 15).

(*n*) By Lord Eldon, in *Pulteney v. Warren*, 6 Ves. 89, 90.

(*o*) *Ruttinger v. Temple*, 4 Best & Sm. 491.

actions may be brought against executors for an injury to property real or personal, by the testator, committed six months before his death : within what time to be brought.

respect of his property, real or personal ; for remedy thereof it is enacted, " that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death (*p*), and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person ; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person."

It was held in the case of *Powell v. Rees* (*q*), where coal had been tortiously taken from the plaintiff's land by an intestate, who had sold it and received the money, and part had been raised more than six months before his death, and part within six months, that the plaintiff might bring trespass, under this statute, against the administrator, for so much as was raised within the six months, and also money had and received for so much as was raised before (*r*) ; the acts being distinct, and therefore the two actions not incompatible.

In *Richmond v. Nicholson* (*s*), which was an action of trover for a watch against the defendant, as the executor of one Harriet Reeves, the declaration stated that Harriet

(*p*) Where the plaintiff brought his action for damages and an injunction against the firm of T. & Co. for fouling a stream which caused no benefit to the defendants, and the firm consisted of T. alone who died more than six months after the commencement of action, and the action was continued against his executors, it was held that, T. having died more than six months after the commission of the acts complained of, no action

either for damages or injunction could be maintained against his executors although the action had been commenced in the lifetime of the testator and although the executors continued the business in the name of the firm. *Kirk v. Todd*, 21 C. D. 484.

(*q*) 7 A. & E. 426. *Ante*, p. 1606.

(*r*) *Ante*, p. 1606.

(*s*) 8 Scott, 134.

Reeves died on the 27th March, 1839, and alleged a conversion by her within six calendar months next before her decease: The defendant pleaded, that Harriet Reeves was not guilty within six calendar months before the time of her death: It appeared on the trial that the watch had been given by Harriet Reeves to one Spencer, in September, 1837; that Spencer redelivered it to her in March, 1838, for the purpose of its being pawned by her; that, on its being demanded by the plaintiff in December, 1838, Harriet Reeves said, "I shall not talk to you any more, but shall see my solicitor:" She died in March, 1839: And the Court of Common Pleas held, that this was sufficient evidence of a conversion within six months before her death.

In conclusion of this branch of the subject, it may be mentioned, that an action on the case lies, by the custom of England, as it is sometimes expressed, but to speak more correctly, by the common law, against the executors of a parson, vicar, or other ecclesiastical person, at the suit of his successor, for dilapidations of the houses or buildings upon his spiritual benefice (*t*). So an action for dilapidations of a prebendal house may be maintained by a succeeding prebendary against the executor of his predecessor (*u*). The law is the same as to a perpetual curate (*x*). And such an action is maintainable where the hedges and fences belonging to the glebe, are left in a state of decay, or where there has been a felling of timber growing thereon, otherwise than for repairs or fuel (*y*). But it will not lie in respect of pulling down a building on the rectory and substituting another in a different part, unless the value of the estate be impaired, the burthens on it increased, or the evidence of title impaired (*z*).

Liability of
executor of
rector, &c.,
for dilapida-
tions.

(*t*) Wentw. Off. Ex. 255, 14th edit. And by stat. 13 Eliz. c. 10, s. 2, if any spiritual person fraudulently grants away his goods, &c., so as nothing be left to his executors, such grantee shall be liable to the successor's suit in any Court Ecclesiastical, as he might

have been, if the grantee was executor of the grantor.

(*u*) Radcliffe v. D'Oyly, 2 T. R. 630, 637.

(*x*) Mason v. Lambert, 12 Q. B. 795.

(*y*) 4 B. & Adol. 830.

(*z*) Huntley v. Russell, 13 Q. B.

Moreover, neglect to cultivate the glebe land in a husband-like manner is not a dilapidation for which the executors of an incumbent are liable (*a*). Nor will an action lie for digging gravel in the glebe (*b*). Formerly, indeed, it was doubted whether any action at law, or elsewhere than in the Spiritual Court, would lie for dilapidations, even by a succeeding rector, &c., against his predecessor who had vacated by cession or otherwise (*c*): but that point was determined in *Jones v. Hill*, 2 Wm. & M. (*d*): And the Temporal Courts having once taken cognizance of such matters, it should seem that the action was considered to lie against the executors of a deceased rector, &c., from the necessity of the thing; and it is at this day of common occurrence (*e*). If the successor dies, without having enforced the right of action, it survives to his executor, who being himself liable to the third incumbent for the whole of the dilapidations existing at the death of his own testator, may recover from the executor of the first incumbent for so much of them as occurred during the first incumbency (*f*).

The reason for the liability of the executor or administrator for such dilapidations was thus stated by Lord Chief Justice Willes, in *Sollers v. Lawrence* (*g*), "Because it is not considered as a tort in the testator, but as a duty which he ought to have performed; and therefore his representatives, so far as he left assets, shall be equally liable as himself: And, for this reason, it is not contrary to the rule, that *actio personalis* (which is always understood of a tort) *moritur cum personâ*." It is observable, however, that this action is in form an action on the case in tort; and that it could not pos-

572. See further S. C., as to what are acts of Waste, for which this action lies.

(*a*) *Bird v. Ralph*, 4 B. & Adol. 826.

(*b*) *Ross v. Adcock*, 1 L. R. 3 C. P. 655.

(*c*) See the observation of Buller, J., 2 T. R. 637. It is said in *Went*.

Off. Ex. p. 255, 14th edit. that the executors are liable, *by the spiritual or ecclesiastical law*.

(*d*) 3 Lev. 268.

(*e*) See the judgment of Buller, J., in *Radcliffe v. D'Oyly*, 2 T. R. 657.

(*f*) *Bunbury v. Hewson*, 3 Exch. 558.

(*g*) Willes, 421.

sibly be framed in *assumpsit*, as on a contract; for the plaintiff must be the succeeding rector, &c., who cannot be known until after the death of the predecessor, and of course could not contract with him: It is clearly an exception to the general rule that no action will lie against an executor to which his testator was not liable, for the testator never can be liable, inasmuch as during his life there is no person who can sue. For the same reason this action, however anomalous in other respects, is not contrary to the rule, that *actio personalis moritur cum persona*; an action cannot be said to die, which never had nor could have had existence. It seems, therefore, not to be quite correctly stated, that "the executor shall be equally liable as the testator."

The liability of the representatives of a deceased incumbent to answer for dilapidations is now governed by Stat. 34 & 35 Viet. c. 43 [Ecclesiastical Dilapidations Act, 1871]. By this Act the bishop within three calendar months directs the diocesan surveyor to inspect the premises and report what sum, if any, is required to make good the dilapidations (*h*) (sect. 29). The surveyor sends a copy of his report to the bishop, new incumbent and the representatives of the late incumbent (sect. 30), to which report opportunity to object is given (sects. 32—33). The bishop makes an order stating the repairs and their cost, for which such representatives are liable, and a copy of such order is delivered to them (sects. 34 and 35). The sum stated in the order as to the cost of repairs is a debt due from the representatives of the late incumbent and is recoverable in law or in equity (*h*) (sect. 36). No sum is recoverable for dilapidations in respect of any benefice unless the claim for such sum is founded on an order made under the provisions of the Act (sect. 53).

An allotment made to a vicar in lieu of tithes, under an Inclosure Act, is subject to the law and custom of England,

(A) The sum stated in the Bishop's order as the cost of repairs is under sect. 36, a debt payable to the new incumbent out of the assets of the late incumbent *pari passu* with the debts of his other creditors. *Re Monk*, 35 C. D. 583. See *ante*, pp. 876, 877.

34 & 35 Viet.
c. 43 (Eccle-
siastical
Dilapidations
Act, 1871).

as to dilapidations, equally with the ancient glebe; and if, when he comes into it, there are fences upon it which he ought to repair, but he dies leaving them unrepaired, his executors are liable at the suit of his successor (i).

Extent to which executor of administrator of rector is liable for dilapidations.

It may be convenient to investigate, in this place, the extent to which the executor or administrator of a rector, &c., is liable for dilapidations. In *Percival v. Cooke* (k), Best, C. J., expressed an opinion at *nisi prius*, that the representatives of a prior incumbent are only liable for such repairs as an outgoing tenant would be bound to perform, and not for complete and finished repairs (l). In *Wise v. Metcalfe* (m), the subject was fully considered by the Court of King's Bench: and the Judges of that Court were of opinion that the incumbent is bound to maintain the parsonage (which must be assumed to be suitable in point of size, and other respects, to the benefice) and also the chancel, and to keep them in good and substantial repair, restoring and rebuilding, when necessary, according to the original form, without addition or modern improvement (n); and that he is not bound to supply or maintain anything in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and whitewashing and papering belong: And that on this principle the damages must be calculated in an action for dilapidations against the executor or administrator of a deceased rector by the successor.

The successor may have separate actions against the execu-

(i) *Bird v. Ralph*, 2 Adol. & Ell. 773. 1 Nev. & M. 415.

(k) 2 Car. & P. 460.

(l) And his Lordship in that case expressed his further opinion, that the executors were entitled to be allowed, in such estimate, for timber which the late incumbent might have cut and used in such repairs, and which his successor had used for that purpose. See also *Accord*, as to stone and

timber, which could be got from the glebe: *Bunbury v. Hewson*, 3 Exch. 558.

(m) 10 B. & C. 299.

(n) In *North v. Baker*, 3 Phillim. 309, Sir John Nicholl intimates that, in some cases, the thorough repair of old building is not all to fall on one incumbent. As to when the incumbent may remove hothouses, see *Martin v. Roe*, 7 E. & B. 237.

tor or administrator of the late rector, for dilapidations to different parts of the rectory (o).

It has been the constant habit of Courts of Equity to charge persons in the character of trustees with the consequence of a breach of trust, and to charge their representatives also; whether they derive benefit from the breach of trust or not (p).

Liability of executor for breaches of trust by testator.

It may here be observed, that if an action is brought against an administrator for a breach of a covenant made by the deceased, it cannot be pleaded in bar that the defendant took out administration at the request of the plaintiff, and on his promise, *not under seal*, that he would not charge, or seek to charge, the defendant as administrator or otherwise with any breaches of the covenant in question (q).

It is no bar to an action against an administrator on a covenant made by the deceased that the defendant took out administration on a parcel promise of the plaintiff that he would not sue.

(o) *Young v. Munby*, 4 M. & S. 183.

(p) *Adair v. Shaw*, 1 Sch. & Lef. 272. *Montford v. Cadogan*, 17 Ves. 489. *Walsham v. Stainton*, 1 De G. J. & S. 678. 1 H. & M. 322. If a trustee commit a breach of trust, and the consequences of it do not occur until after his death, his estate is liable, though if redress had been sought in respect of that breach of trust it was reparable in his lifetime. And this is true as well in the case of wilful default as of an active breach of trust. *Devaynes v. Robinson*, 24 Beav. 86, 95. A testator entitled to shares in a company with unlimited liability, directed his executors to convert his estate with all convenient speed. P., one of these executors, died a year and five weeks after the testator. The shares were not converted, and about fifteen years

afterwards the company was wound up, and the surviving executors being placed on the list of contributories, paid a large sum out of the estate for calls. A bill was filed against the surviving executors and the executors of P. to make them liable for the loss. P.'s executors did not answer, nor did they in evidence give any reason why conversion had not taken place within a year from the testator's decease: and it was held (affirming *Stuart, V.-C.*), that P.'s estate was liable for all loss occasioned to the testator's estate by the omission to sell the shares within a year: and that as P.'s executors had not suggested by answer or evidence any reason for the delay, no inquiry could be directed on the subject. *Grayburn v. Clarkson*, L. R. 3 Ch. 605.

(q) *Harris v. Goodwyn*, 2 M. & Gr. 405. Perhaps the defendant

SECTION II.

Of particular instances where the Executor or Administrator is liable with respect to the Acts of the Deceased.

In the preceding section, it has been attempted to collect the principal cases illustrative of the general principle as to the liability of executors and administrators with respect to claims which might be enforced against the deceased himself, if he were living: It remains to advert to some particular instances in which such liability has been established.

Debts of
record :

First, as to debts of record. The executor or administrator is bound, as far as he has assets, to satisfy all judgments recovered against the testator or intestate, without regard to the circumstance whether a judgment was founded on a cause of action which would not have survived his death: Thus, although the executor of a sheriff is not liable to be sued for an escape permitted by his testator (*r*), yet, if judgment was recovered for such escape against him in his lifetime, his executor is liable upon the judgment (*s*).

Statutes and
recognizances :

An executor or administrator is also liable upon all statutes and recognizances entered into by the deceased (*t*); and upon all the inferior debts of record of the deceased, as fines imposed by the Justices at Westminster, or at assizes, or quarter sessions, or by commissioners of sewers or of bankrupts, by stewards in leets, or the like (*u*).

Liability of
executor on
joint contracts
of testator :

In the case of a joint contract, where several contract on the same part, if one of the parties die, his executor or

might have been relieved by application to the Court to restrain the action: *Per* Tindal, C. J., *ib.* 418: Since the Judicature Act, 1873 (s. 24 (5)) any such relief must be sought by raising any equity as a defence in the action.

(*r*) See *ante*, p. 1601.

(*s*) *Whitacres v. Onsley*, Dyer,

322, a. b.

(*t*) It seems to have been once doubted whether the executor of the consor of a statute merchant was liable: See *Wentw. Off. Ex. c. 11*, p. 243, 14th edit.

(*u*) *Went. Off. Ex. c. 11*, p. 240: but see *Anon. Cro. Jac.* 219.

administrator is at law discharged from all liability, and the survivor or survivors alone can be sued (x): And if all the parties are dead, the executor of the survivor is alone liable: Thus, if two retain an attorney, and both die, the executor or administrator of the survivor only shall be charged, and not the executors of both: for a personal contract survives of both parties; otherwise of real contracts, as warranty: and therefore, where, in an action against the executors of both, they pleaded jointly, and judgment was given for the attorney, it was stayed on motion, because the executor of the survivor only was chargeable, notwithstanding the pleading and admission of the parties (y).

So in debt upon bond, it appeared upon oyer that A., B., and C. were bound jointly, and that A. was dead; whereas the action was brought against his executor and the other two: Upon demurrer, the Court were of opinion, that the action was not well brought: for by the death of one of the obligors, his executor is wholly discharged (z).

If a testator being a sole defendant dies before judgment by Order XVII., r. 1 (R. S. C., 1883), if the cause of action survive or continue, that is to say, if it does not fall within the rule *actio personalis moritur cum personâ*, the action shall not abate, but the plaintiff may, under Rule 4 of the same order, obtain an order that the personal representative of the deceased be added as a party. This order, it seems, may be obtained *ex parte*.

Where testator a sole defendant dies before judgment.

(x) *Godson v. Good*, 2 Marsh. 300, by Gibbs, Ch. J. S. C. 6 Taunt. 594. No particular words are necessary to constitute a covenant of either kind (that is to say, either joint or several). If two covenant generally for themselves without any words of severance, or that they or one of them shall do such a thing, a joint charge is created. *White v. Tyndall*, 13 A. C. 263, 269. *Levy v. Sale*, 37 L. T. 709. *Clarke v. Bickers*, 14

Sim. 639. And this is so even though the covenant be contained in a demise to two as tenants in common: *White v. Tyndall*, *ubi sup.*

(y) *Hamond v. Jethro*, 2 Brownl. 99. See also *Calder v. Rutherford*, 2 Brod. & Bing. 302. *Slater v. Wheeler*, 9 Sim. 156.

(z) *Osborne v. Crosbern*, 1 Sid. 238. See also *Towers v. Moor*, 2 Vern. 99. *Richardson v. Horton*, 6 Beav. 185.

Where testator
a sole defen-
dant dies after
judgment.

If a testator, sole defendant, die *after* judgment, then by the common law the plaintiff could issue execution against the goods of the testator without any order, if the judgment were recovered within a year before his death (a). But now, by Order XLII., r. 23, if any change has taken place by death in the parties liable to execution, leave must, it would seem, be obtained to issue execution (b) against the goods of the testator. This order must, it would seem, be obtained on notice to the executor (c).

Where one of
several defen-
dants dies be-
fore judgment.

If one of several defendants on a joint cause of action die *before* judgment then it would seem that in a personal action the estate of the dead man is discharged from liability (d), for if two enter into a joint bond, and one die at any time before judgment, the survivor shall be charged alone (e). And if one of two defendants dies after judgment, and the plaintiff

(a) *Wheatley v. Lane*, 1 Saund. 285.

(b) Equitable execution is not "execution" within the meaning of this rule. What is commonly called equitable execution is not in fact execution, but equitable relief, which is granted because there is a hindrance in the way of execution at law, and it is subject to the ordinary rule that equitable relief can be granted only when proper parties are before the Court. Assuming, therefore, that execution at law can be issued against the estate of a deceased person without any leave of the Court (as to which *q.v.*) a receiver by way of equitable execution cannot be appointed of the estate in the absence of the persons on whom the estate has devolved. Order XVII. r. 1, does not keep an action alive as against the estate of a deceased party unless the estate has devolved on some one who is a party to the action. *Re Shephard*, 43 C. D. 131.

(c) *Re Shephard*, *ubi sup.*

(d) By sect. 136 of the Common Law Procedure Act, 1852, it was enacted that: "If there be two or more plaintiffs or defendants, and one or more of them should die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated, but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants." And now it would seem that in such a case the action would by virtue of Order XVII. r. 1, proceed as against the defendant on whom the whole liability had devolved by survivorship without the necessity of obtaining any order.

(e) *Lampton v. Collingwood*, 4 Mod. 315.

elects to take execution against the personalty, the execution must be against the survivor alone (*f*): So a release given by the obligee to the representatives of the deceased obligor is no answer to an action against the survivor (*g*).

And if one of *several* defendants on a joint cause of action die *after* judgment, it would seem that Order XLII. r. 23 (R. S. C., 1883), will not, except as against the land of the deceased (*h*), apply, because, as we have seen, if one of two defendants die after judgment and the plaintiff elects to take execution against the personalty, the execution must be against the survivor alone.

When one of several defendants dies after judgment.

And in the same way, although it is provided by Order XVII. r. 1 (R. S. C., 1883), that whether the cause of action survive or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but that the judgment may in such a case be entered notwithstanding the death, so that if one of two or more defendants dies between verdict and judgment, judgment may be entered on taking the proper steps under Order XVII. r. 2 and r. 4, against the deceased defendant, even though the cause of action fall within the rule *actio personalis moritur cum personâ*, yet it would seem that, if the cause of action be joint, there is nothing in this Order to enable the action to continue against any other than the surviving defendant.

But if the contract be several, or joint and several, the executor of the deceased contractor may be sued at law in a separate action (*i*): but he cannot be sued jointly with the

(*f*) If he takes out execution upon the real lien, the charge must be equally against the survivor and the real representative of the deceased; for though a personal execution survives, a real does not: Sir W. Harbert's case, 3 Co. 14, a. 2 Saund. 51, note (4) to Trethewy v. Ackland.

(*g*) Ashbee v. Pidduck, 1 M. & W. 564.

(*h*) If it is sought to have

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execution against the land of a deceased judgment debtor on a joint cause of action, leave to issue an *elegit* must be obtained, it would seem, on notice to the heir. See Ord. XLIII. r. 23.

(*i*) May v. Woodward, 1 Freem. 248. As to what words will constitute a joint and several bond, see Tipping v. Coates, 18 Beav. 401. White v. Tyndall, 13 A. C. 263.

survivor; because one is to be charged *de bonis testatoris*, the other *de bonis propriis* (*k*).

Liability in
Equity of
executor of
deceased joint
contractor.

With regard to the liability in Equity of the executor of the deceased joint contractor, it is completely settled that in the case of a partnership debt, although at law, upon the death of a partner, the remedy against his executors is extinguished (inasmuch as a partnership contract is joint), yet they may be sued in equity (*l*). And after much contention it is now settled that the joint creditor may, in the first instance, resort to the assets of the deceased partner, leaving it to the personal representatives of the deceased partner to take proper measures for recovering what, if anything, shall appear upon the partnership accounts to be due from the surviving partner to the estate of the deceased partner (*m*).

(*k*) Hall v. Huffam, 2 Lev. 228.

(*l*) Valliamy v. Noble, 3 Meriv. 619. Winter v. Innes, 4 My. & Cr. 109. See Holme v. Hammond, L. R. 7 Ex. 218. This rule is applicable to the case of the death of one of two executors carrying on their testator's trade, in that character, and in the ordinary course of the business accepting a bill of exchange describing themselves simply as executors of their testator: Liverpool Borough Bank v. Walker, 4 De G. & J. 24, in which case the estate of the deceased executor was held liable. It is to be observed that in cases of joint contracts there is no difference between Law and Equity, except in the single case of the death of one of the parties to a joint contract, where the contract was such that the maxim *inter mercatores jus accrescendi locum non habet* applied: per Lord Blackburn, Kendall v. Hamilton, 4 A. C. 504, 545.

(*m*) Devaynes v. Noble, 1 Meriv. 530. Wilkinson v. Henderson, 1

M. & K. 582. The surviving partners are necessary parties to a creditor's suit against the assets of the deceased: Hills v. McRae, 9 Hare, 297. In Brown v. Gordon, 16 Beav. 310, Romilly, M. R., said, that the debt though gone at law, remains due in equity, because equity considers it to be unjust that where two or more persons are jointly liable, the death of one should throw the whole debt on the others, and exonerate his estate. In Ridgway v. Clare, 19 Beav. 111, the same learned Judge took occasion to express his opinion as to the mode in which the Court administers assets in cases of this description as follows, viz.: Where both partners are solvent, there is no distinction made between joint and several creditors; they are all paid, and in taking the partnership accounts, the joint debts thus paid will be allowed in account by the surviving partner:—If the estate of the deceased partner be insolvent, and that of the sur-

Thus, in *Kendall v. Hamilton (o)*, Cotton, L.J., in pronouncing the judgment of the Court, says: "It is now well established that a Court of Equity does treat the estate of a deceased partner as still liable to the partnership creditors, though at law the survivor has become solely liable. And it must now be considered as established that the partnership creditor may obtain relief against the estate of the deceased partner without having exhausted his remedy against the survivor."

Again, in the late case of *Re Hodgson (p)*, it was held that a creditor of a partnership firm, although not strictly a joint and several creditor, has concurrent remedies against the estate of a deceased partner and the surviving partner, and that it makes no difference which remedy he pursues first.

Nor will the first creditor be precluded from resorting to the assets of the deceased partner by having in the first instance obtained judgment against the surviving partners (*q*).

Now by section 9 of the Partnership Act, 1890 (53 & 54 *Liability of partners.*)

viving partner solvent, the joint creditors will naturally go against the surviving partner, who will then be a creditor against the separate estate of the insolvent partner for the amount paid by him to the joint creditors beyond his share:—If both the deceased and surviving partner are insolvent, then the joint creditors must resort, in the first instance, to the joint estate, and can only go against the separate estate of each partner after the claims of his separate creditors have been satisfied:—If both parties die before administration takes place, the rule is the same. See also *Lodge v. Pritchard*, 4 Giff. 294. 1 De G. J. & S. 610. The Court of Chancery enforces the remedies against the estate of a deceased partner subject to two conditions. In the first place it requires that partnership

debts shall be postponed to the separate debts, and that upon a very apparent ground; for it is obvious that inasmuch as the partnership debts are paid first from the partnership estate before anything can flow from the partnership estate to the separate estate of the deceased partner, it is not unreasonable by contrast that the partnership debts should be postponed to the separate debts. The second condition is that the Court requires the presence of the surviving partner in some method, shape or manner at the taking of the accounts of the partnership: *per Fry, L. J., Re Hodgson*, 31 C. D. 177, 192.

(*o*) 3 C. P. D. 403, 407.

(*p*) 31 C. D. 177.

(*q*) *Liverpool Borough Bank v. Walker*, 4 De G. & J. 24. *Jacomb v. Harwood*, 2 Ves. Sen. 265.

Vict. c. 89), it is provided that :—" Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner ; and after his death his estate is also severally liable in a due course of administration for such debts and obligations so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts."

The equitable remedy extends to every joint contract for a loan of money giving to the creditor the benefit of the security of several persons, without any distinction that the debt must be a mercantile debt incurred by joint traders : Thus, in *Thorpe v. Jackson* (r), where four persons had opened a joint account with certain bankers, who advanced them money on such joint account, Alderson, B., held, that upon the decease of one of the joint contractors, the bankers had a right in Equity to immediate relief out of his assets, without claiming any relief against the surviving joint contractors, or showing that the latter were unable to pay by reason of their insolvency (s).

Although this interposition of Courts of Equity with regard to partnership debts on the death of a member of a partnership has led to the expression that partnership debts in the eye of a Court of Equity are joint and several, this does not mean that a Court of Equity altered or changed a legal contract, but merely that the Court, in order, before distributing assets, to administer all the equities existing with regard to them, would go behind the legal doctrine that a partnership debt survived as a claim against the surviving partners only, and would give the creditor the benefit of the equity which the surviving partners might have insisted on (t).

At one time there seems to have been a tendency in Courts of Equity to treat partnership debts as being joint and several irrespective of death and the necessity for the purpose of

(r) 2 Younge & Coll. 553.

Drew. 177, 181, 182.

(s) But see *Slater v. Wheeler*,
9 Sim. 157. Other v. Ivison, 3

(t) *Kendall v. Hamilton*, 4 A. C.
504, 517, per Lord Cairns, L. C.

administration of excluding the doctrine of survivorship. Thus, Sir William Grant, after stating that it has never been determined that every joint covenant is in Equity to be considered as the several covenant of each of the covenantors, and that when the obligation exists only by virtue of the covenant the extent of the obligation can be measured only by the words in which it is conceived, goes on to say that in the case of a partnership debt all the partners have had a benefit from the money advanced or the credit given, and the obligation to pay exists independently of any instrument by which the debt may have been secured (u).

But although a partnership liability will not generally be treated as joint and several in Equity, apart from administration, yet there are cases in which a Court of Equity will treat a joint obligation as several, and the true doctrine on the subject of obtaining relief in Equity by considering joint contracts as several, appears to be, that wherever a Court of Equity sees that in a contract joint in form, the real intention of the parties was, that it should be joint and several, it will give effect to such intention. Accordingly, in certain cases, a joint bond has, in Equity, been considered as several (x). Thus a joint bond has, in Equity, been considered as several, where there has been a credit previously given to the different persons who have entered into the obligation, and it was not the bond which first created the liability to pay. But where the obligation exists only by virtue of a joint covenant or bond, the extent of its operation can be measured only by the words in which it is conceived; and a Court of Equity cannot give the instrument any other than its legal effect (y). Accordingly, where a joint promissory

(u) *Sumner v. Powell*, 2 Meriv. 37; 1 Turn. & R. 423.

(x) *Primrose v. Bromley*, 1 Atk. 90. *Bishop v. Church*, 2 Ves. Sen. 100, 371. *Hoare v. Contencin*, 1 Bro. Ch. C. 27. *Thomas v. Frazer*, 3 Ves. 399. *Burn v. Burn*, 3 Ves. 573. *Ex parte Kendall*,

17 Ves. 525. *Liverpool Borough Bank v. Walker*, 4 De G. & J. 24. *Ante*, p. 1618, note (f).

(y) *Sumner v. Powell*, 2 Meriv. 30. S. C. affirmed, 1 Turn. & R. 423. *Richardson v. Horton*, 6 Beav. 185. *Wilmer v. Currey*, 2 De G. & Sm. 347.

note, signed "J. and J. Ewing—James Parr, surety," was given to a creditor of the firm of John and James Ewing, and James Parr died, John and James Ewing being both alive, one of whom afterwards became bankrupt, and the other insolvent; it was held that the promissory note could not be considered as several, against James Parr the surety (z). So where A. and B. were obligors in a joint bond, and A., who was alleged to be the principal debtor, died; it was held that his assets were not, in equity, liable upon the bond, but that the liability survived to B. (a). Again, where premises had been demised to A. and B., who were copartners, upon which they carried on their partnership business, and A. died during the lease, and, after his death, his executors carried on the business in copartnership with B. on the premises: it was held, nevertheless, that the covenants in the lease, which were joint only, were not to be considered in Equity as several as well as joint, so as to make A.'s estate liable for breaches of the covenant which occurred after his death (b). On the other hand, the Court of Appeal, in the case of *Bereaford v. Browning* (c), construed a contract, relating to payment and indemnity to a retiring partner, which was joint in form, as several, on the ground that the circumstances under which the contract was entered into, showed that there was a joint and several liability independently of the contract, and, therefore, an intention that the continuing partners should be severally liable.

It being now settled, beyond dispute, that the estate of a deceased partner is liable in Equity to the creditors of the firm, although the legal remedy exists only against the survivors, a further question remains to be considered, viz.,

(z) *Rawstone v. Parr*, 3 Russ. 424, 539. *Other v. Iveson*, 3 Drewr. 177.

(a) *Richardson v. Horton*, 6 Beav. 185.

(b) *Clarke v. Bickers*, 14 Sim. 639. As to the nature of the

liability of partners see *Lindley on Partnership*, 5th edit. p. 192 *et seq.*

(c) 1 C. D. 30. Cf. *Wilmer v. Currey*, 2 De G. & Sm. 347, where it was held on the facts that the deed imported a new liability.

when and by what means that liability is to terminate. It seems clear that the deceased partner's estate must continue liable until the debts, which affected him at the time of his death, are, in some way, fully discharged (*d*). The discharge, however, may take place in various ways; not only by direct payment, but also by dealings with the continuing partners operating as a payment of the joint debt, or from the creditors having agreed to take and taking the security of the surviving partners in discharge of the joint debt (*e*): Or there may be an equitable bar to the remedy; for as the right stands only upon equitable grounds, if the dealing of the creditor with the surviving partners has been such as to make it inequitable that he should go against the assets of the deceased partner, he will not, upon general rules and principles, be entitled to the benefit of the demand (*f*). But the estate of the deceased partner is not discharged by the mere circumstance that the creditor, knowing of the death, continues his transactions with the surviving partners, and forbears for several years, at their request, to take any steps to enforce payment of his debt (*g*): nor by his receipt of interest from them and a new partner (*h*).

(*d*) *Vulliamy v. Noble*, 3 Meriv. 619.

(*e*) *Thompson v. Percival*, 5 B. & Ad. 925. *Winter v. Innes*, 4 My. & Cr. 110. *Brown v. Gordon*, 16 Beav. 302. (See also *Lee v. Flood*, 2 Sm. & G. 250.) *Blair v. Bromley*, 5 Hare, 555, *per Wigram*, V.-C., *Lyth v. Ault*, 7 Exch. 669. *Bilborough v. Holmes*, 5 C. D. 255. As to discharge by proof, where there is no *locus penitentiae*, against the estate of the continuing parties in bankruptcy, see *Scarf v. Jardine*, 7 A. C. 345. See also *Simpson v. Henning*, L. R. 10 Q. B. 406 as to the effect of the receipt of a composition on the joint debt.

(*f*) *Ex parte Kendall*, 17 Ves. 526, by Lord Eldon.

(*g*) *Winter v. Innes*, 4 My. & Cr. 101.

(*h*) *Harris v. Farwell*, 13 Beav. 403. By sect. 14 (2) of the Partnership Act, 1890 (53 & 54 Vict. c. 39), it is provided that "Where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executor's or administrator's estate or effects liable for any partnership debts contracted after his death." And see *Webster v. Webster*, 3 Swanst. 490. For other cases relating to these doctrines, see *Lindley on Partnership*, 5th edit. 249 *et seq.*

Right to
enforce con-
tribution.

With respect to the right of a surviving co-contractor to enforce contribution from the personal representatives of his deceased companion; although it cannot be stated as a universal proposition that in all cases where two or more jointly employ a third person, there is an implied undertaking in all to contribute rateably *inter se*, so as to bind the executors of a deceased co-contractor; yet if several persons jointly contract for a chattel, to be made or procured for the common benefit of all (for instance the building of a ship or the furnishing of a house), and as to which the executors of any party, dying before the work is completed, are by agreement to stand in the place of the party dying; in such a case, though the legal remedy of the party employed would be solely against the survivors, yet the law would certainly imply a contract on the part of the deceased co-contractor, that his executors should contribute his proportion of the price of the article to be furnished (i).

Provisions of
the Partner-
ship Act,
1890 (53 & 54
Vict. c. 39).

Dissolution by
death or bank-
ruptcy.

Liability of
estate of
partner for
partnership
debts con-
tracted after
death of
partner.

Rights of
partners as to
application of
partnership
property.

Besides the sections already cited the following sections of the Partnership Act, 1890 (53 & 54 Vict. c. 39), seem to be those which affect the duties and liabilities of executors:

Sect. 33 (1). "Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner."

Sect. 36 (3). "The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively."

Sect. 39. "On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership

(i) Prior v. Henbrow, 8 M. & W. 873. See also Bataud v. Hawes, 2 E. & B. 287, 298, *post*, 1663,

note (i), where the Court seemed to think the executors liable without any special agreement.

applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm."

Sect. 42 (1). "Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets."

Right of outgoing partner in certain cases to share profits made after dissolution.

(2). "Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section."

Sect. 43. "Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death."

Retiring or deceased partner's share to be a debt.

With respect to the liabilities of the executors of shareholders in public companies it is important to notice the pro-

Liabilities of executors as such of

deceased
shareholders
in public
companies.
25 & 26 Vict.
c. 89.

visions of the Companies Act, 1862. The following are the chief sections of that Act which are material in this connection :—

Sect. 16. “. . . All moneys payable by any member to the company, in pursuance of the conditions and regulations of the company, or any of such conditions and regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt (*k*).”

Nature of
liability of
contributory.

Sect. 75. “ The liability of any person to contribute to the assets of a company under this Act, in the event of the same being wound up, shall be deemed to create a debt (in England and Ireland) of the nature of a specialty, accruing due from such person at the time when his liability commenced (*l*), but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability; and it shall be lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls as well as calls already made.”

Contributories
in case of
death.

Sect. 76. “ If any contributory dies, either before or after he has been placed on the list of contributories hereinafter mentioned (see sect. 98), his personal representatives, heirs, and devisees (*m*) shall be liable in a due course of administration to contribute to the assets of the company in discharge of the liability of such deceased contributory, and such personal representatives, heirs, and devisees shall be deemed to be contributories accordingly ” (*n*).

(*k*) See *Buck v. Robson*, L. R. 10 Eq. 629. *Re Muggeridge*, *ibid.* 443.

(*l*) See *Re Muggeridge*, L. R. 10 Eq. 443.

(*m*) It follows that under 3 & 4 Will. IV. c. 104, the real estate of the deceased is chargeable with calls made as well after as before the deceased's death: *Turquand v. Kirby*, L. R. 4 Eq. 123. *Hamer's Devisees' case*, 2 De G. M. & G.

366. There is no distinction between the dead shareholder's estate and the living shareholders' as to the extent and measure of liability: *Baird's case*, L. R. 5 Ch. 725.

(*n*) Although the liability is *prima facie* a liability of the deceased's estate and not of his personal representatives personally, unless they have by their acts made themselves liable as share-

Sect. 99. "In settling the list of contributories the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or being liable to the debts of others; it shall not be necessary, where the personal representative of any deceased contributory is placed on the list, to add the heirs or devisees of such contributory, nevertheless such heirs or devisees may be added as and when the Court thinks fit."

Provision as to representative contributories.

Sect. 105. "If any person made a contributory as personal representative of a deceased contributory makes default in paying any sum ordered to be paid by him, proceedings may be taken for administering the personal and real estates of such deceased contributory or either of such estates, and of compelling payment thereout of the moneys due."

Provision in case of representative contributory not paying moneys ordered.

Unless by the Articles of Association the regulations of Table A. are excluded the following articles relating to the transmission of shares and the liabilities thereon will apply:—

Art. 12. "The executors or administrators of a deceased member shall be the only persons recognized by the company as having any title to his share" (a).

Shares devolving by death.

holders; yet where executors paid a legacy without providing for any contingent liability in respect of shares which they retained unsold, and the company was subsequently wound up and the executors placed on the list of contributories, it was held that they were liable to pay the amount of the legacy in satisfaction of calls: *Taylor v. Taylor*, L. R. 10 Eq. 477. As to the right of the executors to be indemnified by the legatees, see *Jervis v. Wolferstan*, L. R. 18 Eq. 18. Where shares are registered in the joint names of two or more persons a joint liability only is created, which will survive on the death of one to the others: *Hill's case*,

L. R. 20 Eq. 585, 595.

(a) The death of a shareholder makes not the slightest difference either in right or liability; the executor of a deceased shareholder who succeeds in point of property takes it (of course in his character as executor) on exactly the same terms and conditions as every other owner of the share, with equal benefits and equal liability. The dead shareholder remains, that is, his estate remains, a member of the association: *Baird's Case*, L. R. 5 Ch. 725. *Blakeley's Case*, 3 Mac. & G. 726; 13 Beav. 133. *Gouthwaite's case*, 3 Mac. & G. 187. *Keen's Executor's case*, 3 De G. M. & G. 272. *Heward v. Wheat-*

Persons
entitled by
death, bank-
ruptcy or
marriage.

Art. 18. "Any person becoming entitled to a share in consequence of the death, bankruptcy or insolvency of any member, or in consequence of the marriage of any female member, may be registered as a member upon such evidence being produced as may from time to time be required by the company."

Personal
liability of
executor
besides lia-
bility of the
estate.

Besides the liability of the estate of a deceased shareholder in respect of shares, the executor or administrator may make himself personally liable in respect of the same. An executor whose testator has held shares in a joint-stock company has generally one of two courses open to him. He may have the shares transferred into his own name and become to all intents and purposes a partner in the company (*p*). He may on the other hand, not wish to have the shares transferred into his own name, and he ought in that case to have a reasonable time allowed him to sell the shares and to produce a purchaser who will take a transfer of them (*q*).

It is quite open to an executor, as appears from Lord Selborne's language in *Buchan's case* (*r*), to notify simply to the company, in which the testator was a shareholder, that he is the executor, and that alone would not authorise the company to put the name of the executor upon the register of shareholders in such a way as to make him personally liable: But where, upon the amalgamation of two banking companies, a shareholder had the option of exchanging his shares in the one bank for shares in the other, which was taking over the business of the former, and did not exercise the option but his executors did, and a certificate was made out to them individually but describing them as executors, they were held

ley, *ibid.* 628. See also *Re Herefordshire Bank*, 33 Beav. 435. *Re Leeds Banking Company*, L. R. 1 Ch. 231.

(*p*) In *Spence's case*, 17 Beav. 203, it was held that executors, who after the death of their testator had purchased further shares, were contributories without qualifi-

cation in respect of them, though they had been treated as executors in regard to such further shares. See also *Re Leeds Banking Company*, L. R. 1 Ch. 231. *Jackson v Turquand*, L. R. 4 H. L. 305.

(*q*) *Buchan's case*, 4 A. C. 549, 588, *per* Lord Cairns, L. C.

(*r*) 4 A. C. 549.

liable, although the bank subsequently at their request cancelled the certificate in their names and made one out in the name of the testator (*s*). For if shares are once put into the names of executors individually, although offered to and accepted by them in a representative capacity, they cannot say that their liability is to be only a liability to the extent of the assets of the testator (*t*).

The case of trustees who take a transfer of shares in their names differs, in principle, from that of executors, who merely intimate their title as executors to a company, in order to claim and exercise the rights which belong to them as the legal representatives of their testator. Trustees have not, in any proper sense of the word, a representative character, but executors have. Having representative rights, it is impossible that they should not be entitled to produce the legal evidence of them to the company, for the purpose of having their title in some way recorded and recognised, without making themselves personally liable (*u*).

The liability of an executor, so long as he has not himself become a shareholder, is limited to the extent of the assets in his hands properly administered. If he is guilty of a *devastavit* he will, however, be held liable to the extent of the *devastavit* to pay moneys due either before or after the death of the testator on the shares of the testator still standing in the testator's name (*x*).

In every case, where the testator is bound by a covenant, the executor shall be bound by it, if it be not determined by the death of the testator (*y*); that is, unless it is such a covenant as was to be performed by the person of the

Covenants
concerning
the realty:

(*s*) *Re Cheshire Banking Co., Duff's Executors' case*, 32 C. D. 301.

(*t*) *Ibid.* 309.

(*u*) *Buchan's case*, 4 A. C. 549, 595, *per* Lord Selborne.

(*x*) *Taylor v. Taylor*, L. R. 10

Eq. 477. As to the liability of an executor where a release given to a testator by a company had been set aside, see *Re Bewley*, 24 L. T. N. S. 177; 19 W. R. 464.

(*y*) *Bro. Covenant*, pl. 12. *Com. Dig. Covenant* (C. 1).

testator (z). Thus, in *Thursden v. Warthen* (a), a lord of a manor covenanted for himself, his heirs, and executors, within seven years to convey, upon request, a copyhold to the plaintiff for life, *secundum consuetudinem manerii*: The covenantor died, and the plaintiff requested his executor to convey the copyhold, which he refused; and thereupon, the plaintiff brought an action of covenant against the executor: It was objected, that the declaration did not show what estate the covenantor had in the manor, and therefore it should be intended to be a fee-simple, and if so, then the request ought to have been made to him who was to make the estate, and this was the heir; for the executor could not possibly perform the covenant, and so no breach by him: But Coke, Chief Justice, said, that the request made to the executor was good; because executors represent the person of the testator as to the performance of covenants to be in covenant performed: And to this the whole Court (except Houghton, Justice) agreed; and judgment was given for the plaintiff.

So in the case of *Macartney v. Blundell* (b), in Dom. Proc., the appellant claimed the renewal of a lease, pursuant to a covenant, against the heirs of the covenantor: They refused, alleging that the covenantor was bare tenant for life: And it was holden, that this refusal was a breach of the covenant, for which an action could be maintained at law against his representatives.

The executor is not only liable upon all covenants by the testator which have been broken in his lifetime (c), but, moreover, he is answerable for all breaches in his own time, as far as he has assets: For the privity of contract of the testator is not determined by his death (d). Thus, if a tenant in tail leases for years, and dies, and the issue in

(z) *Hyde v. Dean of Windsor*, Cro. Eliz. 553. *Bally v. Wells*, 3 Wils. 29.

(a) 2 Bulstr. 158.

(b) 2 Ridgw. P. C. 113.

(c) Wentw. Off. Ex. 251, 14th edit.

(d) *Coghill v. Freelove*, 3 Mod. 326.

tail ousts the termor, he shall have covenanted against the executors, upon an express covenant for quiet enjoyment (e).

Again, although a covenant in a lease should be of a nature such as to run with the land, so as to make the assignee of the term liable for a breach of it after the assignment, yet this shall not discharge the executor of the original lessee from a concurrent liability on the covenant, as far as he has assets, even although the lessor shall have accepted the assignee as his tenant.

Therefore, where the lessee has assigned the term in his lifetime, the lessor may still maintain an action of covenant against the executor of the lessee, upon an express covenant for payment of rent, even although the lessor has accepted the assignee for his tenant: And so may the assignee of the reversion, by virtue of the stat. 32 Henry VIII. c. 34 (f).

liability of
executor of
landlord and
tenant:

So if the executor himself assigns the term, the lessor may afterwards bring covenant against the executor, notwithstanding any acceptance of the assignee as tenant: And so also may the assignee of the reversion (g).

in covenant:

(e) F. N. B. 145 (E), note (a). As to powers now of tenant in tail to lease, see Settled Land Act, 1882, 45 & 46 Vict. c. 38, s. 58.

(f) Brett v. Cumberland, Cro. Jac. 521, 522. 1 Saund. 241, a. note (5) to Thursby v. Plant. But although the executor of the original lessee will be liable for breaches of covenant, incurred after an assignment by the testator or by himself, it is otherwise where the testator was the assignee of the lessee; for no action will lie against him except in respect of breaches in his own time: and therefore, all future liability may be discharged by assignment over,

even to a pauper: Taylor v. Shum, 1 B. & P. 21. And since such a course is quite justifiable, morally as well as legally, after an offer to surrender the lease to the landlord, the executor may be guilty of a *devastavit* in neglecting to do so: Rowley v. Adams, 4 My. & Cr. 534.

(g) Hellier v. Casbard, 1 Sid. 266. Coghill v. Freelove, 3 Mod. 325. But see stat. 22 & 23 Vict. c. 35, s. 27, ante, p. 1204, note (l), by which an executor or administrator liable to a covenant in a lease or agreement for a lease granted or assigned to the testator or intestate, after satisfying all lia-

Hence an executor, when he carries a lease to market, has a right to require that the purchaser shall covenant for indemnity against the payment of rent and performance of covenants, notwithstanding the executor himself is not bound to enter into a covenant for the title, but only that he has done no act to encumber (*h*).

It must be observed, however, that there is a distinction, with respect to this liability, between an express covenant and a mere covenant *in law*: For no action lies against an executor or administrator upon a covenant in law, which is not broken till after the death of the testator. Accordingly, in the case of *Adams v. Gibney* (*i*), a tenant for life, remainder over, demised to the lessee, his executors, &c., for the term of fifteen years, *without any express covenant for quiet enjoyment*: The lessee was evicted by the remainder-man, after

bilities already accrued due, and setting apart a sufficient fund to answer any future claims that may be made in respect of any fixed or ascertained sum covenanted by the lessee to be laid out on the property, may assign the lease to a purchaser and distribute the residuary personal estate of the deceased without appropriating any part to meet any future liability under the lease. When the executor has done this he has freed himself from all personal liability in respect of any subsequent claim. This is, however, without prejudice to the lessor's right to follow the assets of the deceased.

(*h*) *Staines v. Morris*, 1 Ves. & B. 8. *Wilkins v. Fry*, 1 Meriv. 265, 266. Even if there be no such covenant, yet if the lessor proceeds against the executor, and recovers damages for a breach of the covenant after the assignment, the executor may have an action on the case, or *assumpsit*, against

the assignee, for having neglected to perform the covenant, whereby the executor sustained damage: *Burnett v. Lynch*, 5 B. & C. 589. *Marzetti v. Williams*, 1 B. & Ad. 424, by Lord Tenterden. *Moule v. Garrett*, L. R. 5 Exch. 132. Affirmed in Exch. Ch., L. R. 7 Exch. 101. But this liability in the assignee continues no longer than his interest as such: *Wolveridge v. Steward*, 1 Cr. & M. 644. *Humble v. Langston*, 7 M. & W. 530. *Rowley v. Adams*, 4 My. & Cr. 540: though, perhaps, the executor has the same remedy against each subsequent assignee in respect of the breaches committed during the continuance of the interest of each; *Wolveridge v. Steward*, 1 Cr. & M. 660.

(*i*) 6 Bing. 656. See also *Williams v. Burrell*, 1 C. B. 402, as to what shall constitute an implied or an express covenant within the meaning of this rule.

the death of the tenant for life, but before the expiration of the fifteen years : And the Court of Common Pleas held, that the lessee could not maintain an action of covenant against the executor of the tenant for life, in respect of such eviction, although it was admitted that the word "demise" in the lease imported and made a covenant *in law* for quiet enjoyment by the lessee during the continuance of the estate out of which the lease was granted.

With respect to the liability of the executor of the lessee in debt : to an action of *debt* for rent accrued after the death of the testator, it is fully established, that the executor will be liable as long as the lease continues, and as far as he has assets, as well in that form of action as in covenant, notwithstanding the lessor assigned the term before his death, or the executor has done so since (*k*). But if the lessor has *accepted the assignee as his tenant*, then no action of debt will lie against the executor for rent accrued since the assignment, although, as it just appeared, an action of covenant may be maintained on an express covenant for its payment during the continuance of the lease.

This may be the proper place to consider more fully a subject, which has been already partially discussed (*l*), *viz.*, personal liability of executor for

(*k*) It is true that Lord Coke, in Walker's case, 3 Co. 24, *a.*, says, that "it was adjudged in Overton v. Sydhall, that if the executor of a lessee for years assigns over his interest, an action of debt does not lie against him for rent due after the assignment ; and that if lessee for years assigns over his interest, an action of debt does not lie against him for rent due after the assignment ; and that if lessee for years assigns over his interest and dies, the executor shall not be charged for rent due after his death ; for by the death of the lessee the personal privity of contract as to the action of debt in both cases was

determined : " But this is contrary to all the subsequent authorities ; See Coghill v. Freelove, 3 Mod. 325. Pitcher v. Tovey, 4 Mod. 76 1 Saund. 241, *b.* note (5).

(*l*) *Ante*, p. 600. It has been thought better to leave the discussion in the following pages as it appeared in the earlier editions unaltered except by the addition of new cases, notwithstanding the constant reference to ancient pleading. It seemed impossible to adapt the text to the system of pleading since the Judicature Act without diminishing the authority which the text derives from Sir Edward Vaughan Williams.

rent accrued
after testator's
death :

the personal responsibility of the executor for the rent incurred under a demise to his testator.

If the whole rent incurs in the lifetime of the testator, the action to recover it from the executor must be brought against him in his representative character : and therefore, if the form of action be in debt, it must be in the *detinet* only, and not in the *debet* and *detinet* ; and the judgment must be *de bonis testatoris* (m).

But in an action of debt for rent incurred after the death of the lessee, if the executor enters upon the demised premises, the lessor has his election, either to sue him as executor, or to charge him personally as assignee in respect of the perception of the profits (n). Therefore, if the action be brought in debt, the lessor may either sue the defendant as executor in the *detinet* (o), or in the *debet* and *detinet* (p), as assignee of the term (q). So, in covenant, the lessor has his election,

(m) 1 Roll. Abr. 603 (S). pl. 9.
Fruea v. Porter, 1 Sid. 379.

(n) Boulton v. Canon, 1 Freem.
337. S. C. Pollexf. 125. 1 Saund.
1, note (1) to Jevens v. Harridge.

(o) Royston v. Cordrye, Aleyn,
42. Hope v. Bague, 3 East, 2.

(p) Hargrave's case, 5 Co. 31.
Rich v. Frank, Cro. Jack. 238.
Caly v. Joslin, Aleyn, 34. 1
Saund. 1, note (1). So if the
executor enters, he may be charged
in the *debet* and *detinet* for the
current half-year's rent which
commenced before the testator
died : The Bailiffs of Ipswich v.
Martin, Cro. Jac. 411. Jevens v.
Harridge, 1 Saund. 1. But if
one sum of money is due for
arrears of rent which became due
in the lifetime of the testator, and
another sum for arrears due in the
executor's own time, the lessor
cannot in one action charge the
executor in the *detinet* for the one

part, and in the *debet* and *detinet*
for the other ; for then two dif-
ferent judgments would be neces-
sary : Salter v. Codbold, 3 Lev.
74 : but one action may be brought
for both sums in the *detinet* only :
Aylmer v. Hide, 13 Geo. II. B.
R. M. S. Selw. N. P. 610, 6th
edit. : If the lessor in such case
will not waive his right of de-
manding satisfaction out of the
estate of the executor, he must
bring two actions.

(q) In such cases it appears to
have been the practice to name the
defendant executor, and to state in
the declaration, in the *debet* and
detinet, the demise to the deceased,
his death, the grant of administra-
tion to the defendant, his entry
into the demised premises, and the
subsequent accruing of rent : See
the entry in Jevens v. Harridge,
1 Saund. 1, and the case of Caly v.
Joslin, Aleyn, 34. But it is suffi-

either to charge the executor as executor (r), or as assignee, without naming him executor, stating generally in the declaration that the estate of the lessee in the premises lawfully came to the defendant (s).

If the executor does not enter (t), he is still chargeable

cient to charge the defendant in the *debet* and *detinet* as assignee generally, without naming him executor: See *Lyddall v. Dunsapp*, 1 Wils. 4, 5. *Wollaston v. Hakewill*, 3 M. & Gr. 297. *Infra*, note (t).

(r) *Buckley v. Pirk*, 1 Salk. 317.

(s) *Tilney v. Norris*, 1 Ld. Raym. 553. S. C. 1 Salk. 309. *Carth.* 519. *Buckley v. Pirk*, 1 Salk. 317. 1 Saund. 1, note (1).

(t) Before entry and taking possession the executor of a lessee cannot be made liable as assignee of the term, but if he does enter and take possession he may be made liable as assignee; yet he may then by proper pleading limit his liability for rent to the yearly value the premises might have yielded, though it would seem he cannot so limit his liability in respect of breach of contract to repair: *Rendall v. Andrew*, 61 L. J. Q. B. 630, 633. In this case Mr. Justice A. L. Smith adopted the view indicated by Sir Edward Vaughan Williams in the earlier editions of this work, in which the note on this point ran as follows: There seems to be some doubt, whether this distinction, as to the entry of the executor, has not, in a great measure, ceased to exist since the decision of *Williams v. Bosanquet*, 1 Brod. & B. 238. That case decided (overruling *Eaton v. Jacques*, Dougl. 455), that the assignee, in fact, of a lease may be

charged as assignee on a covenant contained in it for the payment of rent, though he has never occupied or actually become possessed. And it does not appear altogether clear, whether it is not a consequence, that an executor may likewise be charged, as assignee in law, without entry: See the observation of Parke, B., at the conclusion of his judgment, in *Nation v. Tozer*, 1 Crompt. M. & R. 176. 4 Tyrwh. 565. Since these remarks were written, the point above suggested has been much discussed in the C. P., in the case of *Wollaston v. Hakewill*, 3 M. & Gr. 297. S. C. 3 Scott, N. R. 593. In that case the plaintiffs declared, as assignees of a lessor, on certain covenants contained in a lease for ninety-nine years, and alleged that all the estate of the lessee, Thomas Stead, of and in a great part of the demised premises, "by assignment thereof then made, came to and vested in the defendant, whereupon and whereby the defendant became and was possessed of the said part of the said demised premises, and continued so possessed, until the commencement of this suit." And the plaintiffs then proceeded to assign a breach of covenant for the non-payment of certain additional rents reserved by the lease, and also a breach of covenant in not keeping the premises in repair: The defendant, by her plea, traversed



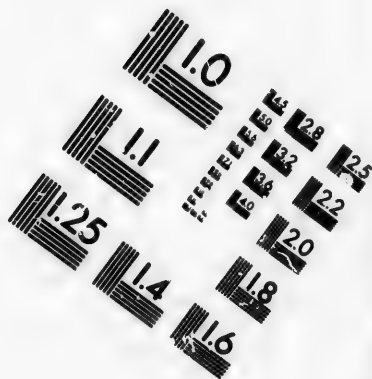
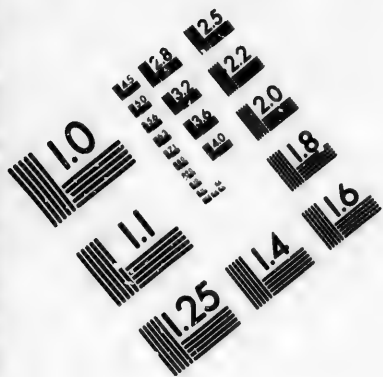
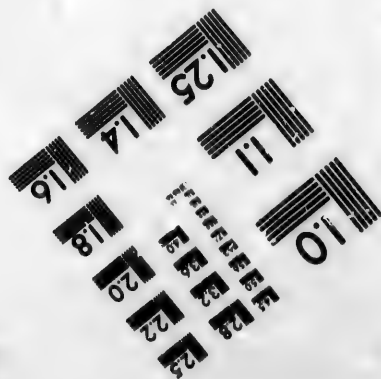
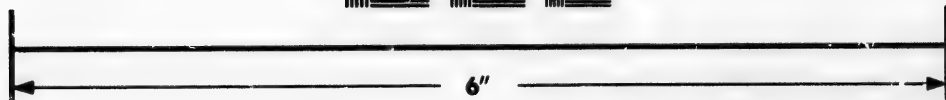
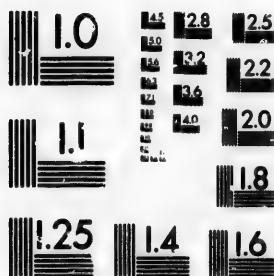


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as executor in the *detinet*, because he cannot so waive the term as not to be liable for the rent as far as he has assets (*u*).

Where the executor, having entered, is sued in the *debet* and *detinet*, as assignee, for rent incurred after his entry, he cannot plead *plene administravit* (*x*), even although he be

"that all the estate, &c., of the said Thomas Stead, of and in the said part of the said premises by assignment thereof made, came to and vested in her, in manner and form, &c.;" upon which issue was joined: After trial and verdict for the plaintiffs, a motion for a nonsuit was made on the ground of an alleged variance between the allegation in the declaration, charging the defendant generally as assignee of the lease, and the proof offered at the trial, whereby she appeared to be only executrix of an assignee, and that she had never entered or taken the profits: But the Court was of opinion that there was no variance: And Tindal, C. J., in delivering the judgment of the Court, said, that as to the argument that the executor, by being charged generally as assignee, becomes thereby liable *de bonis propriis*, the answer is that he may, by proper pleading, discharge himself from personal liability, by alleging that he is not otherwise assignee than by being executor of the lessee, and that he has never entered or taken possession of the demised premises; and from all liability as executor by alleging that the term is of no value, and that he has no assets: But that, if instead of relieving himself by pleading, he takes issue on the fact, whether he is assignee

or not, the evidence that he is executor proves the affirmative of the issue that he takes the term by assignment: And his Lordship referred to the case of *Green v. Lord Listowell*, 2 Irish Law Rep. 384, as having determined this precise point. See also *Ackland v. Pring*, 2 M. & Gr. 937. And as to an executor *de son tort*, see *Paull v. Simpson*, 9 Q. B. 365. This subject has been again considered in the case of *Kearsley v. Oxley*, 2 Hurl. & C. 896. In that case the declaration charged the defendant as assignee of a lease, and alleged the non-payment of rent. The defendant pleaded that administration *de bonis non* of the lessee was granted to a woman whom he afterwards married, and that neither he nor his wife ever entered into nor took possession of the demised premises, nor did they vest in the defendant otherwise than as in and by the plea appeared. And it was held that this plea afforded a good answer to the action as an argumentative traverse that the defendant was assignee.

(*u*) *Howse v. Webster*, Yelv. 103. *Helier v. Casbert*, 1 Lev. 127.

(*x*) *Caly v. Joslin*, Aleyn. 34. *Helier v. Casbert*, 1 Lev. 127, 128. *Sackvill v. Evans*, Freem. 171. *Buckley v. Pirk*, 1 Salk. 317.

named executor in the declaration (*y*): for if the rent be of less value than the land, as the law *prima facie* supposes, so much of the profits as suffices to make up the rent is appropriated to the lessor, and cannot be applied to anything else; and therefore the plea of *plene administravit* confesses a misapplication, since no other payment out of the profits can be justified till the rent is answered (*z*): And if judgment be given against the executor, it is *de bonis propriis* (*a*). But if the land be of less value than the rent, the executor may plead the special matter, *viz.*, that he has no assets, and that the land is of less value than the rent, and pray judgment whether he shall be charged otherwise than in the *detinet* only (*b*). If, however, such a plea be pleaded to the whole rent in the declaration, it will not be a good bar unless it shows that there were no profits at all; because the executor is chargeable personally for so much of the rent as the premises are worth: If, therefore, the profits have been

(*y*) See *ante*, p. 1634, note (*g*).

(*z*) *Buckley v. Pirk*, 1 Salk. 317.

(*a*) *Wentw. Off. Ex.* 285, 286, 14th edit. 1 Saund. 1, note (1). So if the executor be sued in *assumpsit* for use and occupation in his own time, he shall be liable *de bonis propriis*, though it be laid that the defendant occupied as executor: *Wigley v. Ashton*, 3 B. & A. 101. See *Atkins v. Humphrey*, 2 C. B. 654.

(*b*) *Billingham v. Spearman*, 1 Salk. 297. *Buckley v. Pirk*, 1 Salk. 317. 1 Saund. 1, note (1). In many instances the profits of the land may be insufficient for a given period, although the lease may, on the whole, be beneficial; As in respect to the rent for the occupation of premises from Michaelmas to Lady-day, especially where almost the whole profit is taken in the summer; as, formerly, in the case of a lease of tithes or

of meadow grounds which are usually flooded in the winter: *Wentw. Off. Ex.* 289, 14th edit. So the profits for a series of years may be less than the amount of the rent, although the lease for the whole term may be of no small value; as in the case of a lease of woods, which are felleable only once in eight or nine years, and the felling has been very recent; *Ibid.* 290. In these and the like instances, the executor is personally liable only to the extent of the profits, and for such proportion of the rent as shall exceed the profits is chargeable merely in the capacity of executor, or, in other words, as far only as he has assets; and in such case, to an action brought by the lessor against him in the *debet* and *detinet*, he must disclose the matter by special pleading: *Buckley v. Pirk*, 1 Salk. 317. *Toller*, 280.

less than the rent, and therefore cover a part only, that part should be confessed and the plea pleaded to the remainder (c). In *Remnant v. Brenridge* (d), which was an action for use and occupation generally, where it appeared that the defendant, who was the administrator of the original tenant under an agreement for a lease, had taken possession after the intestate's death, yet, it having been proved by the defendant, under the general issue, that the premises had been productive of no profit to him, and that eight months after the death of the intestate, he had offered to surrender them to the plaintiff, it was held that this constituted a good defence to the action.

In *Re Bowes* (e) it was decided that an executor who takes possession of a leasehold of his testator is liable personally, as assign of the lease, for subsequent rent up to the letting value of the holding. And North, J., in delivering judgment says: "The law is, as the cases cited and several others clearly establish, that if an executor is sued as assign of the lease for rent accrued during the time in which he was in possession he is entitled to set up, by way of defence, that he is

(c) *Rubery v. Stephens*, 4 B. & Adol. 241, 247. In that case the plaintiff having declared, in covenant, for rent at 26*l.* a-year, the defendants pleaded that they were only chargeable as executors, and that the term came to them as such; that the premises were of less yearly value than the said rent of 26*l.*, viz., of no value; and that they had fully administered, &c.: The plaintiff replied, that the premises were of the yearly value of 26*l.*, and issue was joined thereon: At the trial the yearly value was found by the jury to be 20*l.*: And the Court of King's Bench held that the replication was, in substance, that the premises were of some value; that

the issue was merely informal and cured by verdict; and that the plaintiff might recover the arrears of rent at the rate fixed by the jury. See also *Hopwood v. Whaley*, 6 C. B. 744, where in a similar plea, an averment that the defendant "*did not*" was held, after verdict, to mean that he "*could not*" derive any profit from the demised premises; and it was further held that the plea might be taken distributively, and the plaintiff should recover to the extent to which defendant might, by the exercise of reasonable diligence, have derived profit.

(d) 8 Taunt. 191.

(e) 37 C. D. 128.

only assign as executor, and that the profits or yearly value of the property amount only to a sum less than the rent. Then he must pay into Court the amount that he admits to be the full value, and if his plea is proved and that is the full value, he will be under no further liability in respect of the matter." The learned Judge goes on to point out that the full value is not the actual amount received by the executor, but the amount which he might have received by the exercise of reasonable diligence.

And on the same principle, although, as it has already appeared (*f*), an executor, generally speaking, cannot waive the term, for he must renounce the executorship *in toto*, or not at all; yet, if the value of the land is of less amount than the rent; and there is a deficiency of assets, he may waive such a lease (*g*). And if there are assets to bear the yearly loss for some years, but not during the whole term, then, it seems, the executor must pay the rent as long as the assets will hold out, and must then waive the possession, giving notice to the reversioner (*h*).

But if the executor be sued as executor, in debt in the *detinet*, for rent incurred after the death of the testator he may plead *plene administravit*: for that is a good plea, wherever no other judgment can be given but only against the defendant as executor (*i*).

So, where the executor is charged as executor, in an action of covenant, for non-payment of rent incurred in the defendant's own time, *plene administravit* is a good plea, although the defendant might have been charged as assignee of the term (*k*).

(*f*) See *ante*, p. 600.

(*g*) Wentw. Off. Ex. c. 11, p. 244, c. 12, p. 290, 14th edit. Wilkinson v. Cawood, 3 Anstr. 909, by Macdonald, C. B. (cited by Wood, V.-C., 1 K. & J. 575). He must, it should seem, promptly offer to surrender the lease, and this will help him as to subse-

quent breaches of covenant: See Reid v. Lord Tenterden, 4 Tyrwh. 118, 120.

(*h*) Wentw. Off. Ex. *ubi supra*.

(*i*) Lyddall v. Dunlapp, 1 Wils. 5.

(*k*) *Ibid.* 4. Wilson v. Wigg, 10 East, 315. But if issue be joined upon this plea, and it

liability of
executor on
assignment
of lease :

It remains to consider how these points are affected by the assignment of the lease. If the term was assigned by the testator, it seems clear that the executor cannot be charged as assignee, because the lease did not pass to him: but still he will be liable as executor in debt in the *chancery* for the rent, unless the lessor has accepted the assignee as his tenant (l); and even in that case, the executor will be liable as executor, in covenant (m). If the executor enters, and afterwards himself assigns the lease, then he is chargeable as assignee, for that time only during which he occupied (n). And if he is sued for rent incurred since the assignment by himself, he is liable in his representative character only: Therefore, if the lessor brings an action of covenant against the executor, and charges that after the testator's death, and the proving of the Will by the defendant, the demised premises came by assignment to one A. B., and that such assignee has broken the covenants in the lease, the defendant may plead *plene administravit* (o).

personal
responsibility
of executor
for repairs
after testator's
death :

It must here be observed, that the Court of Common Pleas held, in the case of *Tremeere v. Morison* (p), that although, in respect of rent, the personal liability of an executor of a lessee does not exceed the value of the demised premises, yet this qualification does not extend to a covenant for repairs;

should be proved that the executor has received any profit from the land, there would, it should seem, be a verdict against him; for he could not legally apply the profits to any other purpose than payment of the rent: Therefore, if the land yields some profit, but less than the rent, the executor ought to plead *plene administravit* *propter* the profit. This doctrine, however, applies only when the action is brought on a covenant in a lease to pay the rent thereby reserved, and not to a case where the assignor of a lease sues the

executor of the assignee on a covenant to perform the covenants in the lease, and to indemnify the assignor for any breach of them, notwithstanding the breach assigned in the non-payment of rent: *Collins v. Crouch*, 13 Q. B. 542.

(l) *Helier v. Casbert*, 1 Lev. 127. See *ante*, p. 1633.

(m) See *ante*, p. 1633. See *Leigh v. Thornton*, 1 B. & A. 625.

(n) See *ante*, p. 1631, note (f).

(o) *Wilson v. Wigg*, 10 East, 313.

(p) 1 Bing. N. S. 89.

but that where an executor is sued as assignee on a covenant to repair, he is liable as any other assignee: Accordingly, in that case a plea by the executor that the demised premises had yielded no profit, nor had been of any value whatever, since the testator's death, with the addition of an averment of *plene administravit*, and an offer to surrender before the breaches occurred, was held bad on demurrer (*q*). The principal ground of this decision appears to have been, that the law is clear that an action of waste will lie against an executor for any waste done in his time, as well permissive as voluntary (*r*).

This decision appears to have been to some extent confirmed by the subsequent case in Q. B. of *Hornidge v. Wilson* (*s*). That was an action of debt for rent against the defendant as assignee of a term: The defendant pleaded that he was administrator; that the premises were of less value, and had yielded less profit than the arrears of the rent, that is to say, £—; that he had paid over to the plaintiff all the profit he had received, and had fully administered, and had offered to surrender: Replication, that the premises were worth more than the sum in the plea mentioned, and a denial of the surrender: the premises were demised by a party, through whom the plaintiff claimed, to N. for twenty-one years, in 1818, the lease containing a covenant by the lessee to repair: N., in 1827, underlet to E. for twelve years, wanting ten days, at a rent exceeding that reserved in the lease: N. died in 1829, and administration was granted to the defendant in 1830: E. died in 1828, and the premises since that time had been occupied by E.'s sister, who for some years had paid the rent, out of which the plaintiff's rent was paid, but had since become insolvent, and her rent had fallen into arrear: The premises had become out of repair, and had been for some years, at the time of the com-

(*q*) But see the observations of Bayley, B., in *Reid v. Lord Tenterden*, 4 Tyrwh. 118, 120.

(*r*) See *Ives v. Sammes*, 2 Anderson, 51. 2 Inst. 302.

(*s*) 11 A. & E. 645.

mencement of the action, of less value than the rent reserved in the original lease; but would be of that value if repaired: The defendant had given the plaintiff notice of his willingness to surrender: And the Court of Queen's Bench held, first, that the proof of non-payment of rent by the under-lessee was no defence to this action, on the issue as to the value of the premises: Secondly, that under the same issue, the defendant could not rely on the premises being out of repair as a ground of defence, being himself bound by the covenant to repair. And in *Sleap v. Newman* (t), the case of *Tremere v. Morison* was expressly recognized and acted on by the Court of Common Pleas.

personal
liability of
executor of
tenant from
year to year
continuing
to occupy:

In *Buckworth v. Simpson* (u), A. demised to B. certain lands and premises for one year certain, and then from year to year, so long as the parties should think proper, with power to determine it on giving notice to quit; and the lease contained various terms and conditions, as to the management of the lands and repairing the buildings: The lessee died, and his executors entered into the occupation of the premises, and continued to occupy and paid rent: And the Court of Exchequer held, that they were chargeable in their personal character, upon the terms contained in the original demise; their continuing to occupy, and the landlord's abstaining from giving notice to quit, raising an implied promise on their parts to abide by the terms of the original contract (x).

liability from
occupation of
co-executor:

It may be useful, in this place, to recur to the remark which there has already been occasion to make (y), viz., that if lands are leased for years by demise not under seal, and one of the two executors of the lessee enters into the demised premises, such entry does not enure as the entry of the two executors, so as to make them both liable in an action for use and occupation (z).

(t) 12 C. B. N. S. 116.

(y) *Ante*, p. 820.

(u) 1 Cr. M. & R. 834.

(z) *Nation v. Tozer*, 1 Cr. M. &

(x) See *Arden v. Sullivan*, 14 Q. B. 832, 840.

R. 172.

It has been held (a), that under the stat. 14 Geo. III. c. 78 (The Building Act), where a party-wall has been rebuilt, the person who is owner of and entitled to the improved rent of the adjoining premises is liable to contribution out of such rent, though he be no otherwise owner than as an executor or administrator (b).

Liability of
executor of
lessee as to
party-walls.

In *Stephens v. Hotham* (c), Wood, V.-C., made a decree for a specific performance of a covenant in a lease to take a renewed lease against the executors of the lessee, who had entered and admitted assets: His Honor acted in this case unwillingly and contrary, it seems, to his own opinion, on the authority of the decision of Shadwell, V.-C., in *Phillips v. Everard* (d): And the learned Judge said that, in this case, the lease must be so framed that no personal liability should be incurred by the executors; though if the lease were a beneficial one claimed by them, they must enter into full covenants.

Liability of
executor on a
covenant by
testator to
take a renewed
lease.

Apart from Locke King's Act, if the purchaser of a real estate dies, without having paid the purchase-money, his heir-at-law, or the devisee of the land purchased, will be entitled to have the estate paid for by the executor or administrator (e). But since 40 & 41 Vict. c. 84, if the purchaser dies before paying the purchase-money, leaving it equitably charged by way of lien on the land, the devisee will take the land charged with the unpaid purchase-money, and is not entitled to have such sum discharged or satisfied out of any other estate of the testator or intestate (f). And in any case in which the heir or devisee may still be entitled to have the estate paid

Liability of
executor of
vendee of a
real estate to
complete the
purchase.

(a) *Thacker v. Wilson*, 3 A. & E. 145.

(b) Nor in the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), which has taken the place of the above statute, is there anything to alter the liability of executor or administrator as estab-

lished in the case above cited.

(c) 1 K. & J. 571.

(d) 5 Sim. 102.

(e) *Milner v. Mills*, Mosely, 123. *Broome v. Monck*, 10 Ves. 597.

(f) *Re Cockcroft*, 24 C. D. 94. See *ante*, p. 1573, note (i).

for by the executor or administrator, as where the testator or intestate has excluded the operation of Locke King's Act by the expression of a contrary intention, if the personal estate cannot be got in, and the heir or devisee pays for the land out of his own pocket, he may afterwards call upon the personal representative to reimburse him (*g*). And in such a case, if the personal estate is insufficient to perform the contract, and the agreement is on that account rescinded, yet the heir or devisee will, it should seem, be entitled to the personalty so far as it goes: And it was decided, that if by reason of the complication of the testator's affairs, the purchase-money could not be immediately paid, and the vendor for that reason rescinded the contract, yet on the coming in of the assets, the devisee of the estate contracted for might compel the executor to lay out the purchase-money in the purchase of other estates for his benefit (*h*).

But if a title cannot be made, or there was not a perfect contract, or the Court should think the contract ought not to be executed, in all these cases there is no conversion of real estate into personal, in consideration of the Court, upon which the right of the executor on the one hand (*i*), and of the heir or devisee on the other, depends: And therefore, if the vendor dies, the estate will go to the heir-at-law of the vendor, in the same manner as if no contract had been entered into (*k*): and the heir or devisee of the purchaser will not be entitled to the money agreed to be paid for the lands, or to have any other estate bought for him (*l*): The Court cannot speculate upon what the deceased party would or would not have done; but in these cases the inquiry

(*g*) *Broome v. Monck*, 10 Ves. 614, 615. 1 Sugd. V. & P. 180, 9th edit. See *Lord v. Lord*, 1 Sim. 505.

(*h*) *Whittaker v. Whittaker*, 4 Bro. Ch. C. 31. *Broome v. Monck*, 10 Ves. 597. 1 Sugd. V. & P. 180, 9th edit. And see *Lysaght v. Edwards*, 2 C. D. 499, 521.

(*i*) See *ante*, pp. 581, 582.

(*k*) *Lacon v. Mertins*, 3 Atk. 1. *Atty.-Gen. v. Day*, 1 Ves. Sen. 218. *Buckmaster v. Harrop*, 7 Ves. 341. See also *Johnson v. Le Garde*, 1 Turn. & Russ. 281.

(*l*) *Green v. Smith*, 1 Atk. 573. *Broome v. Monck*, 10 Ves. 597.

must be, whether at his death a contract existed by which he was bound, and which he would be compelled to perform (*m*): That alone can give the heir of the purchaser a right to call for the personal estate to be applied, or to the personal representative of the vendor a right to call upon his heir (*n*).

Similar principles apply where a vendor dies after there is a valid contract made for the sale of land, and before the sale has been carried out. In such case the purchase-money will devolve as personal estate (*o*): And if the land contracted to be sold has not been conveyed in the lifetime of the testator or intestate, the heir-at-law or devisee will take no beneficial interest. Formerly, the executor could not himself convey the estate, the subject of the contract, but now by the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 4, where, at the death of any person there is a subsisting contract enforceable against his heir or devisee for the sale of the fee simple or other freehold interest descendible to his heirs general in any land, his personal representative shall, by virtue of this Act have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract. This section is not to affect the beneficial rights of any person claiming as heir or devisee, and is only to apply, in cases of death after the commencement of the Act.

Devolution of real estate contracted to be sold.

And by sect. 30 of the same Act, which also is only to apply in cases of death after the commencement of the Act, it is provided that, "Where an estate or interest of inheritance or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the

(*m*) See *Curre v. Bowyer*, 5 Beav. 6, note (b). *Ante*, p. 582.

(*n*) 1 Sugd. V. & P. 189, 9th edit. See also *Lysaght v. Edwards*, 2 C. D. 499, 507, *per* Jessel, M. R. And compare *Re Thomas*, 34 C. D. 166.

(*o*) See *Lysaght v. Edwards*, 2 C. D. 499. *Re Thomas*, 34 C. D. 166. *Farrer v. Earl of Winterton*, 5 Beav. 1. See also *Frayne v. Taylor*, 33 L. J. Ch. 228. *Re Harrison*, 34 C. D. 214.

same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers."

The result of these two sections, in cases of death after December 31st, 1881, is that where the vendor is a trustee for the purchaser, as defined by Jessel, M.R., in *Lysaght v. Edwards* (p), and the Court of Appeal in *Re Colling* (q), the personal representatives are, under sect. 30, the proper persons to convey, and where, though the vendor is not a trustee within that definition, there is a contract enforceable against the heir or devisee, the personal representatives will be the proper persons to convey under sect. 4 (r).

Liability of an
executor to
exonerate
specific
legatees :

Where a specific legacy is pledged or charged by the testator, the specific legatee is entitled to have his legacy redeemed or exonerated by the executor; and if the executor fails to perform that duty, the specific legatee is entitled to compensation to the amount of his legacy out of the general assets of the testator (s).

Therefore if the legacy be of a silver cup or a jewel, and it

(p) 2 C. D. 499, 507.

(q) 32 C. D. 333.

(r) See further *Wolstenholme & Brinton's Conveyancing and Set-*

tled Land Acts, 6th edit. pp. 23, 83.

(s) *Knight v. Davis*, 3 M. & K. 358. *Bothamley v. Sherson*, L. R. 20 Eq. 304.

be in pledge at the testator's death, the legatee has a right to call upon the executor to redeem it, and to deliver it to him (t).

So in *Stewart v. Denton* (u), the testator, a wine merchant, directed by his Will that A. B. and C. D. should carry on his trade, and he bequeathed to them his stock of wines: Before the death of the testator, certain wines belonging to him arrived in a vessel at the port of London, and the vessel was reported: After his death the wines were entered: And it was held, that the executors, and not the legatees, were chargeable with the duties.

In *Marshall v. Holloway* (x), A. having a leasehold estate of leaseholds: on which he had covenanted to erect buildings within a certain time, bequeathed it and also his personal estate, subject, as to the latter, to the payment of his debts, to trustees for B. for life with several limitations over: A. died before the time expired, leaving the covenant unperformed in part: and Sir L. Shadwell, V.-C., held that his general personal estate was liable to the performance of the covenant. But it should seem that it was the clause which directed the debts to be paid out of the personal estate which governed this decision (y). For, unquestionably, the general rule is, that the legatees of leasehold estates must take them *cum onere* (z), and notwithstanding the general personal estate may remain liable to the lessor by reason of the covenants contained in the lease (zz).

(t) Swinb. Pt. 7, s. 20, pl. 18.

(u) 4 Dougl. 219.

(x) 5 Sim. 196. Compare *Farquhar v. Haddon*, L. R. 7 Ch. 1.

(y) *Fitzwilliam v. Kelly*, 10 Hare, 266, 278.

(z) *Hickling v. Boyer*, 3 Mac. & G. 635. *Fitzwilliam v. Kelly*, 10 Hare, 266. *Armstrong v. Burnet*, 20 Beav. 432. Hence, if the demised premises are dilapidated, the executors may require an indemnity against their liability in

this respect from the legatee before letting him into possession: *Hickling v. Boyer*, 3 Mac. & G. 635.

(zz) Moreover, where the burden is of such a character that the leasehold can be described as "charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money," Locke King's Act will apply as mentioned above. See p. 1575.

In *Hawkins v. Hawkins* (a) a testator specifically bequeathed certain personal estate upon trust for H. and her children after payment thereof of a legacy and of his debts and funeral expenses, and bequeathed his residuary estate to the plaintiff, whom he appointed his executor. Part of the residuary estate consisted of a leasehold house, held for a term of years at a rack-rent and considerably out of repair. This leasehold being worthless, the plaintiff, five months after the testator's death, surrendered it to the landlord, who would only accept a surrender on payment of rent for two and a half quarters from the testator's death and a sum for dilapidations. The residuary estate as a whole was valuable. And it was held on appeal (reversing *Malins, V.-C.*), that the plaintiff was not entitled to have the sums which he had paid to the landlord for dilapidation and for rent subsequent to the testator's death paid out of the specifically bequeathed property, on the ground that the liability of the testator's estate to pay the future rent and its liability to damages for the dilapidations were not debts, within the meaning of the clause in the will directing the payment of debts, as between the residuary and specific legatees.

It was said by Sir George Jessel, M.R., in *Bothamley v. Sherson* (b) that, "In fact, the distinction seems to turn on this: is the charge one created by the testator for what has been called a temporary purpose, that is, with the view of raising money or of making use of the property (as in the case of the wines, for the purpose of the testator making use of the wines and getting them to this country), or is it from its nature a charge incident to the property, as in the case of rent on leaseholds or calls payable on railway shares? In the first case the specific legatee is entitled to have the legacy redeemed or freed from the charge. In the second case he is not entitled, because the testator is supposed to give the thing as it is, and the charge upon it is really

(a) 13 C. D. 470, in which case does not seem to have been cited.
Marshall v. Holloway, ubi supra, (b) L. R. 20 Eq. 304, 316.

not in strictness an incumbrance, but something incident to the nature of the thing."

So with respect to specific legacies of shares in banking or other public companies, the legatees are, generally speaking, liable to pay the calls made subsequent to the testator's death. The cases on this subject (*c*) were fully reviewed by Romilly, M.R., in the case of *Armstrong v. Burnet* (*d*), and a distinction drawn by the learned Judge, that where the interest of the testator in the subject-matter which he professes to bequeath is complete, or where it is so treated and considered by him and by all persons connected with it, the future calls fall on the legatee, and not on the general personal estate: But where further payments are required to make perfect the interest which the testator professes specifically to bequeath, then the general personal estate is applicable for that purpose (*e*).

of shares
in public
companies.

There has already been occasion to show, that on the death of the master, the agreement for service on the part of the apprentice is at an end, generally speaking (*f*): And it seems equally well established, that the executors of the master are discharged from all agreements and covenants for the instruction of the apprentice, for these are considered as personal to the testator, and determined by his death (*g*). But the

Liability of
executor as to
apprentices
and articulated
clerks.

(*c*) *Blount v. Hipkins*, 7 Sim. 43. *Jacques v. Chambers*, 2 Coll. 435. 11 Jur. 295. *Clive v. Clive*, Kay, 600. *Wright v. Warren*, 4 De G. & Sm. 367.

(*d*) 20 Beav. 424.

(*e*) See also *Moffett v. Bates*, 3 Sm. & G. 468. The right principle appears to be that if any payments were necessary at the testator's death to constitute him a complete shareholder, they must be borne by his estate. But if he was a complete shareholder, all calls made after his death ought to be

borne by the specific legatee: *Day v. Day*, 1 Dr. & Sm. 261. *Addams v. Ferick*, 26 Beav. 384. But this does not apply to calls made in the lifetime of a person who is tenant for life of the whole residuary estate (including the shares) as an entire fund: *Re Box*, 1 Hemm. & M. 552. See also the cases collected, *ante*, p. 1303, note (*i*).

(*f*) *Ante*, p. 722 *et seq.*

(*g*) *R. v. Peck*, 1 Salk. 66. *Baxter v. Burfield*, 2 Stra. 1266. *Wadsworth v. Guy*, 1 Keb. 820. The

covenant on the part of the master for maintenance of the apprentice still continues in force (*h*); and therefore the executor is liable in an action of covenant, as far as he has assets, if he neglects to maintain him (*i*). By the custom of London, the executor shall put the apprentice to another master of the same trade (*j*). As to maintenance of parish apprentices by executors, particular provisions on this head have been made by the statute 32 Geo. III. c. 57, which has already been stated at large (*k*). Where an attorney, to whom a clerk had been articulated, dies before the articles expire, the Court of Chancery has jurisdiction to entertain a claim for a return of part of the premium, and such claim constitutes a debt payable out of the assets of the attorney (*l*).

Liability of

In case a person assessed to the poor rate dies before pay-

decision in *Walker v. Hull*, 1 Lev. 177, was *contra*; but the Court denied this case in *Baxter v. Burfield*, 2 Stra. 1267. But see *Cooper v. Simmons*, 7 H. & N. 707. *Ante*, p. 723.

(*h*) *R. v. Peck*, 1 Salk. 66. S. C. *nomine R. v. Pett*, 1 Show. 405. *Baxter v. Burfield*, 2 Stra. 1266. *Soam v. Bowden*, Finch. Rep. 396.

(*i*) But an order of magistrates, that the executor or administrator shall maintain and provide for the apprentice is bad, and may be quashed: *R. v. Pett*, 1 Show. 405. S. C. *Carth*. 231. 1 Salk. 66. 3 Salk. 41. 12 Mod. 27. *R. v. Chaplin*, Comberb. 324.

(*j*) By Lord Holt, in *R. v. Peck*, 1 Salk. 66.

(*k*) *Ante*, p. 723.

(*l*) *Hirst v. Tolson*, 2 Mac. & G. 134. This case was, however, dissented from in *Whincup v. Hughes*, L. R. 3 C. P. 78, in which the plaintiff apprenticed his son to a watchmaker and jeweller for the term of six years, paying to the

master a premium of 25*l*. The master duly instructed the apprentice for a year and then died. The plaintiff sought in an action against the master's executrix for money had and received to recover the whole or some part of the premium on the ground of failure of consideration. It was held that such failure being only partial the action was not maintainable. In his judgment Bovill, C. J., is reported to have said: "It does not appear to me that the case of *Hirst v. Tolson* is a satisfactory authority or one by which we are bound. It appears to be based on a misapprehension of the law on the subject, and is distinctly contrary to the opinion of the Court of Exchequer in *Re Thompson* (1 Ex. 864)," and Willes, J., seems to have regarded the decision of that case as sustainable on the sole ground that it was applicable to attorneys only, and was an exercise of the equitable jurisdiction of the Court of Chancery.

ment, it has been doubted how far the goods of the deceased in the hands of his executor or administrator are liable to answer the same: In the case of *Stevens v. Evans (m)*, the point was discussed, but not decided, as the case was determined on its own peculiar circumstances, *viz.*, on the ground that it was necessary to convene the administrator before the justices, before a warrant could legally issue to distrain: So that the principal point was undecided; which includes in it these particulars: 1. Where the warrant of distress is made out during the lifetime of the person assessed, whether the officers can follow the goods into the hands of the administrator or any other, without taking notice of any person as executor or administrator: 2. Where the warrant of distress is not made out till after the death of the person assessed, whether on summoning the administrator, and refusal by him, the officers can distrain the goods in the hands of such administrator: 3. Whether the administrator himself may be assessed in a succeeding rate, as for arrears; and on the assessment being confirmed at the sessions upon his appeal, whether distress may be made as of his own goods, and whether for defect of distress he may be committed: 4. In what course of administration such assessment shall be estimated: And if the administrator shall plead before the justices debts of a higher nature, or insufficiency of assets, whether and how far the justices are to take notice of such plea, and how or in what manner they shall determine the same (*n*).

executor for
poor rate,
where testator
being assessed
dies before
payment:

It was held in the Ecclesiastical Court that the obligation to pay a church-rate was a personal obligation: And that the executor of a deceased parishioner could be cited in respect of a church-rate due from his testator (*o*).

church-rates.

(m) 2 Burr. 1152. 1 W. Black.
284.

(n) Burn's Justice, title Poor,
vol. iv. p. 228, 229, edit. of 1836.

(o) Williams v. George, 3 Curt.

343. By stat. 31 & 32 Vict. c.
109, compulsory church-rates were
abolished, with a saving of rates
called "church-rates," but appli-
cable for a secular purpose.

Debts of
husband
and wife.

With respect to debts which a wife contracted while single, and which remained due at the time of the marriage, at common law the husband is liable, as long as both parties are alive: but this liability, which originated in the marriage, ceases with it: And therefore upon the death of the husband before the wife, and before payment, the debts survive against her, and the executor of the husband is discharged from them (*p*).

Again, if the husband survives the wife, he will not be individually responsible for her debts contracted before marriage, however large a fortune he may have received with her (*q*). Nevertheless, as her administrator, he will be liable to answer for them, to the extent of her assets (*r*).

This question of the ante-nuptial debts and liabilities of a married woman has been dealt with by the Married Women's Property Act, 1882, as follows:

45 & 46 Vict.
c. 75, s. 13.
Wife's ante-
nuptial debts
and liabilities.

Sect. 13. "A woman after her marriage shall continue to be liable in respect and to the extent of her separate property (*s*) for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband,

(*p*) *Woodman v. Chapman*, 1 Campb. 189.

(*q*) *Wentw. Off. Ex.* 369, 14th edit.

(*r*) *Ibid.* 370. *Heard v. Stanford*, Cas. Temp. Talb. 173. S. C. 3 P. Wms. 409. As to what her assets comprise, see *ante*, pp. 736 *et seq.*, pp. 608 *et seq.*

(*s*) See sect. 19 of the Act, and *Jay v. Robinson*, 25 Q. B. D. 467. And generally as to liability of a married woman's property, notwithstanding restraint on anticipation, see *Sanger v. Sanger*, L. R. 11 Eq. 470. *London Provincial Bank v. Bogle*, 7 C. D. 773. *Re Hedgeley*, 34 C. D. 379.

unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed."

Sect. 14. "A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her before marriage, including any liabilities to which she may be so subject under the Act relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise: and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid."

Sect. 14.
Husband to
be liable for
wife's ante-
nuptial debts
to a certain
extent.

The general result of these sections seems to be this. General result.
Whereas at common law a husband was liable to the ante-nuptial debts of his wife to the whole extent of his property whether he knew of their existence or not, and whether he obtained any property from his wife or not: but he could not

be sued alone for such debts if his wife was alive; and he could not be sued at all for them after his wife's death, except as her administrator: now, by the effect of these sections, the husband is liable only so far as he has acquired or become entitled to property from or through his wife, and he can be sued without the wife, and whether she be alive or dead (*t*). It must be noted, however, that these sections of the Act will not apply to cases where the marriage has taken place before 9th August, 1870, which will be governed by the common law as explained above, or, in the case of marriages between 9th August, 1870, and the 31st December, 1882, inclusive, by the Married Women's Property Act, 1870, and the amending Act of 1874. As regards marriages between these dates the law stands shortly thus. Where the husband and wife were married on or after 9th August, 1870, and before 30th July, 1874, sect. 12 of the Act of 1870 entirely relieves the husband of all liability for his wife's ante-nuptial debts, and gives the creditor an equitable remedy only against the wife's separate estate (*u*). But the liabilities of the husband for his wife's torts committed, or breaches of contract made, before marriage were not affected by the statute. But where the marriage took place on or after July 30th, 1874, and before January 1st, 1883, the amending Act of 1874, provides that the husband and wife may be jointly sued for any ante-nuptial debt of the wife or for any tort committed, or breaches of any contract made by the wife before marriage, and that the husband shall be liable in respect of such matter to the extent of the assets specified in sect. 5, which, briefly, are any property which the husband has acquired or might have acquired from or through his wife.

After the passing of M. W. P. Acts, 1870, 1874, it was held, in *Re West of England Bank* (*uu*), that where a woman, absolutely entitled to shares in a company, married in 1878,

(*t*) See *Beck v. Pierce*, 23 Q. B. L. R. 11 Eq. 470. *Re Hedgeley*, D. 316, 321. 34 C. D. 379. And see *ante*, p.

(*u*) See as to the construction of 660, note (*x*).
this section, *Sanger v. Sanger*, (*uu*) 12 C. D. 284.

and before the marriage the shares were settled absolutely upon her for her benefit, that this did not relieve the husband from his liability as a contributory under the 78th section of the Companies Act, 1862, which enacts that "if any female contributory marries either before or after she has been placed on the list of contributories, her husband shall during the continuance of the marriage be liable to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and he shall be deemed to be a contributory accordingly." The ground of this decision was that the section made the husband liable as the debtor, not as the husband of the debtor.

By the M. W. P. Act, 1882, sec. 13, a woman after her marriage shall continue to be liable in respect or to the extent of her separate property for all debts contracted and all contracts entered into before her marriage, including any sums for which she may be liable as a contributory either before or after she has been placed on the list of contributories under and by virtue of the Acts relating to joint stock companies: and by sect. 14, the husband shall be liable for the debts of his wife contracted, and for all contracts entered into, by her before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid to the extent of all property belonging to his wife which he shall have acquired or become entitled to from or through his wife, but he shall not be liable for the same any further or otherwise. There has been no decision as to whether the husband's liability under sect. 78 of the Companies Act, 1862, has been taken away wholly or partially by the M. W. P. Act, 1882.

On one occasion (*v*), Sir John Leach, V.-C., expressed a

(*v*) Gregory v. Lockyer, 6 Madd. 90. See Bertie v. Chesterfield, 9 Mod. 31. Willet v. Dobie, 2 Kay & J. 647. In *Re McMyn*, 33 C. D. 575, however, Chitty, J., held that a husband, executor of his wife's will made under a testa-

mentary power of appointment, is entitled to retain out of her estate the expenses of her funeral, though such estate was insufficient for creditors, and her will did not contain any charge of debts and funeral expenses.

doubt, whether the husband has a right to throw his wife's funeral expenses upon her separate estate.

Wife's post-nuptial debts.

With respect to debts contracted by a wife after marriage, as far as a supply of necessaries, it shall be presumed, as long as he lives, that she had the authority of the husband, as his agent, to procure them for her own use (*w*). He may consequently be compelled to pay for them, and so may his executors if he has assets: But the authority will be revoked by the death of the husband; and therefore his executor is not liable for necessaries supplied to the wife after the decease of the husband, even (according to one case) although the fact of his being dead were unknown at the time the necessaries were provided: Accordingly in *Blades v. Free* (*x*), a man who had for some years cohabited with a woman that passed for his wife, went abroad, leaving her and her family at his residence in this country, and died abroad: And it was held, that the woman might have the same authority to bind him by her contracts for necessaries, as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death, although before information of his death had been received (*y*).

Work and labour with a view to a legacy.

It may be observed, that if a man performs services for the testator, as if a stockbroker transacts all the money concerns of the deceased, without any view to a reward, but in the expectation of a legacy, he cannot set up any demand for such services against the executor or administrator (*z*). Where, however, a surgeon forebore to send in his bill for medicine and attendance to a deceased patient in her lifetime *under the expectation* of a legacy; and on her death,

(*w*) As to the extent of this presumption and how far the agency is a question of fact, see *Debenham v. Mellon*, 6 A. C. 24.

(*x*) 9 B. & C. 167.

(*y*) See *Accord*. *Smout v. Ilbery*,

10 M. & W. 11. But see also *Smith's Leading Cases*, 9th edit., Vol. II., p. 517 *et seq.*

(*z*) *Osborn v. Guy's Hospital*, 2 Stra. 728. *Le Sage v. Cousmaker*, 1 Esp. 188.

finding she had left him nothing, he made a claim on her executors; it was held that he was entitled to recover, no proof having been given of any *understanding* between the parties that he was to be paid only by a legacy (a).

In *Colegrave v. Manby* (b), a tenant for life of a hospital lease, who was directed to lay by, out of the rents and profits, for the purpose of paying the fine on renewal, had neglected to renew, and the lease having been renewed by the remainderman, after his death, a reference, on a bill against his executrix, was made, to ascertain what was a reasonable sum to be paid for the renewal; and the same was ordered to be paid by the executrix.

Executor of tenant for life who neglects to renew lease.

It was once held, that executors continued the estate which their testator had in a copyhold, and, therefore, that they needed no admission: But it is now settled that they must be regularly admitted, and pay their fines (c).

Executors must be admitted to copyhold and pay fines.

If a bill of exceptions was sealed by a Judge and he died, a *scire facias* lay against his executors or administrators to certify it (d). So if the person who ought to certify a record, as a justice of the peace, &c., who hath taken a recognizance, or a Judge of *nisi prius* who hath taken a verdict, or a coroner who hath taken an inquest, &c., happen to die, having such a record in his custody, it seems that a *certiorari* may be directed to his executor or administrator to certify it (e).

Scire facias or *certiorari* against executor of judge, &c.

(a) *Baxter v. Gray*, 3 M. & Gr. 771. But see *Shallcross v. Wright*, 12 Beav. 558.

(b) 6 Madd. 72.

(c) *Bath v. Abney*, 1 Burr. 206. Sect. 30 of the Conveyancing Act, 1881, no longer applies as regards copyholds by virtue of sect. 45 of the Copyholds Act, 1887, and

therefore copyholds held by a testator on trust, or by way of mortgage, still vest in the absence of devise in the customary heir. See *ante*, p. 1543 (z).

(d) 2 Inst. 428. By the Judicature Act, 1875, Ord. LVIII. r. 1, bills of exceptions are abolished.

(e) 2 Hawk. B. 2. c. 27, s. 39.

Executor not
compellable
to complete
the gift of
testator.

As to corroboration in cases of claims against estate of deceased persons.

As a Court of Equity will not, *inter vivos*, compel a party to complete his gift, so it will not compel the executor to complete the gift of the testator: Therefore an act of bounty which has not been perfected by the testator is of no avail against his executor (*f*).

It has been said (*g*) that in the case of a conflict of evidence between living and dead persons there must be corroboration to establish a claim advanced by a living person against the estate of a dead person, but there is no rule of English law laying down such a proposition. The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction, it is natural that in considering the statement of the survivor, we should look for corroboration in support of it; but if the evidence given by the living man brings conviction to the tribunal which has to try the question, then there is no rule of law which prevents that conviction being acted upon (*h*). The rule, such as it is, is a rule of prudence rather than of law, and applies to cases of alleged debt as well as to cases of alleged gift, and in an action tried by a jury it is the duty of the Judge to recommend the jury to disregard the unsupported evidence of the claimant; but if they should decline to do so, and should find for the claimant, *quære* if their verdict could be interfered with (*i*). In the case of *Hill v. Wilson* (*k*) which,

(*f*) *Hooper v. Goodwin*, 1 Swanst. 485. *Cotteen v. Missing*, 1 Madd. 176. *Meek v. Kettlewell*, 1 Phill. Ch. C. 342. *Callaghan v. Callaghan*, 8 Cl. & F. 374. *Searle v. Law*, 15 Sim. 95. *Dillon v. Coppin*, 4 M. & Cr. 647. *Ward v. Audland*, 8 Beav. 201. *Cox v. Barnard*, 8 Hare, 310. *Bridge v. Bridge*, 16 Beav. 315. *Weale v. Ollive*, 17 Beav. 252. *Beech v. Keep*, 18 Beav. 285. An executor may be compelled to execute an agreement by the testator to grant an annuity: *Nield v. Smith*, 14

Ves. 491.

(*g*) See *Re Whittaker*, 21 C. D. 657, 663.

(*h*) *Re Hodgson*, 31 C. D. 177, 183, *per* Sir J. Hannen. And see *Lovesey v. Smith*, 15 C. D. 655. *Re Garnett*, 31 C. D. 1. *Re Farman*, 57 L. J. Ch. 637, 639. *Stephen's Digest of Law of Evidence*, 5th edit. p. 133. See *post*, pp. 1902, 1903.

(*i*) *Re Finch*, 23 C. D. 267, 271, *per* Jessel, M. R.

(*k*) *L. R.* 8 Ch. 888.

however, was a case where parol evidence was tendered for the purpose of altering the terms of a written contract made with the deceased, Lord Justice James said: "The evidence given is the parol evidence of the maker of a promissory note as to a conversation alleged to have taken place between himself and the person to whom the note was given, that person being dead. Even if such evidence be legally admissible for any purpose, the interests of mankind, in my opinion, imperatively require that, unless corroborated, it should be wholly disregarded. Nobody would be safe in respect of his pecuniary transactions if legal documents found in his possession at the time of his death, and endeavoured to be enforced by his executors could be set aside, or varied, or altered by the parol evidence of the person who had bound himself. It would be very easy of course for anybody who owed a testator a debt to say, 'I met the testator, and he promised he would not sue.' 'I met the testator and I gave him the money.' 'I met the testator, and in consideration of something he agreed to relieve me.' The interests of justice and the interests of mankind require that such evidence should be wholly disregarded."

If a person, who has delivered a deed as an escrow, to be handed over to the party for whose use it is made, upon the performance of some condition, happen to die before the performance of the condition, and the condition be afterwards performed, the deed is available notwithstanding the death of him that made it (l).

Liability of executor of a man who has delivered a deed as an escrow.

It may here be mentioned, that in a testator has given a promissory note in this form, "I promise for myself and my executors to pay A. B. or his executors, one year after my death, 300*l.*, with legal interest," and no proof of the con-

A note made payable with interest by executors at a certain period from the tes-

(l) By Lord Ellenborough, in 606, where *executor* appears to be Copeland v. Stephens, 1 B. & A. printed by mistake for *escrow*.

tator's death,
bears interest
from the date.

sideration can be given, the note bears interest from its date, and not merely from the testator's death; for, in the absence of all particular proof, it must be presumed that the note was given for value (*m*).

Liability of
executor on
a continuing
guaranty of
testator.

The death of the surety does not *per se* operate as a revocation of a continuing guaranty (*n*), and his executor is liable in respect of advances made after the testator's death (*o*).

Although upon the death of the surety no express notice of the death has been given by the executor, still, if the fact of such death has come to the knowledge of the creditor, it seems in the absence of express provision that this will operate as a revocation of the guaranty, and the executor will not be liable for subsequent advances made thereunder (*p*).

But a guaranty, the consideration for which is given once and for all, cannot be determined by the guarantor, and does not cease on his death (*q*).

(*m*) *Roffey v. Greenwell*, 10 A. & E. 222.

(*n*) By sect. 18 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 48 of which Act repeals s. 4 of the Mercantile Law Amendment Act, 1856, it is enacted that:—"A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary revoked as to future transactions by any change in the con-

stitution of the firm to which, or of the firm in respect of the transaction of which the guaranty or obligation was given."

(*o*) *Smith's Merc. Law*, 9th ed. 474. *Bradbury v. Morgan*, 1 H. & C. 249. *Harriss v. Fawcett*, L. R. 15 Eq. 311. L. R. 8 Ch. 866, 869, *per Mellish*, L. J.

(*p*) *Harriss v. Fawcett*, *ubi sup.* *Coulthart v. Clementson*, 5 Q. B. D. 42.

(*q*) *Lloyd's v. Harper*, 16 C. D. 290.

CHAPTER THE SECOND.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR
WITH RESPECT TO HIS OWN ACTS.

SECTION I.

*Of the Liability of an Executor or Administrator on his
own Contracts.*

IN this section it is proposed to investigate, First, the liability of an executor or administrator, *as such*, in respect of his own contracts *as executor* or administrator: Secondly, The personal responsibility of the executor or administrator on his own contracts (*a*).

1st, As to the liability of the executor, not personally, but out of the assets of the testator. It seems to have been once considered, that wherever an action was brought against an executor or administrator, on promises laid to have been made by him after the death of the testator or intestate, he was chargeable in his own right, and not in his representative capacity (*b*). The more modern authorities have, however, established, that, in several instances, the executor may be sued, *as executor*, on a promise made by him as executor, and that a declaration founded on such a promise will charge the defendant no further than a declaration on a promise of the testator.

1st. Of the liability of an executor, as such, on his own contracts.

Thus in *Dowse v. Cox* (*bb*), the declaration stated that a

(*a*) Notwithstanding the change in the system of pleading since the Judicature Act, it has been thought more convenient to leave this section as it stood in the former editions of this Work.

(*b*) See *Trewinian v. Howell*, Cro. Eliz. 91. *Hawkes v. Saunders*, Cowp. 289. *Jennings v. Newman*, 4 T. R. 348.

(*bb*) 3 Bing. 20. S. C. 10 Moore, 272.

cause depending in Chancery in which Thomas Biddle was a party, was referred to arbitration, and that it was one of the terms of submission that in case either of the parties should die, the death was not to abate the reference; that Thomas Biddle died before the making of the award; that the arbitrator awarded that the executor should pay the plaintiff 225*l.* out of the assets of Thomas Biddle; and that being so liable, the defendant, executor as aforesaid, *promised to pay*: And the Court of C. B. held that the executor was not charged thereby personally, but as executor only, and that the judgment must be *de bonis testatoris* (c).

So in *Powell v. Graham* (d), one count of the declaration stated a promise by the testator in his lifetime, that, in consideration the plaintiff would enter into his service as a nurse and housekeeper, and would continue to serve him till his death, his executor should, after his decease, pay the plaintiff 20*l.*, and then averred the defendant's liability as executor, and that in consideration thereof *the defendant promised to pay* the plaintiff that sum, whenever he, the defendant, as executor, should be requested so to do: And the Court of C. B. held, that, upon this count, the defendant was not liable individually, but as executor only: And in the same case the Court held, and it is now fully settled, that a count averring an account stated between the plaintiff and the defendant as executor, and that in consideration thereof *the defendant as executor promised to pay* the balance, does not charge him personally; but he may plead *plene administravit*, and the whole judgment which can be given in favour of the plaintiff is *de bonis testatoris* (e): And it makes no difference whether the account be averred to have been stated of money due from the testator to the plaintiff (f),

(c) This judgment was reversed in K. B., but on a different ground, the Court of Error declining to give any opinion on this point: 6 B. & C. 253.

(d) 7 Taunt. 581. S. C. 1 B.

Moore, 305.

(e) *Ashby v. Ashby*, 7 B. & C. 444.

(f) *Secar v. Atkinson*, 1 H. Bl. 102. *Ellis v. Bowen*, Forrest. Exch. Rep. 98. This is the com-

or of money due from the defendant as *executor* to the plaintiff (g).

So it should seem that a count averring that the defendant, as *executor*, was indebted to the plaintiff for so much money, paid by the plaintiff to the use of the defendant, as *executor*, and that in consideration thereof the defendant, as *executor*, promised to pay, charges the defendant in his representative character only, and that he may plead *plene administravit* to it, and that the judgment ought to be *de bonis testatoris* (h). For instance, suppose two persons are jointly bound as sureties, and the one dies, and the survivor is sued and obliged to pay the whole debt: In such case, if the deceased had been living, the survivor might have sued him for contribution in an action for money paid; and it should therefore seem that he is entitled to sue the executor of the deceased for money paid to his use as executor (i). Again, a plaintiff may in many cases have an advantage in proceeding against the assets rather than against the executor personally: the executor in his individual capacity may be insolvent; in his character of executor he may have assets adequate to answer any claim: and when the money is paid to his use as executor, justice seems to require that the person who has made the payment should have the liberty of looking to the fund which the executor has in that character (k).

mon mode of declaring against executors to save the Statute of Limitations, 1 H. Bl. 105.

(g) *Powell v. Graham*, 7 Taunt. 580. *Ashby v. Ashby*, 7 B. & C. 448: but see *Rose v. Bowler*, 1 1 H. Bl. 108. 2 Saund. 117, *h*, note to *Coryton v. Litheby*.

(h) *Ashby v. Ashby*, 7 B. & C. 448, 449, 451, 452. This point was conceded by the counsel and the Court, in *Corner v. Shew*, 3 M. & W. 350.

(i) *Ashby v. Ashby*, 7 B. & C.

449, 451, 452, by Bayley, J., and Littledale, J. See also *Batard v. Hawes*, 2 E. & B. 287, 298, where these *dicta* were regarded as strong authority for holding, that if one of several co-contractors be compelled by suit to pay the whole debt, he may sue the executors of another of them, who has died before payment for contribution.

(k) *Ashby v. Ashby*, 7 B. & C. 449. But it must not be understood that one who has paid off a debt of a testator or advanced

But a count alleging that the defendant, *as executor*, was indebted to the plaintiff for so much money *lent* by the plaintiff to the defendant, *as executor*, and that the defendant, in consideration thereof, *as executor promised to pay*, charges him personally, and he cannot plead *plene administravit*, and the only possible judgment is *de bonis propriis* (l).

And so it is of a count which charges that the defendant, *as executor*, was indebted to the plaintiff *for money had and received* by the defendant, *as executor*, ² the use of the plaintiff, and that in consideration thereof, the defendant, *as executor, promised to pay*; for to such a count *plene administravit* cannot be pleaded, and the judgment on it must be *de bonis propriis* (m). But in *Ashby v. Ashby* (n), Lord Tenterden said, that although he felt himself bound by the authorities on the point, yet if the matter were quite new, it might, perhaps, be as well to hold that a plaintiff might elect to treat the receipt of the money as an act done by the executor in his character of executor, and take his

money to an executor to enable him to do so, can follow the assets into the hands of another to whom the executor has aliened them: *Haynes v. Forshaw*, 11 Hare, 104, *ante*, p. 801, note (b).

(l) *Rose v. Bowler*, 1 H. Black. 108. *Powell v. Graham*, 7 Taunt. 586. An executrix of a testator kept an executorship account with a bank, and having a power under the will to mortgage the real estate in aid of the personalty deposited with the bank the title deeds of part of the testator's real estate as security for the balance. The account having been considerably overdrawn and the moneys to a great extent misapplied, the bank having no notice of such misapplication, and the security

proving insufficient to pay the balance, applied to prove against the testator's estate for the difference. It was held on appeal by L.JJ. James and Mellish that the bank was not entitled to prove, for that a person cannot by contract with an executor acquire a right to prove against the estate, though the executor has power to give him a lien on specific assets. *Farhall v. Farhall*, L. R. 7 Ch. 123.

(m) *Rose v. Bowler*, 1 H. Black. 108. *Jennings v. Newman*, 4 T. R. 347. *Brigden v. Parkes*, 2 B. & P. 424. *Powell v. Graham*, 7 Taunt. 585, 586. *Ashby v. Ashby*, 7 B. & C. 444.

(n) 7 B. & C. 448.

chance whether he would get paid out of the assets or not, and that if he elected so to treat it, then he must show that the money came into the defendant's hands because he was executor: And Bayley, J., concurred in this opinion, and put the following case: "Suppose a bill payable to the testator were remitted from a foreign country, half the amount applicable to the personal use of the testator, and the other half to be paid over by him to some other person: Before the bill arrives, the testator dies, and his executor receives the money: It is possible that he may not have received advice as to the mode in which it is to be applied, until after he has applied it in the ordinary course of administration: He may be insolvent in his individual capacity; and it would be hard that the party, under such circumstances, should not have his election to be paid out of the funds of the testator": The learned Judge, however, proceeded to observe, that the authorities were so strong, that he felt himself bound by them, although his reason was not convinced (o).

Again, a count upon a promise by the defendant *as executor*, for *use and occupation* after the death of the testator, has been held to charge the defendant personally, and not in his character of executor (p). So a count alleging that

(o) 7 B. & C. 450. But Little-
dale, J., expressed his opinion that,
if the case were perfectly new, the
defendant ought to be held per-
sonally liable upon the count in
question; and observed, that where
an executor receives money to the
use of a particular individual, it
operates as a specific appropriation
of that money belonging to the
party, and he, in his individual
capacity, must be liable for the
money so received, it having
nothing to do with the accounts
of the testator: 7 B. & C. 452,
453. Perhaps an illustration of

this view may be found in
Churchill v. Bertrand, 3 Q. B.
568, where an intestate had
granted an annuity to the plain-
tiff, and, after his death, his ad-
ministratrix procured it to be set
aside for a defect in the memo-
rial; and it was held that the
consideration money for the an-
nuity could not be recovered back
as money had and received by the
intestate for the use of the plain-
tiff.

(p) Wigley v. Ashton, 3 B. &
A. 101. But see Atkins v. Hum-
phrey, 2 C. B. 654.

the defendant, as executor, was indebted to the plaintiff for goods sold and delivered by the plaintiff to the defendant, as executor, at his request, or for work done and materials for the same used and provided by the plaintiff for the defendant, as executor, at his request, and that the defendant, as executor, promised to pay, charges the defendant in his personal and not in his representative character; for such a claim must necessarily be for debts due from the defendant in his own right, as no goods can be sold to or work performed for another in his representative character (q). The common count for interest charges the executor personally; for it alleges a forbearance at his request: But a count charging that the defendant is indebted as executor on a contract by the testator to pay interest as long as the debt should be forborne, charges him as executor only (r).

In actions like those above mentioned, which are brought against an executor, in the character of executor, to recover the demand out of the testator's estate, a promise by the executor is a mere *nudum pactum*, if there were no assets (s). But it is not necessary to aver in the declaration that the defendant had assets (t).

2. Of the personal liability of an executor on his own promise:

2ndly, It is now proposed to investigate the personal responsibility of an executor or administrator, arising from his own contracts.

A promise by an executor or administrator to pay a debt of the testator, or to answer damages, will not make him personally liable, unless there be a sufficient consideration to support the promise: For a bare promise by the executor

(q) *Corner v. Shew*, 3 M. & W. 350. See *post*, p. 1677, *et seq.* as to charging an executor for the expenses of the funeral.

(r) *Bignell v. Harpur*, 4 Exch. 773.

(s) 1 Saund. 210, c. 211, note

(1) to *Forth v. Stanton*. Pearson v. Henry, 5 T. R. 8. Rann v. Hughes, 7 T. R. 350, note (a).

(t) *Powell v. Graham*, 7 Taunt 580. *Dowse v. Cox*, 3 Bingham 20. See also *Pinchon's case*, 9 Co. 90, b.

does not make him liable out of his own estate, but he is still chargeable only as executor, and to the extent of the assets in his hands, in the same manner as he would have been had no such promise been made (u). And by the Statute of Frauds, the executor or administrator will not be liable, unless the promise is in writing. It is clear, however, that although the promise be in writing, it is of no more effect since the statute than before, unless it be by deed or there be a good consideration for it. Hence, since the statute, there are two things necessary for the validity of the promise of the executor or administrator to pay the debt of the testator, or answer damages, out of his own estate: 1st, the common law requires that there should be a sufficient consideration to support the promise; 2nd, the statute adds a still further requisite, that the promise should be in writing (x). It is therefore expedient to examine, in the first place, what is a valid consideration for a promise by an executor or administrator to charge him *de bonis propriis*: and then to inquire what is a reduction of the promise into writing, sufficient to satisfy the Statute of Frauds.

Before entering upon this inquiry, it may be remarked, that a promise by an *administrator*, by word of mouth, made *before* administration granted, may, under certain circumstances, be binding upon him afterwards: Thus in *Tomlinson v. Gill* (y), a person promised the widow of an intestate, that if she would permit him to be joined in the letters of administration, he would make good any deficiency of assets to discharge the intestate's debts; And Lord Hardwicke held that this promise was not within the Statute of Frauds, because the party promising was not administrator at the time of making the promise; and it was no answer to say

(u) *Reech v. Kennegal*, 1 Ves. Sen. 126.

(x) 29 Car. II. c. 3, s. 4. *Rann v. Hughes*, 4 Bro. P. C. 27, Toml. edit. S. C. 7 T. R. 350, note (a).

Hawkes v. Saunders, Cowp. 259. *Philpot v. Briant*, 4 Bingh. 717.

But see *Herbert v. Powis*, 1 Bro. P. C. 355, Toml. edit.

(y) *Ambl.* 330.

that he was administrator afterwards (z): His Lordship further held, that this was an engagement which could be made good only in a Court of Equity; because it was not made to the creditors, who could, therefore, claim only through the widow; but that they were entitled in equity to the performance of the promise made to her; because it was to be considered there as made to her in trust for them (a).

what is a sufficient consideration for a promise:

1st, What is a valid consideration: If a creditor, at the request of an executor, *forbears* to sue him, that is considered a sufficient consideration to charge him *de bonis propriis*, whether he has assets or not at the time of the promise; and therefore it is not necessary to aver in the declaration that he had assets: As if A., to whom the testator was indebted, comes to the executor, and says that he intends to sue him for the debt, whereupon the executor promises, in consideration that the plaintiff will forbear him for a reasonable time, to pay him, and A. accordingly forbears to sue him for a reasonable time, that is a good consideration to charge the

(z) See *ante*, pp. 342, 551, 552, as to the difference between the relation of probate and letters of administration to the death of the testator and intestate.

(a) This case was recognised by Lord Northington in *Griffith v. Sheffield*, 1 Eden, 77; and by Sir W. Grant, in *Gregory v. Williams*, 3 Meriv. 590. A promise, however, by a party who is neither the executor nor administrator, to pay a debt of a deceased person, is merely *nudum pactum*; and even if such a party should give his promissory note to the creditor for the debt without any other consideration for making it, the payment of the note cannot be enforced by the payee, if at the time of the making thereof there was no personal re-

presentative of the debtor: *Nelson v. Serle*, 4 Mees. & W. 795, overruling *Serle v. Waterworth*, *ibid.* 9. *Ante*, p. 213, note (g). If, indeed, the note be made payable at a future date, and the maker be entitled to take out administration, as being the widow or next of kin of the debtor, perhaps the creditor might enforce the note; because the effect of giving it is to preclude the payee during its currency from suing the maker, in case the latter should take out administration: 4 M. & W. 9. Where a widow gave a promissory note "for value received by my late husband," it was held that the note was valid on the face of it: *Ridout v. Bristow*, 1 Cr. & Jerv. 231, *post*, p. 1671, note (m).

defendant, in an action upon the case, out of his own estate, without assets; for by this promise it is intended as well to forbear to sue the executor, as to forbear the debt; and a forbearance of a suit is a good consideration, without assets at the time of the promise (b). So if a man declares upon a promise against an administrator, that the intestate was indebted to him in 10*l.* by bond, and died, and the defendant being his administrator, in consideration of the premises, and that the plaintiff *would spare him* till such a time after, promised to pay him the debt; and avers that he spared him till the time, and the defendant had not paid him, &c., though he did not say that he would spare him *the debt*, or to *sue him*, yet it shall be so intended, and therefore the consideration is good (c). So it was said by Hale, C. J., that though a bare accounting by the executor with a creditor of his testator will not bind the executor to pay *de bonis propriis*, yet a promise in consideration of forbearance will (d). Also where the plaintiff having a debt owing to him from the testator on a simple contract, the executor, in consideration the plaintiff would forbear to sue him until such a time, promised to pay, and the plaintiff averred that he did forbear accordingly, this is a good promise: but if the heir had promised, on forbearance of the suit, to pay this debt, no *assumpsit* would have been against him, because without consideration; for the heir is not chargeable to any debt without specialty (e). So where in *assumpsit*, the plaintiff declared, that J. S. devised a legacy to him, and made the defendant executor, and the plaintiff intending to sue him for the legacy, the defendant, in consideration of

(b) *Johnson v. Witchcott*, 1 Roll. Abr. 24, tit. Action sur Case (V.), pl. 33, upon a demurrer, where the defendant pleaded that he had no assets when the promise was made. It is said in Bane's case, 9 Co. 94, a, that if there be no assets, *it shall be given in evidence*: but this opinion has been

overruled since: See the cases in the text, *supra*.

(c) *Gardener v. Fenner*, 1 Roll. Abr. 15, tit. Action sur Case (S.), pl. 3. *Chambers v. Leversage*, Cro. Eliz. 644.

(d) *Hawes v. Smith*, 2 Lev. 122.

(e) *Fish v. Richardson*, Yelv. 55, 56.

forbearance, promised to pay him; the defendant pleaded divers bonds and judgments, and no assets *ultra*; upon which the plaintiff demurred, and had judgment without argument; for it was not material whether he had assets or not; for he was charged upon his own promise, in consideration of forbearance; and a forbearance of a suit for a legacy was a sufficient consideration; although it was said, that if it had appeared by the declaration that the plaintiff had no cause of action, the forbearance would not be sufficient (*f*). It is true that it is now settled that no action at law lies for a general legacy (*g*), but in this case the forbearance might have been to sue in Chancery, or, formerly, in the Ecclesiastical Court, for the legacy, and then the consideration may, perhaps, be a good one (*h*). So if A. together with B. is bound to C. for the proper debt of B., and A. pays the money, and B. dies and makes D. his executor, and D., in consideration that A. will forbear to sue him until such a time, promises to pay him, this is sufficient consideration to support the promise (*i*). So if an executor be indebted to J. S. in 100*l*. who demands the money, the executor is chargeable only in respect of assets, and not otherwise; but if he promises to pay the debt *at a future day*, it becomes *his own debt*, and to be satisfied out of *his own estate* (*k*). So B. having died indebted to G. for work and labour done, his executors signed the following memorandum on the back of G.'s account: "Mr. G. having consented to wait for the payment of the within account, we, as the executors of B., engage to pay Mr. G. interest for the same at 5*l*. per cent. until the same is settled:" And it was held, that the executors were personally liable to pay the debt and interest (*l*).

(*f*) *Davis v. Reynier*, 2 Lev. 3. S. C. *nomine Davis v. Wright*, 1 Vent. 120. 2 Keb. 758.

(*g*) *Deeks v. Strutt*, 5 T. R. 690. See *post*, pp. 1828, 1829.

(*h*) See 2 Saund. 137, *d.*, note to

Barber v. Fox.

(*i*) *Scott v. Stevens*, 1 Sid. 89.

(*k*) *Goring v. Goring*, Yelv. 11.

See *Reech v. Kennegal*, 1 Ves. Sen. 126.

(*l*) *Bradly v. Heath*, 3 Sim. 543.

Accordingly, where two executors gave a promissory note to the plaintiff in the following words, "*As executors to the late T. T., we severally and jointly promise to pay to N. C. the sum of 200*l.* on demand with lawful interest for the same: And the Court of C. B. held that they were personally liable on the instrument, upon the ground that the promise, from the circumstance of interest being added, necessarily imported a payment at a future day, and an executor promising to pay a debt at a future day makes the debt his own (m).*"

(m) *Childs v. Monina*, 2 Brod. & Bing. 460. S. C. 5 Moore, 281. See also *Barnard v. Pumfrett*, 5 M. & Cr. 71. *Lucas v. Williams*, 3 Giff. 151. See also *Ridout v. Bristow*, 1 Cr. & J. 231, where a widow had given a promissory note for "value received by my late husband;" and it was held that the note was valid on the face of it; and Bayley, J., said, "If an administratrix takes upon herself to give a security, which may have the effect of inducing forbearance, and which purports to bind her individually, is it competent for her to say, you must prove assets? To my mind, the act of giving such a security, supersedes the necessity of an investigation as to there being assets: It seems to me that the words 'value received by my late husband,' do not make the proof of assets necessary; and I go still further and say, that it was not competent for her to show that there were no assets." But where an executrix gave an acceptance for a debt, due from her testator, taking an engagement from the drawer to renew the bill from time to time, until sufficient effects were received from the estate of the testator, it was held that this meant

sufficient effects in the ordinary course of administration; and that she had not precluded herself from first applying assets to pay 3,000*l.*, to trustees for her own use, in discharge of a bond given by her husband before marriage to that effect, before she paid the acceptance: *Bowerbank v. Monteiro*, 4 Taunt. 844. Where a bill is endorsed to a person as executor, and he again endorses it, he becomes personally liable, unless he endorses it in such terms as to negative personal liability: *Bills of Exchange Act*, 45 & 46 Vict. c. 61, s. 31 (5). See sect. 16 (1) as to endorsements limiting or negating liability. And by sect. 26 (1) of this Act, it is enacted that where a person signs a bill as drawer, endorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon: but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability. See *King v. Thom*, 1 T. R. 489. *Alexander v. Sizer*, L. R. 4 Ex. 102.

Again, where the plaintiff declared in *assumpsit* that the defendant's testator was indebted to A., who, after the testator's death, assigned the debt to the plaintiff, and appointed him to receive it to his own use, and that the defendant, in consideration that the plaintiff would accept the defendant as his debtor, promised to pay it to the plaintiff; it was held that this was not a sufficient consideration to support the promise, so as to charge the defendant *de bonis propriis* (n): But if the promise had been in consideration of forbearance by such assignee of the debt to sue the executor or administrator, that would have been sufficient (o): for it is sufficient, in the case of any other debtor, whom the assignee of the debt forbears, at his request, to sue (p).

So where the plaintiff declared in *assumpsit* that the husband of the defendant was indebted to the plaintiff in 50*l.* for beer, and died intestate, and administration was committed to the defendant, and that afterwards, she, in consideration that the plaintiff would deliver to her six barrels of beer, promised to pay to the plaintiff, as well the 50*l.* due by the intestate, as for the six barrels delivered to herself, and that he thereupon delivered the six barrels; it was held that the action was well brought against her on her own *assumpsit*, and that the judgment should be for both debts *de bonis propriis* (q).

So where an attorney delivered up deeds to an executor, which he was not obliged to do till the bill was paid, and these deeds were of great use to the executor in several suits which were then carrying on; it was held, that this was a sufficient consideration to make the executor liable to the attorney's whole demand, whether there were assets or not (r).

(n) Forth v. Stanton, 1 Saund. 210.

(o) Pitt v. Bridgwater, 1 Roll. Abr. 20, pl. 11. Russel v. Had-dock, 1 Lev. 188. 1 Saund. 210, note (1).

(p) Reynolds v. Prosser, Hardr.

71. Oble v. Dittlesfield, 1 Ventr. 153. 1 Saund. 210, note (1).

(q) Wheeler v. Collier, Cro. Eliz. 406.

(r) Hamilton v. Incedon, 4 Bro. P. C. 4, Toml. edit.

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It should seem that the having assets is a good consideration for a promise by an executor or administrator to pay a debt of the deceased, or to answer damages out of the executor's own estate: Thus in *Reech v. Kennegal* (s), Lord Hardwicke observed, "At law, if an executor promises to pay the debt of his testator, a consideration must be alleged: *as of assets come to his hands*; or of forbearance; or if an admission of assets is implied by the promise; otherwise it will be but *nudum pactum*, and not personally binding upon the executor." So it was held in *Atkins v. Hill* (t) and in *Hawkes v. Saunders* (u), that the circumstance of the executor having assets sufficient to pay all the debts and legacies, was a sufficient consideration to support a promise to pay a legacy, so as to render the executor individually liable on that promise in an action at law (x): And although the doctrine of these cases, as far as the liability of an executor to be sued at law for a general legacy, has been since exploded (y), yet it should seem that their authority, with respect to the sufficiency of the consideration in question to support a promise to pay debts, remains unimpeached. The consequence is, that if an executor or administrator promises, in writing, that, in consideration of having assets, he will pay a particular debt of the testator or intestate, he may be sued on this promise in his individual capacity, and the judgment against him will be *de bonis propriis* (z).

It may here be observed, that in cases like the above-mentioned, where the nature of the debt is such as necessarily to make the defendant liable personally, the judgment will be *de bonis propriis*, although he be charged as promising *as executor* (a).

(s) 1 Ves. Sen. 126.

(t) Cowp. 284.

(u) Cowp. 289.

(x) See also *Accord. Barnard v. Pumfrett*, 5 M. & Cr. 71, *per* Lord Cottenham.(y) See *post*, p. 1628.(z) *Trewinian v. Howell*, Cro. Eliz. 91. And see *Rann v. Hughes*, 7 Term Rep. 350, note (a).(a) *Powell v. Graham*, 7 Taunt. 585. *Wigley v. Ashton*, 3 B. & A.

what is a
sufficient
reduction of
the executor's
promise into
writing.

It remains to consider 2ndly, What is a sufficient reduction into writing of the promise of an executor or administrator. The fourth section of the Statute of Frauds (29 Car. II. c. 8), enacts (*inter alia*), "that no action should be brought, whereby to charge any executor or administrator, upon any special promise to answer damages out of his own estate, or whereby to charge the defendant, upon any special promise to answer for the debt, default or miscarriage of another person, &c., &c., unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The word "agreement" used in this section means the consideration of the promise (b): and, therefore, it was held in the case of *Wain v. Warlters* (c), that the consideration of the promise, as well as the promise itself, must be in writing, otherwise it is void: This doctrine was very much doubted in several subsequent cases, but was fully established by subsequent decisions (d). It was however, sufficient, if the consideration could be gathered from the whole tenor of the writing; and it was held that it was not necessary that it should be stated on the face of it in express terms (e). This rule having proved a grievance it was enacted by stat. 19 & 20 Vict. c. 97 (Mercantile Law Amendment Act), s. 8, that no special promise to answer for the debt, default, or miscarriage of another person, shall be deemed invalid, by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document.

Personal
responsibility
of executor on

This may be the proper place to consider how far an executor or administrator is liable upon a submission to

101. *Corner v. Shew*, 3 M. & W. 350.

(b) 1 Saund. 211, note (2).

(c) 5 East, 10.

(d) *Saunders v. Wakefield*, 4 Barn. & Ald. 595. 1 Saund. 211, note (d).

(e) 1 Saund. 211, note (d).

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arbitration of a claim upon him as the representative of the deceased. Where the executor submits in broad terms, to pay whatever shall be awarded, and the arbitrator awards that he shall pay a certain sum, he is personally bound to perform the award, whether he has assets or not (*f*); For if an executor or administrator thinks fit to refer generally all matters in dispute to arbitration, without protesting against the reference being taken as an admission of assets, it will amount to such an admission (*g*). Thus in *Barry v. Rush* (*h*), an action of debt was brought on a bond given by the defendant, by which he, as administrator, bound himself, his heirs, &c.: The condition, after reciting that the plaintiff and defendant had agreed to submit to arbitration certain disputes which had arisen between the plaintiff and the defendant's intestate, touching certain articles of agreement between the intestate and the plaintiff's testator, was for the performance of an award to be made by the arbitrators concerning the matters assigned, and also concerning all other matters, &c., between the said parties: The declaration stated, that the arbitrator had awarded that the defendant, as administrator, should pay to the plaintiff, as executrix, 298*l*. on the 27th June following, and that the parties should execute general releases: The defendant pleaded *plene administravit*, and that at the time of entering into the bond, he had no assets: To this plea there was a demurrer: And the Court of K. B. held that the plea was bad; on the ground that the bond was a personal engagement by the defendant to perform the award. So in *Worthington v. Barlow* (*i*), where the arbitrator, under a reference between A., a claimant on the estate of an intestate, and B. the administrator ascertained the amount of the demand, and directed that B. should pay it; it was held that B. could not afterwards object that he had no assets, but that he might be attached

a submission
to arbitration.

(*f*) See Lord Kenyon's judgment, in *Pearson v. Henry*, 5 Term Rep. 7.

(*g*) By Lord Eldon in *Robson v.*

—, 2 Rose, 50. See also *Wansborough v. Dyer*, 2 Chitt. Rep. 40.

(*h*) 1 Term Rep. 691.

(*i*) 7 Term Rep. 453.

for nonpayment: And Lord Kenyon said, that as the arbitrator had awarded the defendant to pay the amount of the plaintiff's demand, it was equivalent to determining, as between these parties, that the administrator had assets to pay the debt. So in *Riddell v. Sutton* (k), an administratrix referred to the final award of an arbitrator certain disputes between the plaintiff and herself as executrix, to be finally settled by the said arbitration: The arbitrator found a balance due from the defendant to the plaintiff, and without finding assets, awarded her to pay it on or before a certain day: And the Court of Common Pleas held that *plene administravit* was no bar to an action on the award.

But the personal liability of the executor or administrator may obviously depend not only on the terms of the submission, but also on those of the award. Thus in *Pearson v. Henry* (l), the defendant, as administrator, submitted to an award, and the arbitrator awarded that a certain sum was due from the intestate's estate, *without awarding that the administrator was to pay it*: And it was held that the administrator was not thereby precluded from denying that he had assets (m). So in *Love v. Honeybourne* (n), a cause and all matters in difference between the plaintiff's testator and the defendant were referred to arbitration by a Judge's order, and the arbitrator, upon an investigation of the accounts, ascertained that there was a certain balance against the testator, and, by his award, directed the plaintiff to pay that sum *out of the assets*, on or before a certain day: The Court was moved to set aside this award for uncertainty, on the ground that the arbitrator had not ascertained whether there were any assets in the hands of the executor to pay the sum awarded: The Court refused to set aside the award, on the ground that although in that respect it might be uncertain, yet that would not vitiate the other part of the award, which was unquestionably certain, namely, that part which found

(k) 5 Bing. 200.

7 T. R. 453.

(l) 5 T. R. 6.

(n) 4 Dowl. & Ry. 814.

(m) See *Worthington v. Barlow*,

that the plaintiff, as executor, was indebted, upon a balance of accounts, to the defendant: But Lord Tenterden observed, that it appeared to him, that the latter part of the award did not conclude the question of assets, but left it open: And Holroyd, J., remarked that the arbitrator had awarded that the money should be paid by the plaintiff out of the assets upon a day which he fixed, *i. e.* if there were any assets in his hands at that time; and that if the plaintiff had fully administered at that time, he would not be bound to pay (o).

It was held by the Court of K. B. in *Gardner v. Baillie* (p), that a power of attorney from an executor, to ask, demand, sue for and receive all sums due to him as executor, and to do all further acts for receiving debts, &c., with power to do and act touching the premises as effectually as the principal could do, does not authorize the attorney to bind his principal, by accepting bills for debts due from his testator. But in *Howard v. Baillie* (q), the Court of Common Pleas inclined to hold, that a letter of attorney given by an executor to A., enabling him to transact the affairs of the testator, in the name of the executor, as executor, and to pay, discharge, and satisfy all debts due from the testator, conveyed a sufficient authority to A. to accept a bill of exchange, in the name of the executor, drawn by a creditor for the amount of a debt due from the testator, so as to make the executor personally liable: And clearly, if the executor admits that such a bill, which has been so accepted by A. with the knowledge of the executor, is for a just debt, and that it ought to be paid, it affords sufficient evidence of an authority given by him to A. to accept that particular bill; without resorting to the letter of attorney (r).

With respect to the liability of an executor or an administrator to the expenses of the funeral of the deceased, it appears to be clear, that if an executor or administrator gives

Liability of executor for acts done under his power of attorney.

Liability of executor with respect to the expenses of the funeral.

(o) See also *Re Joseph and Webster*, 1 Russ. & M. 486.

(p) 6 T. R. 591.

(q) 2 H. Black. 618.

(r) *Ibid.*

orders for the funeral, or ratifies or adopts the acts of another party, who has given such orders, he makes himself liable individually, and not in his representative character, for the reasonable expenses (s). And notwithstanding that, generally speaking, an administrator is not bound, as such, by his acts done before the letters of administration were obtained (t), yet it should seem that if, before taking out letters, he gives orders, or sanctions the orders which another person has given for the funeral of the deceased, he will be thereby bound, after he has become administrator (u), to satisfy the charges incurred under such orders (x).

Where executor or administrator has neither given nor adopted directions for burial.

A question, however, of some difficulty arises, in cases where the executor or administrator has neither given nor adopted any directions for the burial, but he is sought to be charged on an implied contract arising out of his situation, with reference to his character and the estate of the deceased. According to one report of the case of *Ashton v. Sherman* (y), Lord Holt laid it down that if A. employs B. to work for C., without warrant from C., A. is liable to pay for it: an executor is not liable to pay for funeral expenses unless he contracts for them." This *dictum* is not mentioned by the

(s) *Brice v. Wilson*, 8 A. & E. 349, note (c). *Corner v. Shew*, 3 Mees. & W. 350. And it seems from the decision in *Reg. v. Price*, 12 Q. B. D. 247, which establishes the legality of cremation, that an executor or administrator who cremates the dead body of the testator or intestate, either in accordance with directions contained in the Will or in the exercise of his own discretion, is entitled to be paid the reasonable expenses of so doing, in the same manner as he would be entitled to be paid the expenses of burial. See *ante*, p. 835, note (a).

(t) See *ante*, pp. 342, 344.

(u) But the estate of a deceased person is not liable on a contract

made by a person, although for the benefit of the estate, unless that person, by subsequently obtaining letters of administration, becomes authorised to bind the estate, and ratifies the contract: *Re Watson*, 18 Q. B. D. 116. 19 Q. B. D. 117. See *ante*, p. 554.

(x) *Lucy v. Walrond*, 3 Bing. N. C. 841. In this case, the action was sustained against the defendant in his character as administrator; but the point, as to whether he could be properly sued otherwise than individually, was precluded by the circumstance of the defendant having paid money into Court.

(y) *Holt*, 309.

other reporters (z) of the same case; and, indeed, from the nature of the facts, it is difficult to see how the remark could have been introduced into the discussion: But an anonymous case is to be found in the twelfth volume of *Modern Reports* (a), which contains the mere statement that "an executor is not liable to pay for funeral expenses, without he contracts for it:" And this probably is but a reference to the *dictum* of Lord Holt, inserted in the report of *Ashton v. Sherman*. Recent decisions, although the propriety of them has been much questioned (aa), must be considered as having overruled this doctrine: and it seems now established, that in the absence of evidence to charge any other individual, an executor *with assets* is answerable in point of law, without any express contract, for the funeral expenses of his testator, suitable to his degree (b). Thus in *Tugwell v. Heyman* (c), Lord Ellenborough held, that if executors neglect to give orders for the funeral of the testator, and have sufficient assets for that purpose, they are liable upon an implied promise, to the person who furnishes the funeral in a manner suitable to the testator's degree and circumstances. So in *Rogers v. Price* (d), it appeared that the testator died in Wales, at the house of his brother, who thereupon sent for the plaintiff, an undertaker residing at a distance: The plaintiff afterwards furnished the funeral, and the brother of

Executor with assets liable without any express contract to pay for funeral expenses in absence of evidence to charge any other person.

(z) 1 Lord Raym. 263. Carth. 429. 12 Mod. 153. Comberb. 444, 449.

(a) P. 256.

(aa) See *Corner v. Shew*, 3 M. & W. 356.

(b) See the remark of Bayley, J., in *Hancock v. Podmore*, 1 Barn. & Adol. 262; and of Jervis, C. J., in *Ambrose v. Kerrison*, 10 C. B. 779. And Sir G. Jessel, in *Sharp v. Lush*, 10 C. D. 468, 472, said: "It appears to me that the executor is liable to pay the funeral expenses, even without an order

on his part, if he has any assets available for the purpose; and it has also been decided that the funeral expenses are a first charge on the assets. Even if the executor never receives assets to the amount of the funeral expenses, he is liable to pay, although he did not order the funeral. It is part of his official duty to bury the deceased, so that he is liable to pay the funeral expenses without an order." See also *Williams v. Williams*, 20 C. D. 659.

(c) 3 Campb. 298.

(d) 3 Younge & Jerv. 28.

the deceased attended it as chief mourner : It was admitted that the funeral was suitable to the degree of the deceased : There was no evidence of any contract made by the defendant, or that he knew of the funeral until it had taken place : But the Court of Exchequer held that, assuming him to have assets, he was liable, upon an implied promise, to pay the expenses of the burial.

However, it was held by Patteson, J., in *Brice v. Wilson* (e), that, "it has been decided by several cases that an executor is liable upon an implied promise, at common law, to pay reasonable expenses for the funeral of his testator, where no other person is liable upon an express contract, although he does not give orders for it : But there is no case which goes the length of deciding that if the funeral be ordered by another person to whom credit is given, the executor is liable : " In that case the testator's widow ordered an extravagant funeral without the knowledge of the executor, who, however, was present at the funeral, and did not object to it as extravagant : The undertaker, in his bill, charged the widow, but subsequently applied for payment to the executor, who promised to pay : An action was brought against the executor in his own right, in which he suffered judgment by default : And it was held that the defendant was liable to the whole amount of the reasonable charges for the funeral as ordered by the widow ; not, it must be observed, on the ground of a common law liability of the defendant as executor, but on the ground of his having rendered himself liable by adopting the acts of the widow, and treating her as his agent (f). But the learned Judge, in this case, probably intended to lay down no more than that the executor, where credit has been given to another person, is not liable to the undertaker ; for it should seem, that if the person, who gives the order for the funeral, pays for it, he may have an action against the executor for the

(e) 8 A. & E. 349, note (c).

(f) See *Walker v. Taylor*, 6 C. & P. 752.

reasonable expenses: Accordingly, it was held in *Green v. Salmon* (g), that in an action (brought before Lord Denman's Act, making interested witnesses competent) by an undertaker for funeral expenses, against a person not the executor, a residuary legatee was a competent witness for the plaintiff: For although a person, other than the executor, might have rendered himself liable to the undertaker, the estate was ultimately answerable for so much of the cost as an executor might reasonably pay, and no more; and the witness, therefore, had no disqualifying interest (h).

These authorities do not involve the decision of the question whether, in an action on the promise implied by law on the part of an executor to pay for the funeral of his testator, the judgment should be *de bonis propriis* or *de bonis testatoris*, or consequently whether *plene administravit* is a good plea: It should seem, however, that the naming of the defendant executor in the claim is surplusage, and that he is liable *de bonis propriis*, if liable at all (i): but that, since the maintenance of the action is dependent on the fact of his being an executor *with assets*, it is a good defence under the general issue that his testator left none. And accordingly, in *Corner v. Shew* (k), the Court of Exchequer held, that the only point really determined, by *Tugwell v. Heyman*, and *Rogers v. Price*, was that the law implies a contract on the part of an executor, who has assets *personally*, and not in his *representative character*; inasmuch as the implied promise cannot place the defendant in a different condition than if he had made an express contract to the same effect; which certainly would have bound him personally only.

With respect to the liability of an executor or administrator

Liability of
executor

(g) 8 A. & E. 348.

(h) But an heir-at-law who has voluntarily paid the funeral expenses of an intestate cannot claim to have them refunded out of the intestate's personal estate: *Coleby*

v. Coleby, 12 Jur. N. S. 496, *coram* Stuart, V.-C.

(i) See *Hayter v. Moat*, 2 M. & W. 56.

(k) 3 M. & W. 350.

continuing
the trade of
testator.

carrying on the trade of the deceased, the general principle is, that a trade is not transmissible, but is put an end to by the death of the trader: Executors, therefore, have no authority in law to carry on the trade of their testator, and if they do so, unless under the protection of the Court of Chancery, they run great risk, even although the Will contains a direction that they should continue the business of the deceased (l). The case of an executor or administrator, in this respect, is very hard: For, if the trade be beneficial, the profits are applicable to the purposes of the trust, and the executor or administrator derives no personal benefit from the success: If, on the contrary, the trade prove a losing concern, the executor, on failure of assets, will be personally responsible for the debts contracted in the business since the testator's death, to the extent of all his own property; also, in his person; and he may be proceeded against as a bankrupt though he is but a trustee (m). Accordingly, in a case (n) where the

(l) *Barker v. Barker*, 1 T. R. 295. *Ex parte Garland*, 10 Ves. 119.

(m) *Ex parte Garland*, 10 Ves. 119. *Ex parte Richardson*, 1 Buck, 209. *Owen v. Delamere*, L. R. 15 Eq. 134. *Fairland v. Percy*, L. R. 3 P. & D. 217. The creditor who trusts the executor has a right to say, "I have the personal liability of the man I trusted, and I have also a right to be put in his place against the assets," that is, "I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of the trade;" that is, the Court recognises the equity and puts the creditor in the place of the trustee. But if the trustee has wronged the trust estate there is no such equity, because the *cestuis que trust* are not taking the benefit: in such a case the defaulting executor or trustee,

not being himself entitled to an indemnity, except upon terms of making good his default, the creditors are in no better position, and are therefore not entitled to have their debts paid out of a specific part of the assets directed by the testator to be employed in trade, unless the default is made good: *Re Johnson*, 15 C. D. 548. *Ex parte Edmonds*, 4 D. F. & J. 488. See *post*, p. 1900. A creditor, being a vendor of goods, sold and delivered to an executor, carrying on trade under the directions of a Will, has in his own right no lien either upon the trade assets or upon the specific goods sold by him: *Re Evans*, 34 C. D. 597. *Strickland v. Symons*, 26 C. D. 245. Nor will he, as judgment creditor of the executor,

(n) See next page.

executors of a deceased partner continued his share of the partnership property in trade for the benefit of his infant daughter, the Court of K. B. held, that they were liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of a partnership debt; although their names were not added to the firm, but the trade was carried on by the other partners under the same firm as before, and the executors, when they divided the profits and loss of the trade, carried the same to the account of the infant, and took no part of the profits themselves (o).

It is therefore obvious, that where partners covenant that they and their respective executors and administrators will continue partners for a certain term of years, and one of them dies before the term has expired, his executors or administrators cannot be compelled to become partners personally (p),

be entitled to take in execution the testator's assets, although lapse of time and an enjoyment of the assets in a manner inconsistent with the trusts of the Will, coupled with the consent of the beneficiaries, may raise an inference of a gift of the assets by them to the executor, and entitle his judgment creditor to take them in execution. But when the possession and the time which has elapsed are in accordance with the trusts of the Will, no such inference can arise: *Re Morgan*, 18 C. D. 93. If a firm in which the Will authorised the employment of the assets becomes bankrupt, no proof can be made against the estate of the bankrupts in respect of the money so employed: *Scott v. Izon*, 34 Beav. 434.

(n) *Wightman v. Townroe*, 1 M. & S. 412.

(o) See also *Accord. Labouchere v. Tupper*, 11 Moo. P. C. 198; in which case Lord Justice Knight

Bruce further laid down that the executor is personally liable, as above stated, though he carries on the trade avowedly as executor, and whether he is entitled or not entitled to be indemnified out of the testator's personal estate, and whether it is sufficient or insufficient for the purpose, and notwithstanding the testator was bound by a covenant with his partner to continue the trade in partnership. His Lordship also pointed out that the propriety of his executor's conduct, as between himself and those beneficially interested in the testator's personal estate, cannot give the creditors of the trade, becoming so after the death, the rights of creditors of the testator. See further *Re Leeds Banking Company*, L. R. 1 Ch. 231.

(p) *Downs v. Collins*, 6 Hare, 418, 438. See *per James, L. J.*, in *Baird's case*, L. R. 5 Ch. 733. *Ante*, p. 1520, note (n).

Rights of
creditors of
the executor.

though the covenant is binding on the estate of the deceased partner in their hands (q).

The rights of creditors of executors carrying on the trade of a testator have been much discussed in the House of Lords in the recent case of *Dowse v. Gorton* (r). In that case executors carried on the business of their testator under a trust contained in his Will, and a question arose between creditors of the testator and the trade creditors of the executors as to priority. The order made by the Court of Appeal was as follows: That the executors of the testator are entitled as against and in priority to the persons to whom he was indebted at the time of his death to be indemnified out of such part of the estate as has been acquired by the executors since his death against debts and liabilities incurred by the said executors in carrying on his businesses to the full amount of such debts and liabilities, or if the said executors be in default to the testator's estate then to the full amount of such debts and liabilities after deducting the amount in respect of which the said executors are so in default.

Lord Herschell, in dealing with this order, says (rr): "The right of the executors to an indemnity out of such part of the estate as has been acquired by them since the death of the testator, and the limitation of their indemnity to that part of the estate appears to have been based, in the judgment of Lindley, L. J., upon the view that this after-acquired property was not assets of the testator against which his creditors could have execution. He says: 'Now, what is the right of the creditor of the deceased? He is a creditor, he has no equitable rights as distinguished from legal rights against the assets of the deceased. His right is to sue the executor at law, and get a judgment at law, *de bonis testatoris*, and under that to seize under a *fi. fa.* the assets of the deceased

(q) *Ibid.* See also *ante*, p. 1626 *et seq.*, as to the executors of deceased shareholders in Public Companies. If such an executor purchases further shares, he is, of

course, personally liable in respect of these: *Spence's case*, 17 Beav. 203.

(r) [1891] A. C. 190.

(rr) *Ibid.* p. 197.

in the hands of the executors at the time of his death, but he has nothing to do with future-acquired property.' Cotton, L. J., I gather, took the same view, though he does not state the proposition definitely. After saying that the executors could not, so far as regards the original assets of the testator, claim an indemnity as against the creditors of the testator, he continues: 'Where there are liabilities undertaken under the direction of the testator's Will, they are entitled to an indemnity in respect of them out of the assets acquired by the executors after the testator's death. The creditors of the testator say, there are assets of our testator, and he could not, by declaring a trust for you to perform, give you any right of indemnity as against the property. That is not correct.' With all deference I am unable to concur in the distinction drawn between the assets which come into the hands of the executors at the time of the death of the testator, and property which in their capacity of executors, they afterwards acquire. The case of *Abbott v. Parfitt (s)* appears to be a distinct authority that property so acquired is as much assets of the testator as that which was in his possession at the time of his death. It was there held that the price of goods sold to the defendant by the executors who had carried on their testator's business, no part of the materials of which had belonged to the testator, would, when recovered, be assets of the testator; and I do not think it is possible, on principle, to maintain the suggested distinction. Could an executor having property in his hands, to which his only title was that of executor, plead to an action by a creditor *plene administravit*? It seems to me that such a question admits of but one answer. I could, indeed, understand the view that, if the executors had come under liability in acquiring any asset in their hands, they would be entitled to an indemnity against such liability out of that asset before it could be made available for creditors. But this is not the effect of the declaration made by the Court below. All after-acquired property, however acquired, even though it has been purchased with the proceeds of the sale of a part of the

(s) L. R. 6 Q. B. 346.

estate possessed by the testator at the time of his death, is treated as one subject matter out of which the executors are entitled to their indemnity. I cannot think that the executors can be so entitled, if they cannot make good their claim to an indemnity generally, against the whole of the testator's estate. I think it is clear that where a business has been carried on under such an authority as was conferred on the executors by the Will of this testator, they would be entitled to a general indemnity out of the estate as against all persons claiming under the Will. But I take it to be equally clear that they could not, by reason only of such authority, maintain this right against the creditors of the testator. The executors would, no doubt, be entitled to carry on a business of the testator for such reasonable time as was necessary to enable them to sell his business property as a going concern, and would even, as against his creditors, be entitled to an indemnity in respect of the liabilities properly incurred in so doing. But in the present case the businesses were carried on for a period of three years, and it is obvious that this was not done merely for the purpose of effecting a sale. I agree with the contention of the learned counsel for the appellants, that the mere fact that a creditor stood by under such circumstances, and did not immediately take steps to enforce his debt, would not of itself entitle the executors, as against him, to be indemnified out of the estate. But when all the circumstances of the case are considered, I do not think that this is the true view of them. . . . Under the circumstances, I think that the proper inference is, that the businesses were not merely continued for the benefit of those interested under the Will, but that they were also carried on with the assent of the appellants for the purpose of securing the payment of the debt due to them. If this be the true view, it can hardly be contested that the executors of the testator are, as against the appellants, entitled to be indemnified out of their testator's estate against the liabilities which they have properly incurred."

So Lord Macnaghten says (ss) : "If a testator's business is carried on after his death, in accordance with the provisions of

(ss) [1891] A. C. pp. 207—208.

the Will, the indemnity of the executors is only limited by the amount of the assets which the testator has authorised the executor to employ in the business. If the business is carried on by the executors at the instance of the creditors without regard to the terms of the Will, the executors, I suppose, have the ordinary rights of agents against their principals. But I can see no reason in any case for limiting the indemnity to that portion of the assets which may have come into existence or changed its form since the testator's death. An unsecured creditor has no right against any specific part of the assets. He can have no greater right in respect of one part of the assets than another. It is all one estate. His right is to see that the executors get in the estate and apply it in due course in payment of debts, and he may sue in equity, as the appellants have done, to enforce that right."

Lord Macnaghten, in dealing with the course that a creditor of the testator should pursue, says (*ss*): "Creditors of a deceased trader whose business has been continued by his executors, when they come for an administration decree, must treat the continuance of the business either as proper or improper. If the business has been properly continued as between the executors and the creditors, or if the creditors choose to treat it so, which comes to the same thing, the executors are entitled to be indemnified against all liabilities properly incurred in carrying it on. If it has been improperly continued, and the creditors choose to treat the continuance as improper, they may proceed in the proper way to make the executors accountable for the value of the assets used in carrying on the business, and they may also follow the assets and obtain a charge on the business in the hands of the executors for the value of the assets misapplied, with interest thereon; and they may enforce the charge if necessary by means of a receiver and sale. Then there can be no room for any claim to indemnity on the part of the executors. The charge in favour of the trust estate must be satisfied first. The executors can only take what is left."

(*ss*) *Ibid.* p. 203.

If an executor, without any authority from the Will (t), take upon himself to trade with the assets, the testator's estate will not be liable in case of his bankruptcy; the testator's creditors and legatees will have a right to prove demands for such of the assets as have been wasted by the executor in the trade, in proportion to their respective interests: and with respect to such of the assets as can be specifically distinguished to be a part of the testator's estate, they will not pass to the assignees; the executors holding them *alieno jure*, they will not be liable to his bankruptcy (u).

Again, the testator may, by his Will, qualify the power of his executor to carry on trade, and limit it to a specific part of the assets, which he may sever from the general mass of his property for that purpose; and then in the event of the bankruptcy of the executor, the rest of the assets will not be affected by the commission, although the whole of the executor's private property will be subject to its operation (x). Accordingly, in *Cutbush v. Cutbush* (y), the testator directed his widow to carry on his business, until his youngest child should attain twenty-one; and for that purpose gave her the "entire use, disposal, and management of the capital, stock, and effects which should be in, due, and owing, or belonging to him in his said trade," at the time of his decease, and he authorized his executors to augment the capital employed therein: The executors renounced, and the widow took out administration: And Lord Langdale, M. R., held

(t) In *Kirkman v. Booth* 11 Beav. 273, 280, Lord Langdale said, it was a rule without exception, that, to authorize executors to carry on a trade, or permit it to be carried on with the assets, there ought to be the most distinct and positive authority and direction given by the Will for that purpose. See further as to what shall constitute such an authority and

direction, *Travis v. Milne*, 9 Hare, 141.

(u) *Ex parte* Garland, 10 Ves. 110. *Toller*, 487. *Ex parte* Richardson, 1 Buck, 202. *Ante*, p. 559.

(x) *Ex parte* Garland, 10 Ves. 110. *Toller*, 487. *Ex parte* Richardson, 1 Buck, 202. *Thompson v. Andrews*, 1 M. & K. 116.

(y) 1 Beav. 184.

that the specified property of the testator only (and not his general assets) was liable to the debts contracted by the widow in carrying on the trade (z).

It must be observed, that when the law speaks of executors not carrying on the business of their testator, it means, that they are not to buy and sell: There are many cases, when executors not only may, but are bound to continue the business to a certain extent: Thus if a party contracts for himself and his executors to build a house, and dies, the executors must go on, or they will be liable in damages for not completing the work (a). So if a party engages to build a house, and dies, after having procured all the necessary materials, it should seem that his executors ought to complete the work, and not dispose of the materials at a loss to the estate (b). Again, if a bookseller undertakes to publish a work in parts, and, before the completion he dies, a subscriber has a claim upon the estate to complete the work; for otherwise those parts which he has purchased, upon the faith of the work being completed, are useless: So if a man makes half a wheelbarrow, or half a pair of shoes, and dies, the executors may complete them, and they are not bound to sacrifice the property of their testator by selling articles in an imperfect state (c). So if the deceased died possessed of a manufactory, his executors, it should seem, would be justified in continuing the works for a reasonable time, if this should be requisite for the purpose of selling the machinery and premises to advantage; and they will not, at least in equity, be charged with any loss sustained in employing the

(z) A direction in a Will, that the testator's trade shall be carried on, does not of itself authorize the employment in the trade of more of the testator's property than was employed in it at his decease; nor does such a direction coupled with a direction that the testator's debts shall be paid, authorize a mortgage of his real estate, not employed at

his death in the trade, for the purposes of carrying it on: *McNeillie v. Acton*, 4 De G. M. & G. 744.

(a) *Marshall v. Broadhurst*, 1 Cr. & J. 405. *Ante*, p. 1596.

(b) 1 Cr. & J. 405. See also *Edwards v. Grace*, 2 M. & W. 190.

(c) 1 Cr. & J. 405. See *Dakin v. Cope*, 2 Russ. Ch. C. 170.

assets in so continuing the trade, if they act *bonâ fide*, and according to the best of their judgment (*d*).

It may here be mentioned, that if executors, who are by the testator's Will to carry on his trade for the benefit of his family, suffer a person to conduct the trade in his own name, such person may bring actions in his own name for goods sold by him, though afterwards accountable to the executors (*e*).

In *Sterndale v. Hankinson* (*f*), the facts were, that A., the widow and administratrix of B., continued B.'s trade after his decease: B., at his death, was indebted to C. on the balance of an account: A. continued to receive goods from and to make payments to C. as B. had done, and she was charged in account by C. with the debt: The payments made by her to C. exceeded the debt; but a balance was ultimately due to C.; And it was held, that B.'s debt was discharged by A.'s payments, and that the ultimate balance could not be proved as a debt against B.'s estate.

SECTION II.

Of the Liability of an Executor or Administrator in respect of his own tortious or negligent Acts: and herewith of Devastavit; and of Executors' Accounts and Allowances.

It remains to investigate what shall amount to such a violation or neglect of duty by an executor or administrator, as shall make him personally responsible.

Devastavit.

This species of misconduct is called in law a *devastavit*: that is, a wasting of the assets; and is defined to be, a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the duty

(*d*) *Garrett v. Noble*, 6 Sim. 504.
See also *Accord. Collinson v. Lister*, 20 Beav. 356, 365, 366, by

Romilly, M. R.

(*e*) *Wilkes v. Lister*, 6 Esp. 78.

(*f*) 1 Sim. 393.

imposed on them, for which executors or administrators shall answer out of their own pockets, as far as they had, or might have had, assets of the deceased (*g*).

An executor is personally liable in equity for all breaches of the ordinary trusts which, in courts of equity, are considered to arise from his office (*h*). And it may here be observed, that where personal property is bequeathed to executors, as trustees, the circumstance of taking probate of the Will (*i*) is, in itself, an acceptance of the particular trusts: Therefore, where the Will contains express directions what the executors are to do, an executor, who proves the Will, must do all which he is directed to do as executor, and he cannot say, that though executor, he is not clothed with any of those trusts (*j*).

The general rule adopted, with respect to the liability of executors and administrators on this head, is founded upon two principles: 1st, That in order not to deter persons from

Executor liable for breach of trusts arising from office.

Probate by executors is an acceptance of trusts in will.

(*g*) *Rac. Abr. Exors. (I.) 1.*

(*h*) *Re Marsden, 26 C. D. 783, 789.*

(*i*) And where probate is granted to one of several executors, the right of the others being reserved, it enures to the benefit of all and a slight act of intermeddling by the executor, who has not joined in proving the Will, will amount to the acceptance of the office of executor. *Cummins v. Cummins, 3 J. & L. 64. 8 Ir. Eq. Rep. 723.* And where one appointed executor intermeddled with the estate of the testator and afterwards renounced, it was held that he was liable to be sued in equity in the character of executor by the legatees under the Will, one of whom was also executrix, and had proved the Will. *Rogers v. Frank, 1 Y. & J. 409.* So, too, where two out of three executors proved the Will,

and the third, who did not prove, administered part of the assets, and, as purchaser, paid the purchase-money of the stock in trade to one of the other two executors who misapplied the money, it was held that he was liable as executor, being by his conduct completely executor. *Kilbee v. Sneyd, 2 Moll. 186.*

(*j*) *Mucklow v. Fuller, Jacob. 198. Booth v. Booth, 1 Beav. 125. Stiles v. Guy, 4 Y. & Coll. 571, 575. Williams v. Nixon, 2 Beav. 472.* But where the same persons are appointed trustees and executors of a Will, a revocation by the testator of their appointment as executors is not necessarily a revocation of their appointment as trustees: *Graham v. Graham, 16 Beav. 550. Cartwright v. Shephard, 17 Beav. 301. Worley v. Worley, 18 Beav. 58.*

undertaking these offices, the Court is extremely liberal in making every possible allowance, and cautious not to hold executors or administrators liable upon slight ground: 2nd, That care must be taken to guard against an abuse of their trust (*k*).

Executors and administrators may be guilty of a *devastavit* not only by a direct abuse of them, as by spending or consuming, or converting to their own use (*l*), the effects of the deceased, but also by such acts of negligence and wrong administration, as will disappoint the claimants on the assets (*m*).

Devastavit by
direct acts of
abuse:

With respect to incurring the charge by plain and palpable acts of abuse, an example of this sort of *devastavit* may be afforded by recurring to a subject already considered: *viz.*, the application of the assets to the satisfaction of the executor's own debt to a third party (*n*). So where the executor collusively sells the testator's goods at an under-value, when he might have obtained a higher price for them, it is a *devastavit*, and he shall answer the real value (*o*).

by mal-admin-
istration.

With regard to a *devastavit* arising from the mal-administration of the executor or administrator, the charge will be incurred by misapplying the assets in undue expenses for the funeral (*p*); in the payment of debts out of their legal order, to the prejudice of such as are superior (*q*); or by an assent

(*k*) *Powell v. Evans*, 5 Ves. 843.

Raphael v. Boehm, 13 Ves. 410.

Tebbs v. Carpenter, 1 Madd. 298.

(*l*) A disposing of the goods of the testator to the executor's own use is no *devastavit*, if he pays the testator's debts to the value, with his own money, in such order as the law appoints: *Merchant v. Driver*, 1 Saund. 307. Com. Dig. Admon. (I. 2). *Ante*, p. 567.

(*m*) *Bac. Abr. Exors* (L.) 1.

(*n*) See *ante*, p. 805.

(*o*) *Went. Off. Ex.* 302, 14th edit. *Bac. Abr. Exors* (L.) 1. *Rice v. Gordon*, 11 Beav. 265.

(*p*) *Ante*, p. 836 *et seq.*

(*q*) *Ante*, p. 850 *et seq.* But if the executor pays an inferior debt with his own money, though it be to the value of the testator's goods in his hands, it should seem that it will not be a *devastavit*: for the proper of the assets will not be changed thereby, but they remain, as against a creditor of a debt of a superior degree in the same plight as they were before. Com. Dig. Admon. (I. 2). *Wheatley v. Lane*, 1 Saund. 218, by *Pemberton, arguendo*.

to, or payment of a legacy, when there is not a fund sufficient for creditors (r).

It must, however, be observed, that it is not a *devastavit* in an executor or administrator to pay a debt of an inferior degree, before one of higher, of which he had no notice (s). And it has been doubted whether it is any *devastavit* to pay over the whole of the assets to the legatees or parties entitled in distribution, so as to leave nothing to satisfy a claimant for a valuable consideration, if the executor had no notice of the existence of the demand, and a reasonable time elapsed, after the death of the testator, before the payment by the executor to the legatees, or next of kin (t). But the modern authorities appear to establish that the mere circumstance of want of notice of a debt or claim against the estate of the deceased will not excuse the executor from the payment or satisfaction of it, if the assets were originally sufficient for that purpose, notwithstanding that, in ignorance of the existence of the debt or claim, he may have handed over the assets *bonâ fide* to legatees or parties entitled in distribution (u).

An executor or administrator can now protect himself by taking the proper steps, for by stat. 22 & 23 Vict. c. 35, it is enacted: sect. 29, "Where an executor or administrator shall have given such or the like notices (x), as in the opinion of the Court in which such executor or administrator is sought to be charged, would have been given by the Court of Chancery in an administration suit for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties

Devastavit in paying debts of inferior degree before debts of superior degree.

Notice by executor or administrator. As to distribution of assets of testator or intestate after notice given by executor or administrator.

(r) *Ante*, p. 1202.

(s) See *ante*, p. 879.

(t) See *ante*, p. 1205 *et seq.*

(u) *Ante*, p. 1206.

(x) See Ord. LV., rr. 44—61, R. S. C. 1883, for the notices which would have to be given in an administration suit.

entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets, or any part thereof, so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of the distribution of the said assets, or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, into the hands of the person or persons who may have received the same respectively."

If the executor surrenders, or otherwise fails to preserve the residue of a term of years, where the land is of greater yearly value than the rent, it is a *devastavit* (y). On the other hand, if the rent be greater than the yearly value of the land, and the testator was the assignee of the term, the executor may be guilty of a *devastavit* in neglecting to exonerate the estate of the testator from its liabilities in respect of the lease by assigning it to some other person (z). If a term be assigned by an executor in trust to attend the inheritance, he is liable to the creditors for a *devastavit*; for the term has by this means become not assets at law (a).

Distinction
between
executors and
administrators
as to releasing
or compound-
ing debts.

The law formerly pressed very hardly on executors and administrators who, in the exercise of an honest discretion, released or compounded debts due to the testator or intestate. The hardship has been much mitigated by legislation, first by Lord Cranworth's Act, 23 & 24 Vict. c. 145, s. 30, and then by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which repealed the above mentioned section of Lord Cranworth's Act, and by sect. 37 afforded a still larger relief to executors.

23 & 24 Vict.
c. 145, s. 30.

The effect of sect. 30 of Lord Cranworth's Act was to make it lawful for executors to compound, compromise, or refer to arbitration all claims relating to the testator's estate without

(y) Wentw. Off. Ex. c. 13, p. 312, 14th edit. Thompson v. Thompson, 9 Price, 476.

(z) Rowley v. Adams, 4 M. &

Cr. 534. *Ante*, p. 1631, note (f).

(a) Charlton v. Low, 3 P. Wms. 330.

being responsible for any loss occasioned thereby. This provision, however, only extended to persons acting under a will or codicil executed after the 28th August, 1860, or under a will or codicil confirmed or revived by a codicil executed after that date.

The above section of Lord Cranworth's Act is now repealed by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), by the 37th section of which it is enacted that—

Executor may now compound or release debts.

44 & 45 Vict. c. 41.

(1.) An executor may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2.) An executor, or two or more trustees acting together, or a sole acting trustee, where by the instrument, if any, creating the trust, a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition or any security, real or personal, for any debt or for any property real or personal claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition, or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

It should be observed that by sect. 37, sub-s. 4, of this Act, the above section applies to executorships and trusts constituted or created either before or after the commencement of the Act.

This legislation, so far as executors are concerned, renders the old cases valueless, but inasmuch as neither Act would seem to extend to administrators (*b*), it has been thought better to retain the text of the former editions of this work unaltered.

(*b*) See *Re Clay and Tetley*, 16 C. D. 3.

Cases on the old law as to the liability of executors releasing or compounding debts, &c., before Lord Cranworth's Act, 1860, now inapplicable to executors but still applicable to administrators.

If the executor releases a debt due to the testator, or cancels or delivers to the obligor a bond of which the testator was the obligee, this shall charge him to the amount of the debt, whether in point of fact he received it or not (c). So if he releases a cause of action founded on a tort accruing either in the lifetime of the testator, or in his own time in right of the testator, this will be a *devastavit* (d). So if he agrees with an executor *de son tort* and accepts his covenant for payment, he will be liable for so much, though nothing be paid (e). So if the executor takes an obligation in his own name, for a debt due by simple contract to the testator, this shall charge him as much as if he had received the money; for the new security had extinguished the old right, and is a *quasi* payment to him (f). So, apart from the Married Women's Property Act, if the husband of a *feme covert* executrix indulge the debtor with further time, in consideration of an express promise to pay the husband, who afterwards recovers on such promise, this is a *devastavit*: For the money recovered will not be assets of the testator's estate, and if the husband dies before execution sued, the executor or administrator of the husband, and not the wife, shall have execution (g). So if an executor, in his representative character, commences an action in which he has a right to recover, and afterwards covenants with the

(c) Wentw. Off. Ex. 303, 14th edit. *Cocke v. Jenner*, Hob. 66. *Veghelman v. Kighley*, And. 138. S. C. *nomine Brightman v. Kighley*, Cro. Eliz. 43. S. C. 4 Leon. 102. S. C. Godb. 29. But a receipt for so much due on the bond as the executor receives, is not a *devastavit* for the residue: Wentw. Off. Ex. 303, 14th edit. Com. Dig. Admon. (I. 2). Nor a parol agreement that he will not sue for more: *Ibid.* Nor a delivery of the bond into another hand, that it may not be sued: *Ibid.*: But see *post*, p. 1703, note (g).

(d) Wentw. Off. Ex. 304, 4th edit. Com. Dig. Admon. (I. 1). Bac. Abr. Exors. (I) 1.

(e) Com. Dig. Admon. (I. 1).

(f) *Goring v. Goring*, Yelv. 10. Bac. Abr. Exors. (I) 1, *ante*, p. 1537. But where the executor delivered up a bond due to his testator, and took a new bond, with surety to himself for the debt, it was held, that this, though a conversion in law, was none in equity: *Armitage v. Metcalfe*, 1 Chanc. Cas. 74.

(g) *Yard v. Ellard*, 1 Salk. 117.

defendant to receive a specific sum at a future day as a compensation, he will be answerable for the money as assets immediately (*h*).

Again, if the executor submits a debt due to the testator to arbitration, and the arbitrators award him less than his due; this, being his own voluntary act, shall bind him, and he shall answer for the full value as assets (*i*).

But though, generally speaking, an executor, compounding (*h*), or releasing, a debt, must answer for the same, yet if it appears to have been for the benefit of the trust estate, it is an excuse; Therefore, in a case where there were arrears of rent on a lease, and, on the tenant's becoming insolvent, the executor released the arrears, and gave him a sum of money to quit possession, Lord Talbot held, that as the executor appeared to have acted for the benefit of the estate, he should be allowed both sums (*l*). So in *Pennington v. Healey* (*m*), an administrator sued a debtor to his intestate, and recovered a verdict against him: and the debtor, being in gaol, subsequently petitioned to be discharged under the Insolvent Act: The debtor offered terms, whereby he was to be liberated on the payment of 150*l.*, a sum less than the costs incurred in the action: The administrator agreed to

(*h*) *Norden v. Levit*, 2 Lev. 189. S. C. T. Jones, 88. 1 Freem. 442. S. C. cited and said to have been affirmed on error, in Dom. Proc., *Barker v. Talcot*, 1 Vern. 474. *Jenkins v. Plombe*, 6 Mod. 94. It seems to have been once holden, that if an executor to an obligee in a penal bond, after the bond is forfeited, release the penalty on receipt of the principal and interest, this is a *devastavit*: Went. Off. Ex. 303, 14th edit. But the contrary was held by three Judges, in *Kniveton v. Latham*, Cro. Car. 490: And since the statute 4 Ann. c. 16, s. 13, it is obviously no *devastavit*.

(*i*) Wentw. Off. Ex. 304, 14th W.E.—VOL. II.

edit. Anon. 3 Leon. 53. Com. Dig. Admon. (I. 1). Bac. Abr. Exors. (I) 1. *Yard v. Ellard*, 1 Lord Raym. 369, by Holt, Ch. J.

(*k*) See *Wiles v. Gresham*, 5 De Gex, M. & G. 770.

(*l*) *Blue v. Marshall*, 3 P. Wms. 381. In *Legh v. Holloway*, 8 Ves. 213, an executor, having, under a misconception of a Will, at a trial of an issue, entered into a compromise with the creditor, expressly subject to the approbation of the Court, was permitted to try the issue, paying the costs of the former proceedings.

(*m*) 1 Crompt. & M. 402. S. C. 3 Tyrwh. 319.

the terms, and liberated the debtor: And the Court of Exchequer held, in an action brought against him by a creditor of the intestate, that he was not chargeable with any part of the debt as assets.

Devastavit by unnecessary payments :

An executor will be guilty of a *devastavit*, if he applies the assets in payment of a claim which he is not bound to satisfy (*n*): as if he makes disbursements in the schooling, feeding, or clothing of the children of the deceased, subsequently to his decease (*o*). But executors must be allowed a reasonable time for breaking up a testator's domestic establishment and discharging his servants (*p*). Again, where the testator had been attended for many years by a physician without any fees, and the executors had paid him 100*l.*, and he had stated in an affidavit, that the testator had promised to pay him for his services or leave him an equivalent, it was held, that as the physician could not have claimed himself as for a legal debt, the executors, who had taken on themselves to pay him, stood in the same situation as he did; and the payment thereof could not be allowed (*q*). So if an executor

(*n*) Com. Dig. Admon. (I. 1). *Manning v. Purcell*, 7 De G. M. & G. 55. *Vez v. Emery*, 5 Ves. 141. In this last case, Lord Alvanley said, that if the executor had taken advice as to the propriety of making the payment, and had been advised by any gentleman of the law in this country, that he was bound to do so, he (the learned Judge) would not have held him liable. However, the general rule is, that, if, under the best advice he can procure, an executor acts wrong, it is his misfortune; but public policy requires that he should be the person to suffer: if he has been misadvised, the Court must act, not upon the improper advice under which he may have acted, but upon the acts he has done: Doyle

v. Blake, 2 Sch. & Lef. 243.

(*o*) *Giles v. Dyson*, 1 Stark. N. P. C. 32.

(*p*) *Field v. Peckett*, 29 Beav. 576, where two months was held not to have been an unreasonable time having regard to the circumstances.

(*q*) *Shallcross v. Wright*, 12 Beav. 558. But in the same case, a payment was allowed which the executors had made in respect of the loss of the furniture of the house of a friend where the testator had died of malignant fever, and which had been destroyed, under medical advice to prevent infection. And see *ante*, pp. 1656, 1657, as to the liability of an executor to pay for work done or services rendered under the expectation of a legacy.

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pays a bond *ex turpi causâ* or, formerly, a bond founded on a usurious contract, such payment will amount to a *devastavit*, as well against legatees as creditors (*r*). So if the testator was bound in a *joint* obligation, and he dies before the co-obligor, the executor is not liable on the instrument, and therefore if he pays the sum due upon it, he will be guilty of a *devastavit* (*s*): However, in equity, the executor is in some instances chargeable *pari passu* with the survivor; and in such cases he is justified in applying the assets accordingly (*t*). But an executor may prove a debt proved to be justly due by his testator, although barred by the Statute of Limitations (*u*). Again, it has been held that he is not bound to plead the statute to an action commenced against him by a creditor of the testator (*x*): Thus if the surplus of the personal estate, after payment of the debts and legacies, be bequeathed to a residuary legatee, and several creditors, although barred by the Statute of Limitations, commence actions against the executor, equity will not, on his refusal to plead the statute, compel him to plead it in favour of the residuary legatee (*y*). So in the administration of assets under a creditor's bill, it was held, that executors were not bound to plead the statute; and if they did not, the creditor filing the bill would have a decree

(*r*) *Wincheombe v. Bishop* of Winchester, Hobart, 167. *Robinson v. Gee*, 1 Ves. Sen. 254. Com. Dig. Admon. (I. 1), *ante*, p. 871.

(*s*) *Ante*, p. 1614.

(*t*) *Ante*, p. 1621.

(*u*) *Norton v. Frecker*, 1 Atk. 526, by Lord Hardwicke. *Stahlschmidt v. Lett*, 1 Sm. & G. 415. The reason for this is that the Statute of Limitations does not make the contract void but only bars the remedy. Whereas an executor or administrator would commit a *devastavit* who paid a debt to a creditor who is prevented from enforcing it by the Statute

of Frauds, or who retains such a debt due to himself. *Re Rowson*, 29 C. D. 358.

(*x*) *Williamson v. Naylor*, 3 Younge and Coll. 211, note (*a*), by Lord Lyndhurst. But see *contra*, by Bayley, J., in *McCulloch v. Dawes*, 9 Dowl. & Ryl. 43. This dictum of the latter judge was disapproved by Wood, V.-C. (in *Hill v. Walker*, 4 Kay & J. 166). *Lewis v. Rumney*, L. R. 4 Eq. 451.

(*y*) *Castleton v. Fanshaw*, Prec. Chanc. 100. S. C. 1 Eq. Cas. Abr. 305. 2 Eq. Cas. Abr. 254, pl. 1, 259, pl. 1.

on behalf of himself and all other creditors, and would be paid (z). And accordingly, on a creditor's administration summons, if the executor does not set up the statute, the residuary legatees cannot set it up against the plaintiff, whatever may be their right as to other creditors (a). But in *Shewen v. Vandenhorst* (b), under the common decree in an administration suit, where the bill had been filed, and the decree obtained, by the residuary legatee, a creditor applied to prove a debt which was barred by lapse of time; and the executor refusing to interfere, the plaintiff insisted upon setting up the objection of the statute: Sir John Leach, M. R., held, that it was competent for the plaintiff, or any other person interested in the fund, to take advantage of the statute before the Master, notwithstanding the refusal of the executor: And this decision was confirmed by Lord Brougham on appeal (c). And even on a creditor's adminis-

(z) *Ex parte Dawdney*, 15 Ves. 498.

(a) *Briggs v. Wilson*, 5 De Gex, M. & G. 12. See also *Fuller v. Redman*, 26 Beav. 614. So, after decree in an administration suit, the court is not bound, on behalf of an absent party beneficially interested in the estate, to disallow claims against the estate barred by the statute if the personal representative and such of the persons beneficially interested as are parties to the suit or have come in under the decree do not set up the statute: *Alston v. Trollope*, L. R. 2 Eq. 205.

(b) 1 Russ. & M. 347. 2 Russ. & M. 75.

(c) See also *Moodie v. Bannister*, 4 Drewr. 432. *Fuller v. Redman*, 26 Beav. 614. After judgment or order for administration an executor cannot exercise any discretion at all or do any act to vary the rights of the parties, and he cannot there-

fore give an acknowledgment to take a debt out of the Statute of Limitations: *Phillips v. Beal*, 32 Beav. 26. Nothing short of an order for administration will prevent a creditor of the estate from suing the executor, or the executor from paying a debt due from the estate. *Re Barrett*, 43 C. D. 70. But an originating summons under R. S. C., Ord. LV. r. 3, is only a less expensive way of effecting the same thing as an administration action, and therefore the residuary legatee can compel the executors to plead the Statute of Limitations, where under the old practice the question could only have been determined after decree for administration, which would have abolished the executor's discretion. *Re Wenham*, [1892] 3 Ch. 59. If before judgment or order it is desired to prevent waste, the Court will grant interim relief by appointing a receiver, but it will

tration summons, the *cestuis que trustent* of devised estates may set up the statute against him, though the executor should decline to do so; for they would have been necessary parties to the suit, but for the Chancery Amendment Act, and might have set up the statute by answer (*d*).

Such acts of negligence, or careless administration, as by negligence : defeat the rights of creditors, or legatees, or parties entitled in distribution, amount to a *devastavit*. For if persons accept the trust of executors, they must perform it: they must use due diligence, and not suffer the estate to be injured by their neglect (*e*). Thus if an executor has a lease for years, determinable upon the life of J. S., which is upon a reasonable estimate worth 200*l.*, if the executor will not sell this but keeps it, and J. S. dies in a short time, yet the executor shall answer for the value of it at the time of the death of the testator; for it was his own fault that he would not sell it (*f*). So if an executor delays the payment of a debt payable on demand with interest, and suffers judgment for the principal and interest incurred after the testator's death, this is a *devastavit* for the interest, unless the executor can

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interest :

not interfere to prevent the executor or administrator preferring one creditor to another, nor to prevent the exercise of a right of retainer, nor in any case where it is not alleged that assets are being wasted. *Re Wells*, 45 C. D. 569. See *ante*, pp. 886, 887.

(*d*) *Briggs v. Wilson*, 5 De Gex, M. & G. 12. See also *Beeching v. Morphew*, 8 Hare, 129, where it was held, that in a creditor's bill against a husband and wife for a payment out of an estate of which the wife was administratrix, she alone might set up the statute in their joint answer. But where judgment has been recovered against an executor for a debt due by the testator, the statute cannot afterwards be set up in an

administration suit: *Hunter v. Baxter*, 3 Giff. 214.

(*e*) *Tebbs v. Carpenter*, 1 Madd. 298. See *Eaves v. Hickson*, 30 Beav. 136, where trustees were held liable who had paid over the trust fund to wrong persons, trusting to a forged marriage certificate. See also *Hopgood v. Parkin*, L. R. 11 Eq. 74, where a trustee was held liable for a loss of a trust fund, occasioned by the negligence of his solicitor. This case, however, was questioned by the Court of Appeal in *Speight v. Gaunt*, 22 C. D. 727.

(*f*) *Phillips v. Phillips*, 2 Freem. 12. *Taylor v. Tabrum*, 6 Sim. 281. See *ante*, p 1535. *Fry v. Fry*, 27 Beav. 144. But see also *Selby v. Bowie*, 4 Giff. 300.

show that the assets were insufficient to discharge the debt immediately (g). And where the executor permits debts carrying interest at 5l. per cent. to run on, when he had in his hands a fund to pay them, he shall be charged with interest at that rate (h). But it must be observed, that where there is a sufficiency of assets for the payment of debts, executors may pay simple contract debts, not bearing interest, before specialty debts bearing interest, if not objected to by the specialty creditors; and the legatees are not at liberty to complain of the order of payment (i).

in not getting
debts in.

Again, if the executor, by his delay in commencing an action, has enabled the debtor of his testator to protect himself under a plea of the Statute of Limitations, this amounts to a *devastavit* (k). So where the testator had lent out money on bond, and the executor during several years made one application, by an attorney, to the obligor, but brought no action against him, Lord Thurlow held, that the executor should be liable for the sum due, as having not been got in by reason of his neglect, although it did not appear whether the debt was or was not recoverable (l). So where, for more

(g) *Seaman v. Everard*, 2 Lev. 40. Com. Dig. Admon. (I. 1). Bac. Abr. Exors. (L.) 1. So if an executor may save the penalty of a bond by payment of the less sum specified in the condition, or by other performance of the condition, and he neglect to do so, it will be a *devastavit* in him, if he have assets: 1 Saund. 333, a, note (7) to *Hancock v. Prowd*.

(h) *Hall v. Hallet*, 1 Cox, 134, 138. *Dornford v. Dornford*, 12 Ves. 130, note (29), 2nd edit. See also *Bate v. Robins*, 32 Beav. 73. See *infra*, pp. 1749, 1750, *et seq.*, as to charging executors with interest.

(i) *Turner v. Turner*, 1 Jac. & Walk. 39. And see now Stat. 32 & 33 Vict. c. 46, *ante*, p. 869, by

which the distinction as to priority of payment between specialty and simple contract debts of deceased persons was abolished.

(k) By Holt, C. J., in *Hayward v. Kinsey*, 12 Mod. 573. But see *East v. East*, 5 Hare, 348.

(l) *Lowson v. Copeland*, 2 Bro. Chanc. Cas. 156. In *Clack v. Holland*, 19 Beav. 271, 272, Romilly, M. R., said, that where it is the duty of an executor to obtain payment of a sum of money, he is exonerated, though he has taken no steps at all, provided it appears that if he had done so, they would have been, or there is reasonable ground for believing they would have been, ineffectual. But in such a case, it should seem that it lies on the

than three years, the executors permitted money to remain due on bond to their testator, without inquiring into the circumstances and situation of the obligor, or calling upon him to pay in the money, Lord Alvanley held, that, on the obligor's becoming bankrupt, the executors were responsible (*m*). So where executors had suffered rent to be in arrear for several years, without taking any legal steps, by distress or otherwise, Sir Thomas Plumer held, that they should be charged with such arrears (*n*). And it was held by Lord Cottenham, that executors are equally chargeable with neglect in allowing a part of the assets to remain outstanding in an improper state of investment, whether the person in whose hands it is so outstanding be a co-executor or a stranger; and notwithstanding the Will contains the usual indemnity clause (*o*).

There has been occasion to discuss, in a previous part of this Work (*p*), the question of the liability of an executor or administrator, in respect of assets come fully into his possession and hands, and afterwards lost to the estate (*q*). It was there stated, that an executor or administrator has been considered to stand in the condition of a gratuitous bailee, with respect to whom the law is, that he shall not be charged with-

Devastavit by loss of the assets :

[See Stat. 22 & 23 Vict. c. 35, s. 31, *post*, p. 1735.]

executor to prove that, if he had taken proper measures to obtain payment, they would have failed : *Stiles v. Guy*, 16 Sim. 230.

(*m*) *Powell v. Evans*, 5 Ves. 839. See also *Atty.-Gen. v. Higham*, 2 Y. & Coll. Ch. C. 634, and *post*, p. 1717.

(*n*) *Tebbs v. Carpenter*, 1 Madd. 290. See *Buxton v. Buxton*, 1 Mylne & Cr. 95, by Sir C. Pepys, M. R. *Post*, p. 1718. *Ratcliffe v. Winch*, 17 Beav. 217.

(*o*) *Stiles v. Guy*, 1 Mac. & G. 422. *Post*, p. 1734. See also *Mucklow v. Fuller*, Jacob. 198. *Stiles v. Guy*, 4 Y. & Coll. 571. *Dix v. Burford*, 19 Beav. 409.

But see also *Paddon v. Richardson*, 7 De Gex, M. & G. 563.

(*p*) *Ante*, pp. 1534, 1535.

(*q*) In a case where the executor had lost a bond due to the testator, the Court inclined to charge the executor with the debt; but for the present directed only that the defendant should prosecute a suit brought by him in equity against the obligor with effect, in order to recover the money due upon the bond that was lost : *Goodfellow v. Burchett*, 2 Vern. 299. It is now established, that a lost bond may be put in suit at law : *Read v. Brookman*, 3 T. R. 151. 1 Saund. 9, note (*a*).

at law :

out some default in him. But this, as it appears from the judgment of Lord Ellenborough, in *Crosse v. Smith* (r), as the law then stood, must not be understood of the extent of the liability of an executor or administrator at law, but merely in equity: His Lordship there observed that it had been suggested in argument, that an executor was to be considered as a mere ordinary bailee; but that this was an idea probably then for the first time suggested in a Court of law (s): "As no case in law," continued the learned Judge, "has yet decided that an executor once become fully responsible, by actual receipt of a part of his testator's property, for the due administration thereof, can found his discharge in respect thereof, as against a creditor seeking satisfaction out of the testator's assets, either on the score of inevitable accident, as destruction by fire, loss by robbery, or the like, or reasonable confidence disappointed, or loss by any of the various means which afford excuse to ordinary agents and bailees in cases of loss without any negligence on their part (t), I say as no such case in respect to executors has yet occurred in a Court of Law, we are not, from the particular hardship of the present case, authorized to make such a precedent in favour of this defendant."

in equity :

However, a more lenient doctrine was established in the Courts of Equity (u), as will fully appear in the course of this section.

loss by theft
or casualty :

Thus, if any goods of the testator are stolen from the possession of an executor, or from the possession of a third person, to whose custody they have been delivered by the executor, or are lost by casualty, as by accidental fire (x),

(r) 7 East, 258.

(s) See, however, Wentw. Off. Ex. 235, 14th edit.

(t) But see Wentw. *ubi supra*. Com. Dig. Assets (D). *Ante*, p. 1555.(u) See the judgment of Lord Eldon in *Massey v. Banner*, 1 Jac. & Walk. 248.(x) *Croft v. Lyndsey*, 2 Freem.

1. It seems that executors are not bound either to insure or to continue the insurance of their testator: *Bailey v. Gould*, *coram* Alderson, B., 4 Y. & Coll. 221. *Fry v. Fry*, 27 Beav. 146. By sect. 7 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), it is enacted that, (1) "It shall be lawful for, but not obligatory upon, a trustee

the executor shall not, in equity, be charged with these as assets (y).

And now since by virtue of the Judicature Act, 1873, sect. 25, sub-s. 11, where there is any conflict or variance between the rules of equity and the rules of Common Law with reference to the same matter the rules of equity shall prevail, it follows that where the assets of a testator have come into the possession of an executor and are afterwards lost to the estate the rule of law as well as of equity now is that the executor stands in the position of a gratuitous bailee and therefore cannot be charged without some wilful default (z).

Again, where an executor puts out the money of his testator, though without the indemnity of a decree, upon a real security, which there was no reason then to suspect, but afterwards such security proves bad, the executor is not accountable for the loss, any more than he would have been entitled to the profits, had it continued good (a).

loss by invalid security:

(which, by sect. 1 (3), includes an executor or administrator) to insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and to pay the premiums for such insurance out of the income thereof or out of the income of any other property, subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income."

(2) "This section shall not apply to any building or property which a trustee is bound forthwith to convey absolutely to any *cestui que trust* upon being requested so to do."

(y) *Jones v. Lewes*, 2 Ves. Sen. 240.

(z) See *Job v. Job*, 6 C. D. 562.

(a) *Brown v. Litton*, 1 P. Wms. 141: but see *Norbury v. Norbury*, 4 Madd. 191. On the general question as to the precautions which an executor ought to take, and the extent to which he may properly lend, with reference to the value of the property to be mortgaged, see *Stickney v. Sewell*, 1 M. & Cr. 8, 15. *Macleod v. Annesley*, 16 Beav. 600. *Phillipson v. Gatty*, 7 Hare, 516. *Farrar v. Barraclough*, 2 Sm. & G. 231, 235. *Ingle v. Partridge*, 34 Beav. 411. *Learoyd v. Whiteley*, 12 App. Cas. 727. And see the provisions of the Trustee Act, 1888 (51 & 52 Vict. c. 59), (which, by sect. 1, sub-s. 3, applies to executors or administrators) as to the duties, powers, and liability of executors and administrators in lending money of the testator or intestate on real security. Such provisions,

But the rule is, never to permit a trustee or executor after a decree to account, to lay out money on mortgage, or to deal

it should be observed, apply to investments made as well before as after the passing of the Act, except where some action or other proceeding is pending with reference thereto at the passing of the Act. They also apply to transfers of existing securities as well as to new securities (sect. 4, sub-s. 4).

Sect. 4. (1) "No trustee lending money upon the security of any property shall be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of such property, at the time when the loan was made, provided that it shall appear to the Court that in making such loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in such report, and that the loan was made under the advice of such surveyor or valuer expressed in such report. And this section shall apply to a loan upon any property of any tenure, whether agricultural or house or other property, on which the trustee can lawfully lend."

(2) "No trustee lending money upon the security of any leasehold property shall be chargeable with

breach of trust only upon the ground that in making such loan he dispensed, either wholly or partially, with the production or investigation of the lessor's title."

(3) "No trustee shall be chargeable with breach of trust only upon the ground that, in effecting the purchase of any property or in lending money upon the security of any property, he shall have accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted."

(4) "This section shall apply to transfers of existing securities as well as to new securities, and to investments made as well before as after the passing of this Act, except where some action or other proceeding shall be pending with reference thereto at the passing of this Act."

5. (1) "Where a trustee shall have improperly advanced trust money on a mortgage security which would at the time of the investment have been a proper investment in all respects for a less sum than was actually advanced thereon, the security shall be deemed an authorized investment for such less sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest."

(2) "This section shall apply to investments made as well before as after the passing of this Act, except where some action or other

with the assets for the purposes of investment, without the leave of the Court: Where, therefore, the executor, after a decree, and consequently after he might have had the directions of the Court, chooses to lay out the money on mortgage, if the transaction should appear to be for the benefit of the party entitled, the Court will give him the advantage of it; but if otherwise, will consider the fund as money, and make the executor bring it into Court (*b*).

With respect to loans upon personal security, the Court of King's Bench, in *Webster v. Spencer* (*c*), was of opinion that an executor who had lent out on the security of a promissory note, money belonging to the testator, but not wanted for the immediate uses of the Will, was not guilty of a *devastavit*, provided he exercised a fair and reasonable discretion on the subject (*d*). Nevertheless, although the lending itself may not amount to a legal *devastavit*, yet the rule is now completely established, that an executor or administrator, lending money of the deceased upon bond, promissory note, or other personal security, is guilty of a breach of trust (*e*), and shall be personally answerable if the security prove defective.

loss by loans
on personal
security:

proceeding shall be pending with reference thereto at the passing of this Act."

(*b*) *Widdowson v. Duck*, 2 Meriv. 494, 498, 499. After an administration decree has been made, all powers of management of the estate which may be vested in trustees are subject to the control of the Court, and the Judge who exercises such control must be personally satisfied of the propriety of the course proposed to be adopted by the trustees: *Bethell v. Abraham*, L. R. 17 Eq. 24.

(*c*) 3 B. & Ald. 360.

(*d*) In this case, one of two executors had lent the money in question on the promissory note,

and the question was, whether both the executors were properly joined as plaintiffs in an action to recover it: It was assumed, that if the loan had been a *devastavit*, the executor who was the lender ought to have sued alone in his individual character: But see the observations of Bayley, J., in *Clarke v. Hougham*, 2 B. & C. 155. *Ante*, p. 766.

(*e*) *Terry v. Terry*, Prec. Chanc. 273. *Ryder v. Bickerton*, 3 Swanst. 80, note. S. C. 1 Eden, 149, note. *Adye v. Feuillateau*, 1 Cox, 24. S. C. 3 Swanst. 84, note. *Holmes v. Dring*, 1 Cox, 1. *Wilkes v. Steward*, Coop. 6. *Vigrass v. Binfield*, 3 Madd. 62. *Walker v. Sy-*

If, however, the Will directs the executors to lay out the fund in real or personal securities, they would be justified, as against legatees, using a sound discretion, and fairly and honestly lending it to a person whom they considered responsible, at a reasonable interest (*f*): But the rule is different, it should seem, as against creditors (*g*): And though the Will gives the executors power to lend on personal security, this does not enable them, even as against legatees, to accommodate a trader with a loan on his bond (*h*).

loss from loans
to each other:

It must further be observed, that where a testator empowers his executors to lend money on personal security, he must be taken to rely upon the united vigilance of them all, with respect to the solvency of the borrowers: If one of them lends to the other, this object is defeated: consequently, such a loan is a breach of trust, and a misappropriation of the fund; and if any mischief arises to the estate of the testator therefrom, the executors will be liable (*i*). Accordingly, in *Stickney v. Sewell* (*k*), two executors were empowered, by Will, to lend money on government, real, or personal security: One of them, in 1815, lent part of the fund to the other executor and his partner in trade upon mortgage: The mortgagors became bankrupt in 1831, and then the mortgaged property, which consisted in part of a windmill, a water-mill, and a house in a town, being sold, produced considerably less than the sum advanced: And it was held by Sir C. Pepys, M. R., that the executors were liable for the deficiency.

monds, 3 Swanst. 63, overruling *Harden v. Parsons*, 1 Eden, 145. *Bacon v. Clark*, 3 My. & Cr. 294. *Clough v. Bond*, *ibid.* 490, 496. *Bullock v. Wheatley*, 1 Coll. 130.

(*f*) *Forbes v. Ross*, 2 Cox, 116.

(*g*) See *Doyle v. Blake*, 2 Sch. & Lef. 239, 240.

(*h*) *Langston v. Ollivant*, Coop. 33. See further, as to *devastavit* by suffering money to remain in the hands of bankers, &c., which, according to the directions of the

trust, should have been invested in a particular mode: *Bacon v. Clark*, 3 My. & Cr. 294. *Lowry v. Fulton*, 9 Sim. 115.

(*i*) — *v. Walker*, 5 Russ. 7. *Gleadow v. Atkin*, 2 Cr. & J. 548, 555. But if the one should give a bond to the other, to save him harmless from the consequences of such a breach of trust, the bond would be valid at law: *Warwick v. Richardson*, 10 M. & W. 284.

(*k*) 1 My. & Cr. 8.

However, as it will presently appear (*l*), an executor is not justified in unnecessarily keeping his testator's money dead in his hands : and, therefore, if the exigencies of his office do not require otherwise, the executor should invest the unemployed money in investments authorised for that purpose by one of the Acts of Parliament to which reference is hereinafter made (*m*). The rule is that if an executor lays out the testator's money in such investments, he is not liable for the fall of stocks (*n*). But if he invests it in any other fund, which afterwards sinks in value, the loss will be thrown on him, although there be no *mala fides* on his part (*o*). On the other hand, if any profit happen by the rise of the stock in

loss by fall of
stocks ;

by not invest-
ing in the
authorized
funds :

(*l*) *Post*, p. 1716.

(*m*) *Holland v. Hughes*, 16 Ves. 114. *Tebbs v. Carpenter*, 1 Madd. 306. *Norbury v. Norbury*, 4 Madd. 191. Where a trustee has trust money in his hands, which he is authorized to lay out in the public funds or on real security, he is justified, pending the necessary delay in completing an anticipated mortgage, in investing the money in Exchequer Bills : *Matthews v. Brise*, 6 Beav. 239.

(*n*) *Peat v. Crane*, 2 Dick. 499, note. *Franklin v. Frith*, 3 Bro. Chanc. Cas. 434. *Howe v. Lord Dartmouth*, 7 Ves. 150. *White & Tudor's Leading Cases*, 6th edit., Vol. II. p. 321. So if he invests money in the three per cents., and *duly* appropriates the same for the benefit of a legatee, the executor shall not be liable for the fall of stocks : *Ex parte Champion*, cited in *Hutcheson v. Hammond*, 3 Bro. Chanc. Cas. 147. *Fonbl. Treat. Eq. B. 2, c. 7, s. 6*, note (*p*). But it is otherwise where the appropriation is unduly made : Thus where a legacy was left to A. on marrying with consent, and, till marriage, interest to be paid at three per cent. ; and the executrix

laid out a sum equal to the legacy, and conveyed to trustees in trust to pay the legacy with three per cent. interest, and to pay the surplus interest to her ; it was holden that this was not a good appropriation, and, the stocks having fallen in value, that the executrix's estate should make it good : *Cooper v. Douglas*, 2 Bro. Chanc. Cas. 232. See *ante*, p. 1258.

(*o*) *Hancom v. Allen*, 2 Dick. 498. *Howe v. Lord Dartmouth*, 7 Ves. 150. *Clough v. Bond*, 3 My. & Cr. 497. See also *Gordon v. Bowden*, 6 Madd. 342. He was not answerable for any further loss than was occasioned by his buying the other stock instead of the three per cents. : *Hynes v. Redington*, 1 J. & L. 589. It may be doubted whether, where trustees had the power of investing moneys in government securities, they were, even before the passing of the Acts of Parliament hereinafter referred to, absolutely bound to select three per cents. for that purpose : See *Angell v. Dawson*, 3 Y. & Coll. 316, *per Alderson*, B. *Robinson v. Robinson*, 1 De G. M. & G. 255, 256, by Lord Cranworth.

which the executor has laid out the money, he shall not have the benefit, but it shall accrue to the estate of his testator (*p*).

And it should seem that if a testator die leaving stock in funds other than those authorised by Act of Parliament it is the duty of the executor (in the absence of express authority in the Will to retain such stock) to transfer it into such authorised funds (*q*).

Formerly the only fund in which an executor might properly invest the unemployed money of the testator was the 3*l*. per cent. consols, *i. e.*, the fund adopted by the Court of Chancery, and an executor investing in such security was held by the Court not to be liable for any fall which might take place, although if he invested in any other fund which afterwards sank in value he was held liable for such depreciation even in the absence of any *mala fides* on his part. But now the class of investments authorised for trust funds has been considerably enlarged, and the trustee or executor investing in any of the authorised funds will not be responsible for any fall in value.

Authorised
trust invest-
ments :
Trust Invest-
ment Act,
1889.

Most of the provisions now in force for authorising these investments are contained in the Trust Investment Act, 1889 (52 & 53 Vict. c. 32), which enacts :—Sect. 3. “It shall be lawful for a trustee (*qq*) unless expressly forbidden by the instrument (if any) creating the trust, to invest any trust funds in his hands (*r*), in manner following, that is to say :—

(*p*) *Phayre v. Pree*, 3 Dow. 128.

(*q*) See *Howe v. Lord Dartmouth*, White & Tudor's Leading Cases, 6th edit., Vol. II., p. 321.

(*qq*) Which, by sect 9, includes an executor or administrator and a trustee whose trust arises by construction or implication of law, as well as an express trustee.

(*r*) This power of investment does not extend to authorizing trustees to set apart or appropriate any of such stocks to answer a particular purpose, *e.g.* to provide for

an annuity given by Will, so as to facilitate the distribution of the testator's estate : *Re Owthwaite*, [1891] 3 Ch. 423.

The words “trust funds in his hands” are not confined to trust moneys awaiting investment, but include all trust funds in the hands of the trustee, whether at the time in a state of investment or not. *Hume v. Lopes*, [1892] A. C. 112, affirming the decision of the Court of Appeal in *Re Dick*, [1891] 1 Ch. 423.

- (a) In any of the Parliamentary Stocks or Public Funds or Government Securities of the United Kingdom :
- (b) On real or heritable securities in Great Britain or Ireland : (s).
- (c) In the Stock of the Bank of England or the Bank of Ireland :
- (d) In India $8\frac{1}{2}$ per cent. Stock, and India Three per cent. Stock or in any other Capital Stock which may at any time hereafter be issued by the Secretary of State in Council of India, under the authority of Act of Parliament, and charged on the revenues of India :
- (e) In any securities the interest of which is or shall be guaranteed by Parliament :
- (f) In Consolidated Stock created by the Metropolitan Board of Works, or which may at any time hereafter be created by the London County Council, or in Debenture Stock created by the Receiver for the Metropolitan Police District :
- (g) In the Debenture or Rentcharge or Guaranteed or Preference Stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock :
- (h) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than 200 years at a fixed rental to any such railway company as is

(s) See sect. 9 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), which provides that : "A power to invest trust money in real securities shall authorize and be deemed to have always authorized an investment upon mortgage of property held for an unexpired

term of not less than two hundred years, and not subject to any reservation of rent greater than one shilling a year, or to any right of redemption, or to any condition for re-entry except for non-payment of rent."

Of the Liability of an Executor. [Pt. IV. Bk. II.]

mentioned in sub-section (g), either alone or jointly with any other railway company :

- (i) In the Debenture Stock of any railway company in India, the interest on which is paid or guaranteed by the Secretary of State in Council of India :
- (j) In the "B." Annuities of the Eastern Bengal, the East Indian and the Scinde Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway :
- (k) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India :
- (l) In the Debenture or Guaranteed or Preference Stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than 5*l.* per centum on its ordinary stock :
- (m) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough, having according to the return of the last census prior to the date of investment a population exceeding fifty thousand, or by any County Council, under the authority of any Act of Parliament or Provisional Order :
- (n) In nominal or inscribed stock issued, or to be issued, by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area

having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners shall not have exceeded 80 per centum of the amount authorised by law to be levied :

- (o) In any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the order of the Court : (t) and also from time to time to vary any such investment (u).

Sect. 4. (1.) "It shall be lawful for a trustee under the powers of this act to invest in any of the stocks, funds, shares, or securities mentioned or referred to in section 3 of the Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

Purchase at a premium of redeemable stocks.

(2.) "Provided that it shall not be lawful for a trustee under the powers of this Act to purchase at a price exceeding its redemption value any stock mentioned or referred to in sub-sections (g), (i), (k), (l), and (m), which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or to purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate.

(3.) "It shall be lawful for a trustee to retain until redemption, any redeemable stock, fund or security which may have been purchased in accordance with the powers of this Act.

Sect. 5. "Every power conferred by this Act shall be exercised according to the discretion of the trustee, but subject

Discretion of trustees.

(t) See R. S. C. 1883, Order XXII. r. 17.

(u) These words are not confined to investments made under the Act, but extend to any investment, whenever made, upon any

such stocks, funds, or securities, as are mentioned in the section : *Re Dick* [1891], 1 Ch. 423 ; affirmed in the House of Lords, *sub nom. Hume v. Lopes*, [1892] A. C. 112.

to any consent required by the instrument (if any) creating the trust with respect to the investment of the trust fund.

Sect. 6. "This Act shall apply as well to trusts created before as to trusts created after the passing of this Act, and the powers hereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust."

Investments
authorised
apart from
Investment
Act, 1889.

And further apart from this Act the following investments of trust moneys have been authorised by other Acts under certain restrictions. Thus trustees may invest in—

- (1.) Debenture stock of companies whose mortgages or bonds are authorised as an investment, unless the contrary is expressed: 34 & 35 Vict. c. 27.
- (2.) Debentures issued under 28 & 29 Vict. c. 78, as amended by 33 & 34 Vict. c. 20, in cases where trustees can invest in the shares, stock, mortgages, bonds, or debentures of companies incorporated by, or acting under an Act of Parliament: 28 & 29 Vict. c. 78, s. 40.
- (3.) Securities of the Government of the Isle of Man created under 43 & 44 Vict. c. 8, where trustees can invest in Isle of Man or Colonial Government securities unless the contrary is expressed: 43 & 44 Vict. c. 8, s. 7.
- (4.) Charges under the Improvement of Land Act, 1864, or mortgages thereof, where trustees can invest in real securities, unless the contrary is expressed: 27 & 28 Vict. c. 114, s. 60.
- (5.) Nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875, where the trustees may invest in the debentures or debenture stock of any railway or other company unless the contrary is expressed: 38 & 39 Vict. c. 83, s. 27.

And further many local Acts of Parliament contain express provisions authorising trustees to invest in the stocks and debentures thereby authorised to be created (x).

(x) See Wolstenholme & Brington's Conveyancing Acts, 6th edit. p. 193. Lewin on Trusts, 9th edit. p. 349.

Again, it has already appeared (y), that where personal property is bequeathed for life, with remainder over, and not specifically, it is the duty of the executor, with certain exceptions, to convert it; and the tenant for life is entitled only upon that principle. In the case of *Dimes v. Scott* (z), a testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in government or real securities, of which they were to stand possessed, upon trust for A. during her life, and after her death, for B.: The trustees permitted a share which the testator had in an Indian loan, bearing interest at 10l. per cent., to remain for several years on that security, during which time they paid to A. the interest at 10l. per cent., which it yielded annually; and the loan being afterwards paid off, they invested the money in the three per cents., at a time when the funds were so low that the amount of stock purchased was considerably greater than if the conversion had taken place at the end of a year from the testator's death: And it was held by Lord Gifford, that the tenant for life was not entitled to the actual interest which the money yielded, while it remained on the Indian security, but only to the dividends of so much three per cent. stock as would have been purchased with it at the end of a year from the testator's death; that the trustees ought to be charged with the whole of the stock actually purchased, and all the sums actually received in respect of the Indian rate of interest; and they ought to be allowed in their discharge, as payments to the tenant for life, not the sums which they had, in fact, paid her, but only a sum equal to what she would have received for dividends, if the money had been transferred from the Indian security, and invested in the three per cent. stock at the end of a year from the testator's death: And this decision was confirmed, on appeal, by Lord Lyndhurst. In the case of *Mackenzie v. Taylor* (a),

Consequence of
not converting
property be-
queathed for
life with
remainder
over :

(y) *Ante*, p. 1248.

(z) 4 Russ. Chanc. Cas. 195.

(a) 7 Beav. 467.

where the testator gave his residuary personal estate to his executors upon trust, as soon as convenient after his death, to convert into money and invest the same, and the executors allowed it to be enjoyed in specie by Mrs. M., the tenant for life, as long as she lived, but three years after her death, they accounted for the value and paid it into Court; it was held by Lord Langdale that they ought to pay interest at four per cent. from her death to the day of such payment. In *Wightwick v. Lord (b)*, in a case where the Will gave no specific directions as to the payment of debts, the executor, who was also the ultimate residuary legatee, did not ascertain and secure the residue at the end of the year, but worked part of the property (a coal mine) to a profit for several years, when it ceased to be of any value; it was held, on a bill at the suit of a person having a charge for life on the residue, that the executor was not entitled to postpone the sale of the property to the prejudice of such person, and that having postponed it, he was chargeable with the value of the mine at the end of the year from the testator's death with interest thereon, and that that value must be calculated as constituted of the aggregate of the annual profits derived from the mine in all the subsequent years till it became unproductive, such annual profits to be treated as deferred payments.

But in *Baud v. Fardell (c)* it was held that an executrix, who was also tenant for life under a Will directing the residuary estate to be sold and the proceeds invested in government or other good securities, was not liable for not converting into consols a sum of Navy 5l. per cents. forming part of the residuary estate: for she had a discretion expressly reposed in her as to the nature of the investment.

Consequences
of retaining in
hand instead
of investing;
or of investing

Where trustees are bound by the terms of their trust to invest the money in the public funds, and instead of doing so, they retain the money in their hands, or invest it upon an insufficient security, the *cestuis que trust* may elect to

(b) 6 H. L. C. 217.

(c) 7 De Gex, M. & G. 628.

charge them either with the amount of the money, or with the amount of the stock which they might have purchased with the money (*d*): Where, however, the trustees are not bound to invest the money in the public funds, or in any specific security, but by the terms of the trust have a discretion to invest it in various ways, the authorities were conflicting on the question whether, if the trustees fail to invest as prescribed, the *cestuis que trust* can claim to charge them with the value of some particular security that might have been obtained, or whether they are merely chargeable with the whole amount of the trust fund, together with interest (*e*). But this question has been settled in favour of the latter view, by the decision of the Lords Justices in *Robinson v. Robinson* (*f*).

on a deficient security :
[See Stat. 22 & 23 Vict. c. 35, s. 31, post, p. 1735.]

This consideration leads to the question, how far an executor or administrator is liable, in respect of losses occasioned by not calling in the money of the testator already invested upon securities. Executors ought not, without great reason, to permit money to remain upon personal security longer than is absolutely necessary: Accordingly, in *Powell v. Evans* (*ff*), executors were charged with a loss caused by neglecting to call in money lent by the testator on bond (*g*). Though the *prima facie* rule is that executors should get in the assets of the testator within a year (*h*),

loss by not calling in money on securities, or in hands of banker.

(*d*) *Shepherd v. Moulds*, 4 Hare, 503, 504. *Pride v. Fooks*, 2 Beav. 430. *Robinson v. Robinson*, 1 De Gex, M. & G. 256.

(*e*) *Hockley v. Bantock*, 1 Russ. 141. *Watts v. Girdlestone*, 6 Beav. 188. *Ames v. Parkinson*, 7 Beav. 379, were in favour of the former view: *Marsh v. Hunter*, 6 Madd. 295, and *Shepherd v. Moulds*, 4 Hare, 500, of the latter.

(*f*) 1 De Gex, M. & G. 247. See also *Knott v. Cottee*, 16 Beav. 80, 81, by Romilly, M. R.

(*ff*) 5 Ves. 839.

(*g*) See also *ante*, p. 1694. *Row-*

ley v. Adams, 4 Mylne & Cr. 496, and *Eagleton v. Kingston*, 8 Ves. 466, 467. *Atty.-Gen. v. Higham*, 2 Y. & Coll. Chan. C. 634. The money, when called in, should be invested in the three per cents. or other authorised fund, if there is no present occasion for it: *Howe v. Lord Dartmouth*, 7 Ves. 149, 150. This seems a sufficient answer to the inquiry of Lord Camden in *Orr v. Newton*, 2 Cox, 276.

(*h*) *Grayburn v. Clarkson*, L. R. 3 Ch. 605, 606, *per* Page-Wood, L. J. *Sculthorpe v. Tipper*, L. R. 13 Eq. 232.

there is no inflexible rule, it would seem, as to the time within which they are bound to do so. In every case the particular circumstances must govern, and the Court allows the executors a reasonable discretion (i). Where executors have neglected to realise assets which are outstanding upon an improper investment there is no fixed period at which the loss is to be calculated. It depends on the particular nature of the property and the evidence affecting it. Thus in *Hughes v. Empson* (k) losses were occasioned by the non-sale of Crystal Palace shares which were at a premium at the testator's death, but which subsequently fell to a discount, and the executors were charged with the value at the end of twelve months. So in *Moyle v. Moyle* (l), executors and trustees who, for upwards of a year after the testator's death, allowed a considerable portion of the assets to be unproductive in the hands of a banker who failed, were, under the circumstances, charged with the loss (m). So executors were held personally liable in respect to the loss to the testator's estate of a sum outstanding on personal security, although the security was that of a bond of the testator's solicitor, and the money had been invested in that security by the testator some years before his death, and by his Will he directed that his trustees should get in his outstanding estate "as soon as conveniently might be" after his decease (n). But in *Buxton v. Buxton* (o), an executor who allowed part of a testator's assets to remain invested in Mexican bonds for a year and seven months after the testator's death, and eventually sold the bonds at a lower price than might have been obtained by a sale at an earlier period, but who appeared to have acted throughout with diligence and good faith, was held, by Sir C. C. Pepys, M.R., under the circumstances, not to be liable for the loss consequent on his not

(i) *Hughes v. Empson*, 22 Beav. 181, 183, *per* Romilly, M. R. *Marsden v. Kent*, 5 C. D. 598.

(k) 22 Beav. 181.

(l) 2 Russ. & M. 710.

(m) See *Johnson v. Newton*, 11 Hare, 168, 169.

(n) *Bullock v. Wheatley*, 1 Coll. 130.

(o) 1 Mylne & Cr. 80.

having sold them sooner: And his Honor further held, that a difference of opinion between two executors, as to the propriety of converting the assets at a particular period, followed by a demand made by one of them upon the other, to concur in effecting an immediate conversion, does not deprive the latter of the right to exercise his own discretion, or render him liable for the loss that may arise from the delay consequent on his declining to comply with the demand (p). This case has been followed in the case of *Marsden v. Kent* (q), where the Court held that where the executors had acted in the honest exercise of their discretion as to the time of selling property of a very uncertain and speculative character, they ought not to be made personally responsible for the loss arising from their not having sold within the twelvemonth.

Executors acting under a Will by which *an absolute discretion is given to them to postpone the sale and conversion of the testator's estate* are not bound by the ordinary rule above referred to, viz., to convert the property within a year, even though some of the property consists of shares in an unlimited company, nor will they be liable in the absence of *mala fides* for loss arising to the estate from the non-conversion (r). So too an express power to retain existing investments takes a case out of the rule as to the conversion of perishable property (s).

It is not the duty of an executor to call in money invested on real security, where no risk is apparent; nor are executors bound to convert leasehold property into three per cent. stock, unless under particular circumstances (t).

Generally speaking, if an executor appoints another to receive the money of his testator, and he receives it, it is the same thing as if the executor himself had actually received

Where executors have an absolute discretion to postpone sale of testator's estate.

Loss by failure of banker,

(p) See also *East v. East*, 5 Hare, 348.

(q) 5 C. D. 598.

(r) *Re Nerrington*, 13 C. D. 654.

(s) *Gray v. Siggers*, 15 C. D. 74.

(t) *Howe v. Lord Dartmouth*,

7 Ves. 150. *Ante*, p. 1248 *et seq.* As to whether Turnpike Bonds are real securities, see *Robinson v. Robinson*, 1 De Gex, M. & G. 247, and *Cavendish v. Cavendish*, 30 C. D. 227.

solicitor, &c.
See Stat. 22
& 23 Vict.
c. 35, s. 31,
post, p. 1735]

it, and will be assets in his hands; and, consequently, appointing another to receive, who will not repay, is a *devastavit* (u). Thus, in a case where the Will directed that one Edward Pistor should carry on the business of the testator to a given day, for the benefit of his estate, and the executors, from the confidence thus reposed by the testator in Pistor, permitted him to get in debts, without anything appearing on the Will to show the testator's intention to that effect, the Court of Exchequer held, that the executors must answer to the residuary legatees for the money so received by their agent (x). So where trustees for sale sold the trust property and placed the conveyance executed by them and having their receipt indorsed, in the hands of a solicitor, who received and misapplied the purchase-money, they were held liable for a breach of trust (y). Again, where trustees left some Exchequer Bills, in which they had properly invested trust money, in the hands of a broker, they were held personally liable upon a misapplication of the bills by the broker (z).

But with respect to losses sustained by the failure of bankers, or other persons into whose hands the money of the testator has been deposited by the executor, the rule seems to be, that where the deposit was made from necessity, or conformably to the common usage of mankind, the executor will not be responsible for the loss (a). So if the executor, living in London, and receiving money of the testator, should

(u) *Jenkins v. Plombe*, 6 Mod. 93.

(x) *Pistor v. Dunbar*, 1 Anstr. 107.

(y) *Ghost v. Waller*, 9 Beav. 497.

See also *Bostock v. Floyer*, L. R. 1 Eq. 26. *Sutton v. Wilders*, L. R. 12 Eq. 373. *Re Brier*, 26 C. D. 238. The liability of the executor, according to the case of *Speight v. Gaunt*, 9 A. C. 1, affirming the decision of the Court of Appeal reported in 22 C. D. 727, would seem to depend on whether the defaulting agent was properly em-

ployed. If he was properly employed in the ordinary course of business, the executor would not seem to be liable. *Sutton v. Wilders* (*ubi sup.*) would probably be decided differently since *Speight v. Gaunt*.

(z) *Matthews v. Brise*, 6 Beav. 239. See also *Rowland v. Witherden*, 3 Mac. & G. 568, and stat. 22 & 23 Vict. c. 35, s. 31, post, p. 1735.

(a) *Churchill v. Hobson*, 1 P. Wms. 243. *Knight v. Lord Plymouth*, 3 Atk. 480. S. C. 1 Dick.

remit to an attorney in the country to pay the debts there, and the attorney becomes insolvent, the executor will not be chargeable, if the business was transacted in the ordinary manner without any circumstance to show suspicion (b). So where executors employ an auctioneer to sell the leaseholds, or other portion of the assets, who receives the deposit and fails to pay it over, the executors will not, generally speaking, be held personally liable for the loss (c). But in *Darke v. Martyn* (d), where a testator died in March, 1823, and in January, 1824, and January, 1825, the executors and trustees deposited part of the assets in the hands of bankers on their notes carrying interest; and the bankers failed in November, 1825; Lord Langdale, M. R., held, that *as no necessity had been shown for such deposit*, the trustees were personally responsible for the loss (e). So where a trustee deposited a trust fund with his bankers, accompanied by an order in writing to invest the money in consols, he was held answerable for the omission of the bankers to make the investment, where he made no subsequent inquiry respecting it, until about five months afterwards, when the bankers became bankrupt (f). And if an executor pays the money of the testator into a banker's, not on any distinct account, but *mixing it with his own money*, it should seem that the executor will be answerable for the loss sustained by the failure of the banker (g).

120. *Ex parte* Belchier, Amb.

219. *Rowth v. Howell*, 3 Ves.

565. *Adams v. Claxton*, 6 Ves.

226. *Wilks v. Groom*, 3 Drewr.

584. *Swinfen v. Swinfen*, 29 Beav.

211. *Johnson v. Newton*, 11 Hare,

160. *Mendes v. Gueñalla*, 2 J. &

H. 259. *Fenwick v. Clarke*, 31

L. J. Ch. 728. *Re Bird*, L. R. 16 Eq.

203. *Speight v. Gaunt*, 9 App.

Cas. 1. *Re Brier*, 26 C. D. 238.

(b) *Bacon v. Bacon*, 5 Ves. 334,

335. *Castle v. Warland*, 32 Beav.

660.

(c) *Edmonds v. Peake*, 7 Beav.

239. See also stat. 22 & 23 Vict.

c. 35, s. 31, *post*, p. 1735.

(d) 1 Beav. 525.

(e) See also *Rehden v. Wesley*,

29 Beav. 213.

(f) *Challen v. Shippam*, 4 Hare,

555.

(g) *Wren v. Kirton*, 11 Ves.

377. *Fletcher v. Walker*, 3 Madd.

73. *Massey v. Banner*, 4 Madd.

413. S. C. 1 Jac. & Walk. 241.

Robinson v. Ward, Ry. & Mood.

274. S. C. 2 C. & P. 59. See

also *Salway v. Salway*, 2 Russ. &

M. 215, in which case, Lord Brough-

am held (overruling the decision

of Sir J. Leach, M. R., 4 Rus.

Review of law
in *Speight v.*
Gaunt.

The whole of the law on this particular point has been recently reviewed in the House of Lords in the case of *Speight v. Gaunt* (*h*). The general result seems to be this: Trustees are not bound personally to transact such business connected with or arising out of the proper duties of their trust, as according to the usual mode of conducting business of a like nature persons acting with reasonable care and prudence on their own account would ordinarily conduct through mercantile agents; and where, according to the usual and regular course of such business (*i*), moneys receivable or payable ought to pass through the hands of such mercantile agents (*k*), that course may properly be followed by trustees, though the moneys are trust moneys; and if under such circumstances, and without any other misconduct or default on the part of the trustees, a loss takes place through any fraud or neglect of the agents employed, the trustees are not liable to make good such loss (*l*). In conformity with this doctrine the statute 22 & 23 Vict. c. 35, s. 31 (*m*), enacts

60), that a receiver appointed by the Court is answerable for the loss of moneys consequent on the failure of a banker with whom they have been deposited for security, if the deposit be made in such a way that the receiver parts with the absolute control over the fund: This judgment was afterwards affirmed in Dom. Proc.: *White v. Baugh*, 9 Bligh, 181.

(*h*) 9 A. C. 1.

(*i*) Where an executor or trustee employs an agent to collect money under circumstances which make such employment proper, and the money collected is lost by the agent's insolvency, the burden of proof is not on the executor to show that the loss was not attributable to his own default, but on the persons seeking to charge him to prove that it was. *Re Erier*, 26 C. D. 235.

(*k*) This rule is subject to the limitation that the agent must not be employed out of the ordinary scope of his business. It is not part of the ordinary business of a solicitor to choose a valuer for trustees intending to invest money on mortgage. *Fry v. Tapson*, 28 C. D. 268.

(*l*) *Ex parte Belchier*, Amb. 218. A trustee although remunerated for his services is not liable for loss occasioned to the trust estate by the felonious acts of his servant, provided such servant is properly entrusted with the custody of the trust property, and is selected and employed without negligence: and *semble*, the liability of a trustee is not increased by the fact of his being remunerated for his services. *Jobson v. Palmer*, [1893] 1 Ch. 71.

(*m*) See *infra*, p. 1735.

that every instrument creating a trust shall be deemed to contain a clause exonerating the trustees from liability "for any banker, broker, or other person, with whom any trust moneys or securities may be deposited."

But neither this statute nor the doctrine of *Ex parte Belkier* (mm) authorises a trustee to delegate, at his own mere will and pleasure the execution of his trust, and the care and custody of the trust moneys, to strangers, in any case in which there is no moral necessity from the usage of mankind for the employment of such an agency. The cases of *Rowland v. Witherden* (n), *Bostock v. Floyer* (o), and many others show that trustees bound to invest trust moneys in authorised securities are *primâ facie* answerable for the proper care and custody of such trust moneys, until they are actually so invested; and will not be exonerated from liability if, in the meantime, they leave them in other hands, though the hands of professional advisers or agents, to whose assistance, for many purposes connected with the trust, they may properly have recourse (p).

The result of all the best authorities on the subject of the general liability of executors was thus stated by Lord Cottenham, in his judgment in the case of *Clough v. Bond* (q): "Although a personal representative, acting strictly within the line of his duty and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be entrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make

General result of authorities as to the liability of executors for loss of assets.

(mm) Amb. 218.

(n) 3 Mac. & G. 568, 574.

(o) 35 Beav. 603, 606. L. R. 1 Eq. 26.

(p) See per Lord Selborne, L. C. in *Speight v. Gaunt*, 9 A. C. 1, 5.

(q) 3 Mylne & Cr. 496.

it good however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive (*r*). Thus if he omit to sell property when it ought to be sold, and it be afterwards lost without any fault of his, he is liable (*s*); or if he leave money due upon personal security, which, though good at the time, afterwards fails (*t*). And the case is stronger if he be himself the author of the improper investment, as upon personal security, or an unauthorized fund. Thus he is not liable, upon a proper investment in the three per cents., for loss occasioned by the fluctuations of that fund (*u*), but he is for the fluctuations of any unauthorized fund (*x*). So when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted: Necessity, which includes the regular course of business in administering the property, will, in Equity, exonerate the personal representative: But, if without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable although the person possessing it be a co-executor or co-administrator" (*y*).

(*r*) Of course if there be fraud or wilful default on the part of the executor, or he be actuated by an improper motive, he will be liable for any loss. *De Cordova v. De Cordova*, 4 A. C. 692.

(*s*) *Phillips v. Phillips*, 2 Freem. 11. *Ante*, p. 1701. *Fry v. Fry*, 27 Beav. 144.

(*t*) *Powell v. Evans*, 5 Ves. 839. *Tebbs v. Carpenter*, 1 Madd. 290. *Ante*, p. 1703. See also p. 1718.

(*u*) *Peat v. Crane*, 3 Dick, 499, note. *Ante*, p. 1709.

(*x*) *Hancom v. Allen*, 2 Dick. 498. *Howe v. Lord Dartmouth*, 7 Ves. 137. *Ante*, p. 1709.

(*y*) *Langford v. Gascoyne*, 11 Ves. 333, *post*, p. 1730. *Shipbrook v. Lord Hinchinbrook*, 11 Ves.

252. 16 Ves. 477, *post*, p. 1730. *Underwood v. Stevens*, 1 Meriv. 712, *post*, p. 1736. *Styles v. Guy*, 1 Mac. & G. 422, *post*, p. 1734. *Trutch v. Lamprell*, 20 Beav. 116. The following are cases bearing on the general principles above stated, *viz.*, *Bacon v. Clark*, 3 My. & Cr. 294. *Lowry v. Fulton*, 9 Sim. 115. *Munch v. Cockerell*, 9 Sim. 339. 5 M. & Cr. 178. *Broadhurst v. Balguy*, 1 Y. & Coll. Ch. C. 16. *Booth v. Booth*, 1 Beav. 125. *Phillipson v. Gatty*, 7 Hare, 516. *Byrne v. Norcott*, 13 Beav. 336. *Garner v. Moore*, 3 Drewr. 277. *Lander v. Weston*, 3 Drewr. 389. *Collinson v. Lister*, 20 Beav. 356. 7 De G. M. & G.

In conclusion, the sections here set out of the following two statutes should be noted.

By sect. 56 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), it is provided that:—

- (1.) "Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt."
- (2.) "This section applies only in cases where consideration is to be paid or given after the commencement of this Act."

44 & 45 Vict.
c. 41, s. 56.
Receipt in
deed or
indorsed
authority for
payment to
solicitor.

And by sect. 2 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), it is provided that:—

- (1.) "It shall be lawful for a trustee (z) to appoint a solicitor to be his agent to receive and give a discharge for any money or any valuable consideration or property receivable by such trustee under the trust by permitting such solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in the 56th section of the Conveyancing and Law of Property Act, 1881 (zz); and no trustee shall be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by such solicitor shall have the

51 & 52 Vict.
c. 59, s. 2.
Receipt of
money by
solicitor as
agent.

634. *Gibbins v. Taylor*, 22 Beav. 300. (z) Which in this Act by sect.
344. *Selby v. Bowie*, 4 Giff. 300. 1 (3) includes an executor or ad-
Griffith v. Porter, 25 Beav. 236. ministrator.
Fry v. Fry, 27 Beav. 144, 146. (zz) *Ubi supra*.

same validity and effect, by virtue of the said 56th section, as the same would have had if the person appointing such solicitor had not been a trustee: Provided that nothing herein contained shall exempt a trustee from any liability which he would have incurred if this Act had not passed, in case he permits such money, valuable consideration, or property to remain in the hands or under the control of the solicitor appointed as aforesaid for a period longer than is reasonably necessary to enable such solicitor to pay or transfer the same to the trustee."

- (2.) "It shall be lawful for a trustee to appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to such trustee under or by virtue of a policy of assurance by permitting such banker or solicitor to have the custody of and to produce such policy of assurance, with a receipt signed by such trustee, and no trustee shall be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment: Provided that nothing herein contained shall exempt a trustee from any liability which he would have incurred if this Act had not passed, in case he permits such money to remain in the hands or under the control of the banker or solicitor appointed as aforesaid for a period longer than is reasonably necessary to enable such banker or solicitor to pay the same to the trustee."
- (3.) "This section shall apply only where the money or valuable consideration or property is to be received after the passing of this Act."

In what case
an executor is
liable for the

A *devastavit* by one of two executors or administrators shall not charge his companion (a), provided he has not in-

(a) Wentw. Off. Ex. 306, 14th edit. Anon. Dyer, 210, a. Harg-
thorpe v. Millforth, Cro. Eliz. 318.
Williams v. Nixon, 2 Beav. 472.

tionally or otherwise contributed to it: For the testator's *devastavit* having misplaced his confidence in one shall not operate to the prejudice of the other (*b*).

Hence, an executor shall not, under ordinary circumstances be responsible for the assets come to the hands of his co-executor (*c*). Hence, also, the circumstance that one of two executors had notice of the existence of a debt of superior degree, which he concealed from his co-executor, did not affect the latter, so as to make him guilty of a *devastavit* by paying an inferior debt (*d*); though, perhaps, if notice to one executor were proved, and nothing more appeared, it would have been presumed that he communicated it to his co-executor (*e*).

But where an executor, possessing assets of his testator hands over those assets to a co-executor, and they are misapplied by that co-executor, there the executor, who so hands them over, shall be answerable for their misapplication, unless he can show a good reason for having so acted (*f*).

(*b*) Cro. Eliz. 319.

(*c*) Cro. Eliz. 319. Littlehales v. Gascoyne, 3 Bro. Chanc. Cas. 74. Williams v. Nixon, 2 Beav. 472. Dix v. Burford, 19 Beav. 412. By Romilly, M. R. See *post*, p. 1861, as to a finding by a jury, upon a plea of *plene administravit* by several executors, that one only had assets. See also stat. 22 & 23 Vict. c. 35, s. 31, *post*, p. 1735.

(*d*) Hawkins v. Day, Ambl. 162.

(*e*) *Id.* See Timson v. Ramsbottom, 2 Keen, 35. Smith v. Smith, 2 Cr. & M. 231. Meux v. Bell, 1 Hare, 73.

(*f*) Townsend v. Barber, Dick, 356. Macpherson v. Macpherson, 1 Macq. H. of L. 243. However, in the case of Davis v. Spurling, 1 Russ. & M. 66, an executor was

employed by his co-executor as his agent to sell an estate which under the Will of the testator, the co-executor alone had power to sell: The executor so employed handed over the price of the estate to the co-executor, who afterwards misapplied it: And Sir John Leach, M. R., held, that although, by the Will of the testator, the price of the estate, when sold, was to be considered as part of his personal estate, yet the executor, so handing it over, was not accountable for the misapplication of it; inasmuch as he had no legal right to retain it: for it was in his hands, not as executor, but simply as agent of his co-executor, who alone had power to sell the estate and to receive the price of it.

The rule may, perhaps, be stated to be, that where, by any act done by one executor, any part of the representative estate comes to the hands of his co-executor, the former will be answerable for the latter, in the same manner as he would have been for a stranger, whom he had entrusted to receive it (*g*).

But if an executor is merely passive, by not obstructing his co-executor from getting the assets into his possession, the former is not responsible (*h*). If, however, the one, in any way, contributes to enable the other to obtain possession, he is answerable, notwithstanding his motive be innocent, unless he can assign a sufficient excuse (*i*). Thus, in the case of several executors, if, by agreement among themselves, one is to receive and intermeddle with such part of the estate, and another with such a part, each of them will be chargeable for the whole; because the receipts of each are pursuant to the agreement made between them (*k*). So

(*g*) See Mr. Cox's note to 661.

Churchill *v.* Hobson, 1 P. Wms. 241, and Lord Thurlow's judgment in Sadler *v.* Hobbs, 2 Bro. Chanc. Cas. 117. Accordingly in Home *v.* Pringle, 8 Cl. & F. 264, 268, the rule was stated to be that the appointment of one of several trustees to manage the property would not *per se* make the other trustees responsible for his acts; but it would make the trustee so appointed the agent of the other trustees for those purposes, and render them responsible for his acts, so far as they would have been responsible for the acts or receipts of a stranger. See also Toplis *v.* Hurrell, 19 Beav. 423, where the rule here stated was adopted by Romilly, M. R. See also Candler *v.* Tillett, 22 Beav. 363. Cowell *v.* Gatcombe, 27 Beav. 568. Ingle *v.* Partridge, 32 Beav.

661. (*h*) Langford *v.* Gascoyne, 11 Ves. 335. Candler *v.* Tillett, 22 Beav. 257. This, it should seem, applies only to cases where the question arises under a decree for the common accounts, and not under a special charge against the executor for wilful neglect and default: Terrell *v.* Mathew, 1 Mac. & G. 433, note (*a*). (See also the remarks of the reporters of that case, *ibid.*) He would clearly be liable if he stood by and saw his co-executor commit a breach of duty: See the cases cited *post*, p. 1735.

(*i*) Langford *v.* Gascoyne, 11 Ves. 335. Hewett *v.* Foster, 6 Beav. 259. Broadhurst *v.* Balguy, 1 Y. & Coll. Ch. C. 16. See also the cases collected in note (*g*).

(*k*) Gill *v.* Atty-Gen., Hardr. 314.

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Ch. II. § II.] *Devastavit—Co-executors.*

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where A., B., C., D. and E. (the two latter being married women) took out administration to an intestate, and afterwards appointed C. to be the acting administrator, and directed the creditors to pay their debts to him: and C. became insolvent; it was held that A., B. and the husbands of D. and E., were responsible for C.'s receipts (l). So where a man made several executors, who all joined in the sale of the testator's goods, but one only received the money, and he became insolvent; it was holden that they should all be charged (m).

Accordingly, an executor, having a fund standing in the joint names of himself and another, cannot, upon the mere representation of the co-executor, if false, be justified in doing an act that is an exercise of power over that fund: First, the act must be necessary for the purposes of the Will, and then the person, to whom the representation is made, has imposed upon him at least ordinary and reasonable diligence to inquire whether the representation is true (n).

Also, if an executor has been dealing with the assets a considerable time, much beyond that period, in which, according to the ordinary course, the debts would be paid, and he applies to the other executor to have a fund put into his hands exclusively, and the other does inquire, and satisfies himself that there are debts unpaid, and the real purpose of the executor making the application, was to apply the fund to the discharge of debts; if it turns out afterwards, that he had in his own hands a fund sufficient for the payment of those debts, and therefore the application of the other fund to that purpose was unnecessary, and that fund was not in fact devoted to the purpose for which it was provided, it would be impossible for the executor, who parted with it, to dis-

(l) *Lees v. Sanderson*, 4 Sim. 28.

(m) *Aplyn v. Brewer*, Prec. Chan. 173. *Burrows v. Walls*, 5 De G. M. & G. 233.

(n) *Shipbrook v. Lord Hinchinbrook*, 11 Ves. 254. *Hewett v. Foster*, 6 Beav. 259. *Broadhurst v. Balguy*, 1 Y. & Coll. Ch. C. 16.



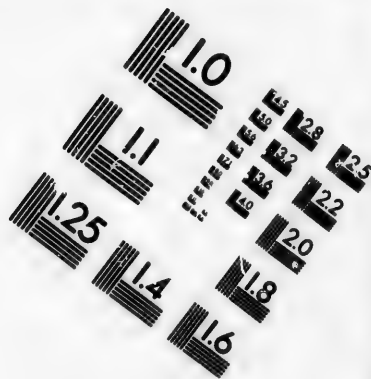
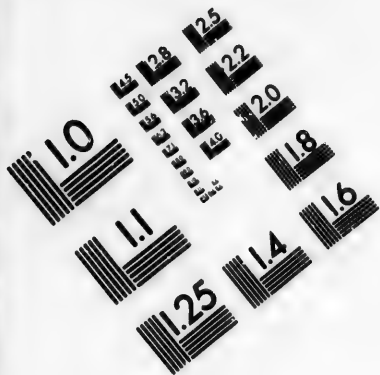
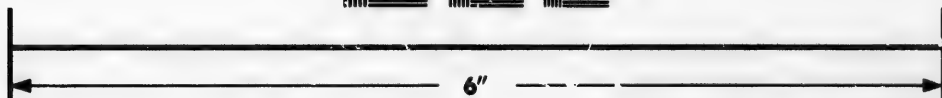
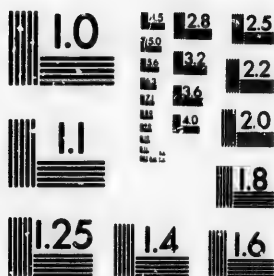


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charge himself: He would be subject to the imputation of negligence, as having been too easy with his co-executor; too remiss in not asking how he had been dealing with the assets in his hands (o).

Upon these principles, Lord Eldon held, in *Shipbrook v. Lord Hinchinbrook* (p), that where executors joined in a transfer of stock, vested in the name of all the executors, to a co-executor, upon his groundless representation that it was required for debts, the executors were answerable for the whole of the produce of the stock which they could not prove to have been applied by the co-executor to the payment of debts of the testator (q): But his Lordship further held, that they were not liable so far as they could prove the application to that purpose, although he possessed other funds, part of the assets, not through them, which funds he wasted.

Again, in *Langford v. Gascoyne* (r), it appeared from the affidavit of a witness, that on the day after the testator's funeral, his three executors, Gascoyne, Spurrell and Lambert, met at his house, and his widow, being present, left the room to fetch a bag of money: Upon her return with it, she asked the witness to which of the executors she should deliver it; and the witness not then having a good opinion of Gascoyne's circumstances, advised her to give it to Spurrell; upon which she passed by Gascoyne and Lambert, who were sitting near the door, and gave the bag into the hands of Spurrell, who counted the money over, and then delivered it into the hands of Gascoyne: The witness further stated, that at that time Gascoyne was not reputed to be in good circumstances: And Sir Wm. Grant held, that the money must be considered to have been so far in the hands of Spurrell, that he was answerable for what after-

(o) *Shipbrook v. Lord Hinchinbrook*, 11 Ves. 254. See also *Mendes v. Guedalla*, 2 Johns. & H. 259.

(p) 11 Ves. 252. S. C. 16 Ves. 477.

(q) See also *Chambers v. Min-*

chin, 7 Ves. 186. *Underwood v. Stevens*, 1 Meriv. 713. *Williams v. Nixon*, 2 Beav. 472. *Hewett v. Foster*, 6 Beav. 259. *Broadhurst v. Balguy*, 1 Y. & Coll. Ch. C. 16.

(r) 11 Ves. 333.

wards became of it; but that as to the other executor, Lambert, it was impossible to charge him: for that he had neither done nor said anything that in any degree contributed to the loss of the money, or to its getting into the hands of Gascoyne: And his Honor observed, that it was not incumbent in one executor by force to prevent the money getting into the hands of another.

So in *Moses v. Levi* (s), a testatrix bequeathed the residue of her property to certain persons, some of whom lived in the west of England, and others in Norfolk, and she appointed two persons to be executors, one of whom lived at Clifton, and the other at Diss: The executors having paid all the debts and specific legacies of the testatrix, entered into an arrangement by which the Clifton executor was to pay the residuary legatees in the west of England, and the Diss executor those in Norfolk; and the residuary funds were apportioned between them for that purpose: The Diss executor made default in payment of one of the legatees in that neighbourhood: And Alderson, B., held that the other executor was responsible for the default.

But if one executor places the property of the testator in the hands of the other, who happens to be a banker, or in such a situation that the act is not imprudent, the executor so depositing shall not be charged in case of a loss; for if he had been a sole executor, and had, under the same circumstances, placed the money in a banker's hands, he would not have been liable (t). So if an executor in the country executes a power of attorney to a co-executor in town for the purpose of changing a fund of the testator, as the Court would order it to be changed, as from the long annuities to three per cents., the act is justifiable, being for a purpose belonging to the administration of assets; but not to

(s) 3 Younge & Coll. 359. See 7 Ves. 198. See also Atty.-Gen. also Lewis v. Nobbs, 8 C. D. 591. v. Randell, MS. Rep. 21 Vin.

(t) Churchill v. Hobson, 1 P. Abr. 534, tit. trust. (N. a.) pl. 9. Wms. 241. Chambers v. Minchin,

change it to bank stock (*u*). So, in *Bacon v. Bacon* (*x*), where an executor, living in London, paid money to his co-executor, who had been the confidential agent and attorney of the testator, for the purpose of paying debts in the country where he resided, and the money was lost by his insolvency, Lord Loughborough held, that the executor, who had paid the money under such circumstances, should not be charged with the loss (*y*).

One executor not answerable for receipt of the other merely by taking probate, &c.

Again, it has been held, that one executor is not answerable for the receipt of the other, merely by taking probate, permitting the other to possess the assets, and joining in acts necessary to enable him to administer (*z*): Accordingly, where a bill of exchange was remitted to two agents, payable to them personally, who, on the death of the principal, became his executors, Lord Alvanley held, that the mere indorsement of one, after they were executors, in order to enable the other to receive the money, was not sufficient to charge him who did not receive it (*a*). So it was laid down by

(*u*) *Chambers v. Minchin*, 7 Ves. 193, by Lord Eldon. See *ante*, p. 1709 *et seq.*

(*x*) 5 Ves. 331.

(*y*) This decision was approved of by Lord Eldon, in *Chambers v. Minchin*, 7 Ves. 193. See *Davis v. Spurling*, 1 Russ. & M. 66, where Sir John Leach, M. R., intimates, that an executor, handing over assets to his co-executor for the express payment of a particular debt, will not be answerable for their misapplication. See also *Castle v. Warland*, 32 Beav. 660. But in *Hanbury v. Kirkland*, 3 Sim. 265, on a marriage, a sum of stock was settled for the separate use of the wife for life, remainder for the husband for life, remainder for their children, with power to change securities with consent of the wife: The dividends on the stock being reduced, one of the

trustees, in whom the husband and wife principally confided, and who, with his partners, was their solicitor, informed his co-trustees that he had an opportunity of investing the property in a mortgage at five per cent., and, with the consent of the husband and wife, requested his co-trustees to execute a power of attorney to enable him to sell the stock: The co-trustees, without inquiring into the matter, complied: The trustee sold the stock and absconded: And Sir L. Shadwell, V.-C., held that the co-trustees were liable. See also *Accord. Broadhurst v. Balguy*, 1 Y. & Coll. Ch. C. 16. *Trutch v. Lamprell*, 20 Beav. 116.

(*z*) *Hovey v. Blakeman*, 4 Ves. 596. But see *ante*, p. 1728, note (*h*), and *Styles v. Guy*, *post*, p. 1734.

(*a*) *Hovey v. Blakeman*, 4 Ves. 608, 609.

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Lord Redesdale in *Joy v. Campbell* (b), that if an executor, living in London, remits money to his co-executor to pay debts in Suffolk, "he is considered to do this of necessity: he could not transact business without trusting some persons, and it would be impossible for him to discharge his duty, if he is made responsible where he remitted to a person to whom he would have given credit, and would in his own business have remitted money in the same way: It would be the same, were one executor in India, and another in England, the assets being in India, but to be applied in England; there the co-executor is appointed for the purpose of carrying on such transactions; and the executor is not responsible; for he must remit to somebody, and he cannot be wrong if he remits to the person in whom the testator himself reposed confidence" (c).

But the rule, it should seem, was different at law prior to the Judicature Act: Thus, in *Crosse v. Smith* (d), it was held, that an executor administering, having once received money, assets of his testator, could not discharge himself, under a plea of *plene administravit* to an action by a bond creditor, by showing that he paid the money over to his co-executor, even for the purpose of satisfying the bond creditor, who had applied for payment to such co-executor if the co-executor afterwards misapplied the money by retaining it to satisfy his own simple contract debt. Now, however, the rule at Law as well as in Equity, is that the executor stands in the position of a gratuitous bailee, and, therefore, cannot be charged without some wilful default (e).

(b) 1 Sch. & Lef. 341.

(c) In *Speight v. Gaunt*, 22 C. D. 727, 744, Jessel, M. R., commenting on this case says: "That is a mere question of selecting an agent. Of course, although the testator reposed confidence in him something else might happen afterwards, the man might become

insolvent, or the like, it does not mean that, but it is an additional reason that a man who was in good credit at the time was actually named as executor by the testator."

(d) 7 East, 246.

(e) *Job v. Job*, 6 C. D. 562. Judic. Act, 1873, sect. 25 (sub-a. 11). See *ante*, p. 1535.

Liability of executor who stands by and sees a breach of trust committed by his co-trustee:

It may here be mentioned that by the established rules of Courts of Equity, it is the duty of all executors to watch over, and, if necessary, to correct the conduct of each other; and that an executor as well a trustee, who stands by and sees a breach of trust committed by his co-trustee, becomes responsible for that breach of trust (*f*). Accordingly in *Booth v. Booth* (*g*), a testator bequeathed to his partner and to one Batkin, his personal estate, upon trust to invest the same, for the benefit of his wife and children: Both the executors proved the Will, and the surviving partner retained the testator's monies in the trade, which were lost: Batkin took no active part in the trusts, but was cognizant of the breach of trust, and took no proceedings to prevent it: And Lord Langdale, M. R., held, that Batkin was responsible for the consequences of the breach of trust. So, in *Lincoln v. Wright* (*h*), two executors permitting their co-executor to retain in his hands the ascertained residue, were held by the same learned Judge to be liable for a breach of trust. Again, in *Styles v. Guy* (*i*), where two of three executors, with the knowledge that there were unsettled accounts subsisting at the testator's death between him and their co-executor, in which they had reason to believe that the latter was considerably indebted to the estate, took no effectual measures to compel him to account and pay or secure the balance for several years, at the end of which he became bankrupt, Lord Cottenham held, that the solvent executors (who were unable to prove that an attempt to recover the money at an earlier period would have been fruitless) were responsible for the loss, as having been occasioned by their wilful neglect and default (*k*).

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In cases of the description lately above considered, a trustee

(*f*) 1 Mac. & G. 433, by Lord Cottenham. *Williams v. Nixon*, 2 Beav. 475, by Lord Langdale. *Horton v. Brocklehurst*, 29 Beav. 510, by Romilly, M. R.
(*g*) 1 Beav. 125.

(*h*) 4 Beav. 427.

(*i*) 1 Mac. & G. 422.

(*k*) See also *Egbert v. Butter*, 21 Beav. 560. *Candler v. Tillett*, 22 Beav. 257.

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or executor will not be protected by the usual indemnity clause, exonerating him from all responsibility on account of the acts of his co-trustees or co-executors (I).

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By stat. 22 & 23 Vict. c. 35, s. 31, it is enacted that "every deed, Will, or other instrument creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following; that is to say, That the trustees or trustee for the time being of the said deed, Will, or other instrument, shall be respectively chargeable only for such monies, stocks, funds and securities, as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust monies or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, Will, or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the said deed, Will, or other instrument."

22 & 23 Vict. c. 35, s. 31.

Every trust instrument to be deemed to contain clauses for the indemnity as to loss of assets and reimbursement of the trustees.

(I) *Mucklow v. Fuller*, Jacob. 198. See also *Underwood v. Stevens*, 1 Meriv. 712. *Hanbury v. Kirkland*, 3 Sim. 265. *Williams v. Nixon*, 2 Beav. 472. *Dix v. Burford*, 19 Beav. 409. *Brumridge v. Brumridge*, 27 Beav. 5. But where the Will provided that any trustee who shall pay to his co-trustee, or enable him to receive monies for the general purposes of the Will, should not be

obliged to see to due application thereof or be responsible by express or implied notice of the misapplication, it was held that this was a good answer to a bill against two of three trustees to make good trust monies which they had allowed their co-trustee to receive: *Wilkins v. Hogg*, 3 Giff. 116. See *Accord. Pass v. Dundas*, 43 L. T. 665; 29 W. R. 332.

Liability of an executor who renounces after an act of administration.

It may here be observed, that if an executor administers part of the assets, he shall be charged with such as he has received, although he has renounced the executorship, and paid the money to a co-executor who proved the Will (m): For executors must either wholly renounce, or if they act to a certain extent as executors, and take upon them that character, they can be discharged only by administering the assets themselves, or by putting the administration into the hands of a Court of Equity (n). Thus in *Doyle v. Blake* (o), A., named executor in a Will, acted on behalf of particular legatees, disclaiming an intention of interfering generally: He afterwards renounced formally in favour of B. who was named a trustee in the same Will, who thereupon obtained administration *cum testamento annexo*: B. possessed himself of the assets, and afterwards died insolvent: And it was held that A. was liable, as executor, notwithstanding his renunciation; and was answerable for the acts of B., it appearing that he had a control over the assets, and B. being considered as having obtained possession thereof by his means. So in *Underwood v. Stevens* (p), one of two executors and trustees did not act, otherwise than by joining with his co-executor and trustee in the sale of stock, under a representation that the sale was necessary for payment of debts, which it was not; the produce was received by the latter, and the greater part applied by him to his own private purposes: And the first executor was held chargeable for the amount, except so far as any part was applied to the trust purposes; together with interest at four per cent.; notwithstanding the parties beneficially interested consented to and approved of the sale, under a similar misrepresentation. Again, in *Rogers v. Frank* (q), the defendant, named in the Will as executor, did not prove the Will, but before he

(m) *Read v. Truelove*, Ambl. 417.

(n) *Doyle v. Blake*, 2 Sch. & Lef. 231, 245. See *Riky v. Kemmis*, 1 Lloyd & Goold, 101.

Horton v. Brocklehurst, 29 Beav. 504.

(o) 2 Sch. & Lef. 231.

(p) 1 Meriv. 712.

(q) 1 Younge & Jerv. 409.

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renounced, he collected large sums belonging to the estate of the testator: And it was held that he was liable to be sued in Equity in the character of executor by the legatees under the Will, one of whom was also executrix, and had proved the Will (r).

But an executor, who has not proved, is not to be considered as acting, by assisting a co-executor who has proved, in writing letters to collect debts, or by writing directly to a debtor of the testator, and requiring payment (s). So, if one of two persons named executors disclaims and renounces, who afterwards possesses himself of assets as agent to the other, who has proved the Will, the former does not thereby become accountable as executor (t). So in *Stacey v. Elph* (u), a person named as executor and trustee under a Will did not formally renounce probate until after the death of the acting executrix, nor did he ever disclaim by deed the trust of the real estate; but he purchased a part of the real estate, and took the conveyance from the widow, who was tenant for life, and the heir, to whom the estate must have descended upon the disclaimer of the trust: During the life of the acting executrix, however, he interfered in the disposition of the testator's property, as her friend or agent: and it was held that he was not, under the circumstances, chargeable as executor or trustee. But in *Harrison v. Graham* (x), the case was as follows: Barbara Graham by Will appointed her mother, her sisters Margaret and Elizabeth, and her brother Robert, her executors, and died: Margaret alone proved the Will, and acted chiefly as executrix, and was described as the only acting one, in a letter of attorney executed by the others, who were therein described as executors, to empower Margaret to receive a quantity of stock: Robert, by virtue of another letter of

(r) See also *Harrison v. Graham*, stated *infra*. 9 Sim. 104.

(u) 1 M. & K. 195.

(s) *Orr v. Newton*, 2 Cox, 274.

(t) *Dove v. Everard*, 1 Russ. & Wms. 241, note (y) to 6th edition.

M. 231. See also *Lowry v. Fulton*,

attorney, executed by the other executors, transferred a quantity of the testatrix's S. S. Stock, received the money, and paid it over the same day to Margaret: After this she and the mother died, making Robert their executor: It did not appear that Robert had, under the first executorship, done any other act as executor, besides giving the one letter of attorney, and receiving the other: The question was, whether this was such an act of administration in Robert, as should make him chargeable as to his own estate: The Master had charged him, and the case came on, upon exceptions to the report: Lord Hardwicke:—"The question in the case is, whether or no this defendant had acted as an executor, and consequently whether he is chargeable? I agree that there may be cases where an executor may act, as an attorney to the other executors. If an executor renounces and then acts under a letter of attorney, it is no administration: for it depends on the nature of the act, accompanied with any other acts. Here is a Will and four executors. The Will is proved by one only, with a reservation of the rights of the other three. Here appear to have been acts done by them all, and a letter of attorney given by the defendant, together with the other executors, to Margaret, who indeed is described therein as the only acting executrix. But the defendant describes himself there as an executor. This was clearly acting as an executor. Then he afterwards accepts another letter of attorney from Margaret, and the rest of the executors. Shall executors be allowed to discharge themselves at their pleasure from being liable to assets? Money comes into his hands, he pays it over to Margaret; this cannot discharge him" (y).

Liability of
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It is a general rule, that where an executor has once proved the Will, he cannot renounce his representative character, and act under another: he can do no act in regard to the estate for which he is not answerable as executor. In the case of *Graham v. Kebble* (x), a partner in a house of

(y) See also *James v. Frearson*, cases collected, *ante*, pp. 230—233. 1 Y. & Coll. Ch. C. 370; and the (x) 2 Dow. P. C. 17.

agency in India, where a deposit was made in trust for a particular purpose, was made one of the executors of him who made the deposit, and proved the Will: A power of attorney was sent from the executors in Europe to the house of agency, for them to act under: But it was held, that as the partner named executor had proved the Will, the house could only act under his authority, and that he himself could not renounce the executorship, and act in another character. But a co-executor, who proved, but never acted, cannot be charged by reason of the mere circumstance that he received a letter by the post from a debtor to the estate, inclosing a bill of exchange on account of his debt, which bill the co-executor immediately sent to the acting executor, who afterwards became insolvent (*a*).

Formerly there was much discussion as to whether an executor who joined in signing a receipt for money of which he had never had control, but which had been received by his co-executor, thereby made himself liable for its application (*b*).

The non-liability of the executor appears to be now fully settled by the stat. 22 & 23 Vict. c. 35, s. 31 (*ante*, p. 1735).

Although it is true, as a general rule, that concurrence in the act of *devastavit* on the part of the parties injured by it, or acquiescence without original concurrence, will release the executors (*c*), yet the Court must inquire into all the circumstances which induced concurrence or acquiescence, and ascertain whether their conduct really amounts to such a previous sanction or subsequent ratification as ought to relieve the executors from responsibility (*d*).

(*a*) *Balchen v. Scott*, 2 Ves. 678.

(*b*) See 8th edit. of this Work, pp. 1840—1843.

(*c*) *Griffiths v. Porter*, 25 Beav. 236.

(*d*) *Walker v. Symonds*, 3 Swanst. 1. *Burrows v. Walls*, 5 De G. M. & G. 233, 251. *Davies v. Hodgson*, 25 Beav. 177. Neglect to sue, even for eighteen years, by a specialty creditor, is not such

acquiescence in the non-payment by an executor of a sum payable under a covenant as to preclude the creditor from suing or charging the executor with a *devastavit* in neglecting to convert shares in a bank, which afterwards failed, and raise the necessary sum to pay the amount: *Re Baker*, 20 C. D. 230. The Court of Appeal in this case refused to draw any inference of concurrence or acquiescence from

Liability of a co-executor joining in a receipt.

Stat. 22 & 23 Vict. c. 35, s. 31.

When a *devastavit* is released by concurrence or acquiescence

51 & 52 Vict.
c. 59, s. 6.
Indemnity for
breach of
trust.

It may be noted that by sect. 6 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), it is provided that :

- (1.) "Where a trustee (*e*) shall have committed a breach of trust at the instigation or request, or with the consent in writing (*ee*) of a beneficiary, the Court may, if it shall think fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use, whether with or without a restraint upon anticipation, make such order as to the Court shall seem just (*eee*) for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him."
- (2.) "This section shall apply to breaches of trust committed as well before as after the passing of this Act, except where an action or other proceeding shall be pending with reference thereto at the passing of this Act."

Distinction as
to executors'
liability
between
creditors and
legatees.

It may be observed, in concluding this subject, that in *Churchill v. Hobson* (*f*), Lord Harcourt took a distinction between creditors and legatees (*g*). But Lord Thurlow, in *Sadler v. Hobbs* (*h*), said that this seemed to him an odd

neglect to sue within the time limited by the Statute of Limitations. On the other hand, in *Sleeman v. Wilson*, L. R. 13 Eq. 36, where persons claiming as beneficiaries under a trust acquiesced for many years in no steps being taken towards realizing securities, a portion of the trust estate, and after the death of the trustee filed a bill against the executors of the trustee, it was held that the plaintiffs, by their acquiescence, had lost their right to make any claim against the estate of the trustee: Cf. *Dixon v. Dixon*, 9 C. D. 587. *Re Hulkes*, 33 C. D. 552.

(*e*) Which, as above stated, includes, by sect. 1 (3), an executor or administrator.

(*ee*) The words "in writing" apply only to "consent," and not to "instigation" or "request." *Griffith v. Hughes*, [1892] 3 Ch. 105.

(*eee*) The discretion which this section confers upon the Court of ordering that the interest of the beneficiary be impounded by way of indemnity to the trustee, ought to be exercised in a case where both the trustee and the instigating beneficiary were aware of the facts which constitute the breach of trust. *Griffith v. Hughes*, *ubi sup.*

(*f*) 1 P. Wms. 242.

(*g*) See the remark of Lord Northington on this distinction, *Haden v. Parsons*, 1 Eden, 148.

(*h*) 2 Bro. Chanc. Cas. 117.

distinction, that a creditor should have a right to charge an executor and a legatee not. It should seem, however, that there may be cases where the strictness of law would charge a man as executor as to creditors, in which a Court of Equity would not charge him as to legatees: For example, legatees are bound by the terms of the Will, but creditors are not so: and therefore, in many instances executors would be discharged as against legatees, though not as against creditors (i).

It remains to consider the doctrine of *devastavit*, as applied to the case of a married woman, executrix or administratrix.

It is provided by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), that:—

Sect. 1 (2.) "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

And by sect. 24: "The word 'contract' in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or *devastavit* committed by any married woman being a trustee, or executrix, or administratrix, either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word 'property' in this Act includes a thing in action."

And by sect. 18: "A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee

Present law as to liability of *feme covert* executrix.

45 & 46 Vict. c. 75.

(i) *Doyle v. Blake*, 2 Sch. & Lef. 239, 240.

alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer, or join in transferring, any such annuity or deposit as aforesaid (*k*), or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid (*k*), or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*."

And by sect. 23: "For the purposes of this Act the legal personal representatives of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living."

Liability of husband and *feme covert* executrix for *devastavit* before Married Women's Property Act, 1882: before marriage:

Before the passing of the Married Women's Property Act, 1882, if a *feme sole*, being an executrix or administratrix, wasted the goods of her testator or intestate and then married, her husband was liable, as long as the coverture lasted, for the *devastavit* (*l*). But, upon her death his liability ceased: And such being the principle of law, Courts of Equity have held, that they could not establish any rule upon the difference whether the husband had or had not received a portion with his wife (*m*).

It must, however, be observed, that if the wife was entitled to any *choses in action*, which the husband did not reduce into possession in her lifetime, so that it became necessary for him to take out administration to her, he was liable, as her administrator, for her *devastavit*, by virtue of the statute 30 Car. II. c. 12 (*n*).

during coverture:

With respect to the *devastavit* of the wife committed during the coverture, the husband was liable in law and in equity, as long as both parties were alive, for the acts of his wife as executrix or administratrix: for, as she had no power

(*k*) See sect. 6 of the Act.

(*l*) *Kings v. Hilton*, Cro. Car. 603. *Heyward's case*, Moore, 761. *Lumley v. Hutton*, 1 Roll. Rep. 268, 269. *Bachelor v. Bean*, 2 Vern. 60. Com. Dig. Baron and

Feme (N.). *Palmer v. ...field*

3 Beav. 227.

(*m*) *Adair v. Shaw*, 1 Sch. & Lef. 263.

(*n*) See *ante*, p. 1601.

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to act alone, his assent was presumed (o) : And it was bolden, that the husband, though living separate from his wife, should be charged with her *devastavit* (p). If the assets were wasted, during the coverture, either by the husband or wife, a creditor or legatee of the testator might, it should seem, sue the wife as well as the husband, and if she predeceased him, her estate was answerable (q).

Upon the death of the wife, the general rule was, that the liability of the husband (except as her administrator) for his wife's *devastavit*, committed as well during coverture as before, ceased (r).

But in Equity, the surviving husband was liable for whatever assets came to the hands of his wife, or his own hands, during the coverture; upon the principle that all persons coming into possession of property bound by a trust are chargeable in Equity as trustees: The cases establishing this head of Equity are collected and commented upon by Lord Redesdale in his elaborate judgment in *Adair v. Shaw* (s), in which case his Lordship held, that where a *feme covert* obtained administration, and the goods were wasted during coverture, and the husband died, his assets were chargeable in Equity for the waste committed during coverture. So in *Smith v. Smith* (t), Romilly, M. R., said it was settled law that a husband was liable for all the assets received or *devastavits* committed, either by himself or by his wife during the coverture, in respect of an estate of which his wife was legal personal representative, and that in this respect the husband was liable at law during his life and his estate after his death (u).

husband's liability after coverture for assets come to his hands :

liability of his estate where the wife survives.

(o) *Adair v. Shaw*, 1 Sch. & Lef. 266.

(p) *Paget v. Read*, 1 Vern. 143.

(q) *Kingham v. Lee*, 15 Sim. 401, by Shadwell, V.-C.

(r) *Adair v. Shaw*, 1 Sch. & Lef. 261. 1 Saund. 219, d, note to *Wheatley v. Lane*. Likewise, if the goods of the testator remain *in specie* in the hands of the husband, the party entitled to them

may, after the death of the wife, bring an action of trover or detinue against the husband to recover them : 1 Sch. & Lef. 262.

(s) 1 Sch. & Lef. 243. See also *Clough v. Bond*, 3 My. & Cr. 499. 8 Sim. 594.

(t) 21 Beav. 385, 387.

(u) See also *Charlton v. Coombes*, 4 Giff. 382.

Executors'
accounts :

they shall
account for
all profits :

On the subject of the accounts of an executor or administrator, there has already been occasion to state, that he must account for all profits which have accrued in his own time, either spontaneously, or by his acts, out of the estate of the deceased (*v*). Therefore, if an executor has a lease for years which yields profits to the value of 20*l.* a year, rendering rent of 10*l.* a year, he shall account for 10*l.* a year, as assets (*w*). So if the executor carries on the trade or business of the testator, whether in pursuance of a provision in articles of partnership entered into by the deceased, or by direction of the testator contained in his Will, or under the direction of the Court of Chancery, the profits must be accounted for as assets (*x*). Where the executors employ the assets in carrying on the trade for their own benefit, the legatees are entitled, at their option, to interest at 5 per cent. on the amount of assets employed, or the profits actually made (*y*). An executrix who held the residue of the testator's estate in trust for herself for life and after her death for the children of the testator, entered into a fresh partnership with two other persons and brought in the testator's assets as part of the capital of the firm, the other partners having notice of the trusts of the testator's will, and it was held that the executrix and the other partners were bound to make good to the children the assets of the testator employed in trade, together with all profits, or else with interest at 5 per cent., at the option of the children (*z*). It will be observed that in *Flockton v. Banning* (*a*) the transaction was not a mere loan in breach of trust as in *Stroud v. Gwyer* (*b*) and *Vyae v. Foster* (*c*), but an embarking of trust funds in a partnership

(*v*) *Ante*, p. 1519. So he must account for all profits derived from his office as executor, as where he abandons it in favour of another for a valuable consideration : *Sugden v. Crossland*, 3 Sm. & G. 192.

(*w*) *Godolph.*, Pt. 2, c. 24, s. 1. *Com. Dig.* Assets (C.).

(*x*) *Ante*, pp. 1520, 1681. *Palmer v. Mitchell*, 2 M. & K. 672.

Willett v. Blanford, 1 Hare, 253.

(*y*) *Wedderburn v. Wedderburn*, 22 Beav. 100. *Post*, p. 1753.

(*z*) *Flockton v. Banning*, L. R. 8 Ch. 323, note.

(*a*) L. R. 8 Ch. 323, in note to *Vyae v. Foster*.

(*b*) 28 Beav. 130.

(*c*) L. R. 8 Ch. 309. L. R. 7 H. L. 318.

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business, and that all the partners were cognizant of the breach of trust and were defendants in the suit. It will also be observed that in the case of *Vyse v. Foster*, the partnership business in which the estate of the dead partner was embarked was duly wound up and the share of the dead partner ascertained, and the case therefore did not fall within the class of cases of which *Crawshay v. Collins* (d), *Brown v. De Tastet* (e), *Yates v. Finn* (f), are leading authorities. And the executor may be made to account for and pay over the profits, although the persons in partnership with whom he had made those profits are not made parties to the suit. So in the case of surviving partners who are the executors of the deceased partner, and who continue the trade after his death, employing his assets, they must account for the profits made by such employment (g), and it makes no difference that they have taken a security for it in the form of a mortgage of the real and personal property belonging to the partnership (h). It will be observed that, in the cases referred to, the relation of the executors and surviving partners was that of partners. In the case of *Vyse v. Foster* (i), the terms of the articles of partnership were such that on the death of any partner his share was to be taken by the surviving partners at a price to be ascertained from the last stocktaking, and to be paid by instalments extending over two years with interest at 5 per cent. from his death. The testator appointed three executors, one of whom was one of his partners in the business, and another some years after his death became a partner, and the third never was concerned in the business. The relation, therefore, between the executors and surviving partners was that of creditor and debtor, and the executors allowed the price payable by the surviving partners to remain outstanding on the personal security of persons engaged in trade: one of

(d) 15 Ves. 218.

ubi supra. Townend v. Townend,

(e) Jac. 284.

1 Giff. 201.

(f) 13 C. D. 839.

(h) *Ibid.*

(g) Wedderburn v. Wedderburn,

(i) L. R. 8 Ch. 309.

the executors at first and afterwards two of them being engaged in such trade as partners and having the use of the moneys so left in their hands. This the Court held to be, at least technically, a breach of trust, and James, L. J., in dealing with the liability incurred by the executors by this breach of trust says: "If an executor commits a breach of trust, he and all those who are accomplices with him in that breach of trust are all and each of them bound to make good the trust funds and interest. If an executor or a trustee makes profit by improper dealing with the assets or trust fund, that profit he must give up to the trust: if that improper dealing consists in embarking or investing the trust money in business, he must account for the profits made by him by such employment in such business; or at the option of the *cestui que trust*, or if it does not appear or cannot be made to appear what profits are attributable to such employment, he must account for trade interest, that is to say, interest at 5 per cent." (j). The learned Lord Justice then pointed out that in the case in question it did not appear, and could not be made to appear, what profits were attributable to the employment of the trust money in the business, and the Court held that the plaintiff, who was one of the *cestuis que trustent*, was not entitled to any account of profits, the mere delay by executors in calling in any debt due to the testator's estate from the firm of which some of the executors were members not giving his estate any right to share in the profits of the business.

This decision of the Court of Appeal was affirmed by the House of Lords (k), and Lord Cairns, L. C., in delivering his opinion said: "If a partner in a trading firm dies, and if he constitutes one or more of his co-partners his executors, and if there is nothing special in the contract of co-partnership, and if the assets of the testator are not withdrawn from the co-partnership but are left in it, and no liquidation is arrived at, no settlement of accounts come to, it is a trite and

(j) L. R. 8 Ch. 329.

(k) L. R. 7 H. L. 318.

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familiar rule in the Court of Chancery to hold that the estate of that testator is to all intents and purposes entitled to the benefit of a share of the profits which are made in the trade after his death. And if this should happen, which is the principle of another class of cases, that the partnership articles have given the surviving partners an option to take to the interest of the testator on certain terms, at a certain price, to be fixed by arrangement after the death of the testator, an option or power which may be accepted or refused, but which if accepted and acted upon, must be acted upon according to the terms on which it is given; if in a case of that kind the surviving partners, or one or more of them, being also executors of the deceased partner, are found not to have pursued exactly the terms of the power or option which has been given, then again the power or option to become purchasers of the interest of the testator after his death falls to the ground, and the partnership remains an unliquidated partnership, to a due share of the profits of which the estate of the testator will continue to be entitled until liquidation actually takes place." Lord Cairns, after pointing out that on the facts of the particular case before the House the plaintiff was not entitled to an account of the profits, proceeded thus: "I am bound to say that it appears to me that whenever a case shall occur in which relief upon the footing of an account of profits ought to be given, if it should appear that the executors of a deceased partner, acting along with surviving partners, have deliberately and without justification employed the assets of the testator in the trade of the partnership, I should expect to find that the Court of Chancery would be prepared to hold that all partners, not merely those who are executors of the testator but also the surviving partners who are not executors, would be liable to account for profits made by the employment of that which to the knowledge of all of them is trust money which ought not to have been so applied. But I have not heard of any case, and I have not been able to find any case—for I put aside the case of *Brown v. De Tastet* (kk) by reason of the

great peculiarity of the facts of that case—where one surviving partner, being an executor, has been made answerable for the whole of the profits made in the trade by the employment of the capital of the testator, those profits being received not merely by the executor but by other partners not brought before the Court nor subjected to any liability under the decree.”

On the other hand, where the surviving partners admit the executor into the firm in his individual character, and the business is carried on without employing, in any way, any part of the assets of the testator, he will not have to account for profits as assets (*l*). Accordingly, in *Cook v. Collingridge* (*ll*), a sale of a testator's share in a partnership trade, and the property belonging to it, made by his executors to his partners, for the purpose of being resold to one of his executors, was set aside, and his estate held entitled to his aliquot proportion of the subsequent profits as if the partnership had continued (*m*). And it is a general rule, that an executor cannot be allowed, either immediately or by means of a trustee, to be a purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased (*n*). So if an executor compounds debts or mort-

(*l*) *Simpson v. Chapman*, 4 De G. M. & G. 154.

(*ll*) *Jacob*, 607. See 27 Beav. 456, note.

(*m*) “One of the most firmly established rules is, that persons dealing as trustees and executors must put their own interest entirely out of the question, and this is so difficult to do in a transaction in which they are dealing with themselves, that the Court will not inquire whether it has been done or not, but at once says that such a transaction cannot stand.” By Lord Eldon, *Jacob*,

621. See *Acc. Wedderburn v. Wedderburn*, 2 Keen, 722. 4 My. & Cr. 11. *Willett v. Blanford*, 1 Hare, 253. See also *Portlock v. Gardner*, 1 Hare, 594, 603.

(*n*) *Hall v. Hallett*, 1 Cox, 134. *Watson v. Toone*, Madd. & Geld. 153. *Ante*, p. 807. *Smedley v. Varley*, 23 Beav. 358. See *De Cordova v. De Cordova*, 4 App. Cas. 692. In *Clark v. Clark*, 9 App. Cas. 733, it was held by the Privy Council that a sale is not to be avoided merely because when entered upon the purchaser has the power to become trustee of

gages, and shall not and legatees them, the surplus for a testator for a surplus was held the testator

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gages, and buys them in for less than is due upon them, he shall not take the benefit of it himself, but other creditors and legatees shall have the advantage of it; and for want of them, the benefit shall go to the party who is entitled to the surplus (*o*). So in a case where the executor of a mortgagee for a term of years purchased the equity of redemption in fee for a small sum in his own name, and for his own benefit, it was held that he was a trustee of the fee for the benefit of the testator's estate (*p*).

Again, if an executor lays out the assets on private securities, although he shall answer for all deficiencies which may be caused thereby (*q*), he must account to the estate for all the benefit (*r*). Indeed, the principle is general, that an executor, if he will take upon himself to act with regard to the testator's property in any other manner than his trust requires, puts himself in this situation: that if there be any loss he must replace it; but he cannot possibly be a gainer by it: any gain must be for the benefit of his *cestui que trust* (*s*).

This may be the proper place to inquire, under what circumstances executors or administrators shall be charged with interest on the assets retained in their hands. There

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the property purchased, as, for instance, by proving the Will which relates thereto, though in point of fact he never does become such. Such a purchaser is under no disability, and in order to avoid such sale it must be shown that he in fact used his power in such a way as to render it inequitable that the sale should be upheld.

(*o*) Anon. 1 Salk. 155. *Ex parte* James, 8 Ves. 348. Where an executor contracted with legatees for the purchase of their legacies, which were accordingly assigned to a trustee for him, in consideration of sums of money less in amount than the legacies, it was

admitted that the transaction could not be sustained for the benefit of the executor; and it was also held that the deed of assignment did not operate as a release of the estate, and could not be upheld, as against the legatees who executed it, for the benefit of their co-legatees: *Barton v. Hassard*, 3 Dr. & W. 461.

(*p*) *Fosbrooke v. Balguy*, 1 M. & K. 226. 3 Sug. V. & P. 271, 10th edit.

(*q*) See *ante*, p. 1707.

(*r*) *Adye v. Feuilloteau*, 1 Cox, 24.

(*s*) *Pisty v. Stace*, 4 Ves. 622. *Crosskill v. Bower*, 32 Beav. 86.

are two grounds on which an executor or administrator may be charged with interest: 1st. That he has been guilty of negligence in omitting to lay out the money for the benefit of the estate: 2nd. That he himself has made use of the money, or has committed some other *misfeasance*, to his own profit and advantage (*t*).

1st. With respect to neglect on the part of the executor in not laying out balances, it must be observed, that it frequently may be necessary and justifiable for an executor to keep large sums in his hands to answer the exigency of the testator's affairs (*u*), especially in the course of the first year after the decease of the testator; in which case such necessity is so fully acknowledged, that according to the ordinary course of the Court, the fund is not considered distributable until after that time (*z*). But if the Court observes that an executor keeps money dead in his hands without any apparent reason or necessity, then it becomes negligence, and a breach of trust, and the Court will charge the executor with interest (*a*). And it seems, that outstanding demands, even on probable grounds, are no reason why the executors should not lay the testator's money out (*b*). But an executor shall not be charged with interest

(*t*) *Rocke v. Hart*, 11 Ves. 59, 60. *Tebbs v. Carpenter*, 1 Madd. 306, 307. *Kildare v. Hopsen*, 4 Bro. P. C. 550, Toml. edit. *Lincoln v. Allen*, 4 Bro. P. C. 553, Toml. edit. *Ashburnham v. Thompson*, 13 Ves. 401.

(*u*) See *Dawson v. Massey*, 1 Ball & B. 231.

(*z*) *Forbes v. Ross*, 2 Cox, 115, 116, by Lord Thurlow.

(*a*) *Littlehales v. Gascoyne*, 3 Bro. Ch. C. 73. *Brown v. Southouse*, 3 Bro. Ch. C. 108. *Franklin v. Frith*, 3 Bro. Ch. C. 433. *Hall v. Hallett*, 1 Cox, 134. *Seers v. Hind*, 1 Ves. 294. *Longmore v. Broom*, 7 Ves. 124. *Ashburnham*

v. Thompson, 13 Ves. 401. *Turner v. Turner*, 1 Jac. & W. 39. *Goodchild v. Fenton*, 3 Y. & Jerv. 481. *Stafford v. Fiddon*, 23 Beav. 386. *Johnson v. Prendergast*, 28 Beav. 480. In order to give a claim for interest, there must be a clear case of improper retention of balances to a considerable or substantial amount: *Jones v. Morrall*, 2 Sim. N. S. 241, 252. See also *Davenport v. Stafford*, 14 Beav. 319. The executors may be charged with interest on balances, though not claimed by the bill: 1 Jac. & W. 39. See *Jones v. Morrall*, 2 Sim. N. S. 241.

(*b*) *Franklin v. Frith*, 3 Bro. Ch.

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for a balance in his hands, retained under a fair apprehension of his right to it (c).

As to the rate of interest which the executor shall pay, the rule appears to be, that in those cases, where negligence alone is imputable to him, he shall be charged only with 4l. per cent. in respect of the balances, which he ought to have laid out, either in compliance with the express directions of the Will, or from his general duty, where the Will is silent on the subject (d). In order to induce the Court to charge the executor with more than 4l. per cent. a special case is necessary (e).

But 2ndly. Where there has been a direct breach of trust,

C. 434. 1 Madd. 305. It was resolved by Sir Joseph Jekyll, in *Taylor v. Gerst*, Mosely, 99, that if money placed out at interest be called in by the executor without any cause, he shall pay interest for it: But in *Newton v. Bennet*, 1 Bro. Ch. C. 361, Lord Thurlow said that an executor had an honest discretion to call in a debt bearing interest, if he thought the same in hazard. It should seem that he ought to lay it out again immediately in the Three per Cents., or other authorised security.

(c) *Bruere v. Pemberton*, 12 Ves. 386. So as to money paid away under a mistake as to the legal right to it: *Saltmarsh v. Barrett*, 31 Beav. 349. But in the late case of *Re Hulkes*, 33 C. D. 552, this decision, viz., that executors who, acting *bona fide*, have distributed the assets upon what turns out to be an erroneous construction of the will are not liable to be charged with interest upon the principal sums wrongly paid, which must be refunded to the estate, was dissented from by Chitty, J., as departing from the

principle established in *Atty.-Gen. v. Köhler*, 9 H. L. C. 654, and *Atty.-Gen. v. Alford*, 4 De G. M. & G. 843. An administrator *pendente lite* is not liable to pay interest upon a balance in his hands during the pendency of the suit in the Ecclesiastical Court: *Gallivan v. Evans*, 1 Ball & B. 191. The Court will not charge an executor, who has been guilty of delay in accounting, with interest on arrears of income unpaid by him: *Blogg v. Johnson*, L. R. 2 Ch. 226.

(d) *Dornforth v. Dornforth*, 12 Ves. 130, note (29), 2nd edit. S. C. cited 1 Madd. 302. *Ashburnham v. Thompson*, 13 Ves. 401. *Rooke v. Hart*, 11 Ves. 58, 60, 61. *Tebbs v. Carpenter*, 1 Madd. 307. *Sutton v. Sharp*, 1 Russ. Ch. C. 151. *Melland v. Gray*, 2 Coll. 295. *Re Hulkes*, 33 C. D. 552.

(e) *Tebbs v. Carpenter*, 1 Madd. 290, 306. *Mousley v. Carr*, 4 Beav. 49. *Hoaking v. Nicholls*, 1 Y. & Coll. Ch. C. 478, 480. See *De Cordova v. De Cordova*, 4 App. Cas. 692.

the executor may be charged with a higher rate of interest. With respect to employing the assets to his own advantage, Lord Hardwicke, on two occasions (*f*), expressed an opinion that an executor might do so without impropriety, and without being liable to any charge for interest. But this doctrine has been entirely overruled by more modern cases (*g*). And it is now established, that if the executor makes use of the money, he ought to pay the interest he made (*h*); upon the principle just above considered, that he ought not to derive any profit from the trust property (*i*). Hence it has become a settled rule that if a trustee, having trust money in his hands, knowingly applies it to his own use, or in his trade, he shall be charged with interest at the rate of 5*l.* per cent. (*k*). If the fund is employed in trade, the *cestuis que trustent* have a right to an option of taking either the interest or the profits which have arisen from the trade (*l*): but they must elect to take either the profits for the whole period, or the interest for the whole period (*m*).

(*f*) *Adams v. Gale*, 2 Atk. 106.
Child v. Gibson, 2 Atk. 603.

(*g*) *Perkins v. Baynton*, 1 Bro. Ch. C. 375. *Newton v. Bennet*, 1 Bro. Ch. C. 361. *Forbes v. Ross*, 2 Bro. Ch. C. 439. *Tebbs v. Carpenter*, 1 Madd. 304.

(*h*) *Forbes v. Ross*, 2 Cox, 116.
Rocke v. Hart, 11 Ves. 60.

(*i*) *Ante*, p. 1744.

(*k*) *Mousley v. Carr*, 4 Beav. 49.

(*l*) *Burden v. Burden*, cited 1 Jac. & Walk. 134. *Wedderburn v. Wedderburn*, 22 Beav. 100.
Ante, p. 1744.

(*m*) *Heathcote v. Hulme*, 1 J. & W. 122. In *Vyse v. Foster*, L. R. 8 Ch. 303, 334, which was a case in which a daughter of the testator, a beneficiary under the will, was asking for an account of profits, having been credited with interest at 5 per cent. on her share

of trust monies, which consisted of the ascertained share of the testator left in breach of trust in the business in which he had been a partner, James, L. J., says: "It has been distinctly laid down that a plaintiff cannot claim both interest and profits in respect of the money employed in trade, but must elect between them, and it might be a grave question whether the plaintiff must not either adopt or repudiate the terms on which the successive partnerships were willing to hold her money. If she repudiate the arrangement, it might be considered that she would have to elect between interest and that share only of the profits made in respect of her capital which actually came into the hands of her trustees, as appears to have

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If it be shown that the executor used the property in his trade, and the amount of the profits made by him does not appear, the Court takes it for granted that he made 5*l.* per cent. at the least, and it is incumbent on him to show that he made less (*n*). It has been further established, that if an executor or other trustee mixes trust funds with his private moneys, and employs them both in a trade or adventure of his own, the *cestui que trust* may, if he prefers it, insist upon having a proportionate share of the profits, instead of interest on the amount of the trust funds so employed (*o*). And it should seem to be now settled, that an executor, who, being a trader, and having, of course, an account with a banker, places the assets at his banker's in his own name, by that means increases the balances in his favour, acquiring additional credit, and enjoying in his business the advantages naturally arising from that circumstance, must be considered as having employed the money for his own benefit, and must, therefore, be charged with interest at 5*l.* per cent. (*p*).

been held in *Jones v. Foxall*, 15 Beav. 388. The application, however, of that rule as to election between interest and profits to the case of an actual loan by a trustee in breach of trust to himself and others, would, we think, require very full consideration before the Court came to a final decision on it."

(*n*) *Rocke v. Hart*, 11 Ves. 61. It should seem, that interest shall in no case be charged at less than 5*l.* per cent., when the fund has been embarked in trade without authority: *Heathcote v. Hulme*, 1 J. & W. 134, 135. See also *Robinson v. Robinson*, 1 De G. M. & G. 257, by Lord Cranworth.

(*o*) *Docker v. Sones*, 2 M. & K. 655. *Wedderburn v. Wedderburn*,

2 Keen, 722. 4 My. & Cr. 41. *Willett v. Blanford*, 1 Hare. 253. *Portlock v. Gardner*, 1 Hare, 594, 603.

(*p*) *Treves v. Townshend*, 1 Bro. Ch. C. 385. *Rocke v. Hart*, 11 Ves. 61. *Sutton v. Sharp*, 1 Russ. Ch. C. 151, 152. *Re Jones*, 49 L. T. 91. Although the Will authorised the executor to invest the residue on "good private securities:" *Westover v. Chapman*, 1 Coll. 177. See also *Re Hilliard*, 1 Ves. 90. *Melland v. Gray*, 2 Coll. 295. *Williams v. Powell*, 15 Beav. 461. But see *contra*, *Perkins v. Baynton*, 1 Bro. Ch. C. 375. *Brown v. Southouse*, 3 Bro. Ch. C. 107. See *Burdick v. Garrick*, L. R. 5 Ch. 293, as to what is employment of money in business.

There are many other cases where executors, who have applied the assets in direct dereliction of their duty, have been charged with 5*l.* per cent. interest. Thus in *Forbes v. Ross* (g), there was an express trust, by a direction in the Will, to lay out the fund in the purchase of lands, or upon heritable or personal securities, at such a rate of interest as the executors should think reasonable; so that they were at liberty, using their discretion soundly and fairly and honestly, to lend it to anybody that they might suppose would give a reasonable interest for it, considering at the same time the degree of responsibility of the person to whom it was lent: they lent the fund to one of themselves, on bond at 4*l.* per cent., when 5*l.* per cent. might have been made by heritable or government securities: And it was held, that he should be charged with 5*l.* per cent. interest. So in *Pietty v. Stace* (r), the Will directed the executor to place the money in the public funds or upon mortgages or other good securities, and to pay the dividends and interest to certain persons for life, and after their death to dispose of the capital in a certain mode: The executor called in part of the property which was out on security, used it generally in his trade, and in various transactions in the public funds, paying only the dividends of the stock to the persons entitled under the Will, and he lent part to his son: And Lord Alvanley directed an account of all the executor had made, with the interest at the rate of 5*l.* per cent. upon the balances in his hands. In *Pocock v. Reddington* (s), the executor and trustee having been guilty of a breach of trust by selling out stock and dealing improperly with the money, Lord Alvanley held that the *cestui que trust* had an option to have the stock replaced or the money produced by the sales, with interest at 5*l.* per cent. or more, if more had been made by it, and the costs occasioned by the executor's misconduct (t). In

(g) 2 Cox, 113. S. C. 2 Bro. Ch. C. 430. (h) See also *Bate v. Scales*, 12 Ves. 402. (i) 5 Ves. 794.

Mosley v. Mosley, 10 Ves. 403. 5*l.* per cent. his hands. *Eldon to In Bick v. Bick*, 10 Ves. 403. had, by s. sums bel. were both so receiv. tive comm. Sir C. Pe. the exec. chargeabl. with int. enabled. ingly ma. added to. rupts' es. *Williams v. Williams*, 10 Ves. 403. establish. balances. Court wi. on the. has com. misconduct. cent. (b). But i.

(u) 11 Ves. 403. (x) 2 Ves. 403. (y) See 9 Sim. 3. charging at 5*l.* per cent. ham, 5*l.* per cent. (z) 15 Ves. 403. (a) 11 Ves. 403.

Mosley v. Ward (u), an executor in trust for infants, unnecessarily calling in the property, out upon good security at 5l. per cent., except a small part, keeping large balances in his hands, and using it as his own, was ordered by Lord Eldon to be charged with interest at 5l. per cent. and costs. In *Bick v. Motley* (x), the master found that two executors had, by signing joint cheques, enabled each other to receive sums belonging to the estate of their testatrix, when they were both largely indebted to that estate: and that the sums so received by them were debts provable under their respective commissions; both executors having become bankrupt: Sir C. Pepys, M. R., said, that as, in respect of such sums, the executors had each committed a *devastavit*, each was chargeable, according to the uniform practice of the Court, with interest at 5l. per cent. upon the sums which he had enabled his co-executor to receive: And his Honor accordingly made an order, that interest at that rate should be added to the principal sums to be proved against the bankrupts' estates respectively (y). In *Jones v. Foxall* (z), and *Williams v. Powell* (a), Romilly, M. R., stated the rule as established by the authorities, that if an executor has retained balances in his hands, which he ought to have invested, the Court will charge him with simple interest at 4l. per cent. on the balances; but if in addition to such retention he has committed a direct breach of trust, or been guilty of misconduct, he will be charged after the rate of 5l. per cent. (b).

But in the later case of *The Attorney-General v. Alford* (c),

(u) 11 Ves. 581.

(x) 2 M. & K. 312.

(y) See also *Munch v. Cockerell*, 9 Sim. 339, 351; confirmed as to charging the trustees with interest at 5l. per cent., by Lord Cottenham, 5 M. & Cr. 178, 220.

(z) 15 Beav. 388.

(a) 15 Beav. 461.

(b) See also the rule stated by the same Judge in *Knott v. Cottee*, 16 Beav. 80.

(c) 4 De Gex, M. & G. 483, 851, 852. *Burdick v. Garrick*, L. R. 5 Ch. 233, 241. The principle, established in the above case of *Atty.-Gen. v. Alford*, and also in that of *Atty.-Gen. v. Köhler*,

Lord Cranworth, C., said he could not understand the principle on which the Court can proceed *in pœnam* to punish the executor for his misconduct by making him account for more interest than he has received: and his Lordship stated his opinion to be, that the Court ought, in the case of an executor who has money in his hands which he ought to invest and does not invest, to charge him only with the interest which he has received, or which the Court is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive, that he is estopped from saying that he did not receive it: and the learned Judge added, that misconduct did not seem to him to warrant the conclusion that the executor did in point of fact receive, or is estopped from saying that he did not receive, the interest, or that he is to be charged with anything he did not receive, if it is not misconduct contributing to that particular result: And his Lordship proceeded to hold (varying a decree of Stuart, V.-C.) (*d*), that an executor who for several years had retained funds in his hands uninvested, which he ought to have invested, was chargeable only with simple interest at 4l. per cent., there being no circumstance to lead to the conclusion that he had made any profit by his misconduct: If indeed it had appeared that he had improperly used the money for his own purposes, the Court would not inquire what had been the actual proceeds of his speculation, but would infer he either did make 5l. per cent., or ought to be estopped from saying that he did not (*e*).

Instances of
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interest.

As a general rule, the Court decrees the computation of simple interest to be made (*f*). But there are instances in

9 H. L. C. 654, was approved of in the late case of *Re Hulkes*, 33 C. D. 552. *Ante*, p. 1751, note (*c*).

(*d*) 2 Sm. & G. 488.

(*e*) See *Accord*. *Mayor of Berwick v. Murray*, 7 De G. M. & G. 497, 518, in which case Lord Cranworth said that it was a mistake

to suppose that he had laid it down in the *Atty-Gen. v. Alford*, that a defaulting trustee could never be charged with more than 4l. per cent. And see *Vyse v. Foster*, L. R. 8 Ch. 309, 333.

(*f*) *Robinson v. Cumming*, 2 Atk. 410.

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which an executor has been charged with compound interest. Thus in *Raphael v. Boehm (g)*, a legacy was given to the executor, with a declaration in the Will, that such a legacy should be in full for the trouble he might have in performing the duties of the Will, and that he should not have any claim for commission, or derive any advantage from keeping in his possession any sums of money, without duly accounting for the legal interest thereof: The testator then disposed of the residue upon certain trusts for his children, and directed that a sufficient part of the interest of the portions should be applied to the maintenance, &c., of each child, and the surplus should be accumulated: the executor did not lay the money out as directed, but kept upwards of 80,000*l.* in his hands, and used it in his trade, so that there was a wilful violation of the Will, which prohibited retainer and directed accumulation: And Lord Loughborough decreed, that an account should be taken from the moment of the testator's death, and interest be charged upon all the sums received, and rests to be made half-yearly upon the balance, including intermediate interest: so that double compound interest was given: The cause came on afterwards before Lord Eldon, upon exceptions to the Master's report, and though his Lordship did not approve of the decree, yet he agreed in the propriety of giving compound interest. So in *Knott v. Cottee (h)*, where there was an express trust for accumulation, Romilly, M. R., held that, though the circumstances were not such as to make it right to charge the executor with more than 4*l.* per cent. interest on monies which he had improperly invested, yet it was a case for annual rests. And other instances, where, in executors' accounts, interest has been given with rests, will be found in the cases cited in the note below (i). And it has been

(g) 11 Ves. 92. 13 Ves. 407, 2 Dow & Clark, 58. Walker v. Woodward, 1 Russ. Chanc. Cas. 590.

(h) 16 Beav. 77. 107. Townend v. Townend, 1 Giff.

(i) Stackpoole v. Stackpoole, 4 Dow, 209. Willson v. Carmichael, 201. Walrond v. Walrond, 23 Beav. 588. See also, on this subject,

held by Romilly, M. R., on two occasions (*k*), that if an executor employs the assets in trade or speculation, for his own benefit, he shall be charged either with the profits actually so obtained by him for the use of the money, or with compound interest at 5% per cent.

His Honor, however, observed, that the principle on which executors have been charged with compound interest has not been clearly defined, nor are the decided cases by any means free from obscurity or contradiction. The principle of some of them seems to have been, that the Court ought to visit the executor as it were with a penalty, when he has not merely misconducted himself, but has derived, or tried to derive, a profit for himself from the use of the money. And it has not unfrequently been said, that in order to make out a claim for compound interest, a very strong case of violation of duty is required (*l*). But there has already been occasion to mention that, in the latest case on this subject (*m*), Lord Cranworth repudiated the doctrine of *punishing* the executor, and maintained the principle, with respect to compound as well as simple interest, that the Court ought to charge him only with the interest which he has received, or which the Court is justly entitled to say he ought to have received, or to presume he did receive.

It may here be observed, that a considerable difference of opinion has existed as to the effect of a direction to the Master "to make annual rests" in taking the account: In *Heighington v. Grant* (*n*), Lord Langdale, M. R., after reviewing all the authorities, denied that a direction to ascertain balances, to compute interest on such balances, and "in taking the said accounts" to make annual rests,

Binnington v. Harwood, 1 Turn. & R. 481, and Lord Brougham's judgment in *Docker v. Somes*, 2 2 M. & K. 655.

(*k*) *Jones v. Foxall*, 15 Beav. 388. *Williams v. Powell*, *ibid.* 461.

(*l*) See *Crackelt v. Bethune*, 1 Jac. & Walk. 586. *Tebbs v. Carpenter*, 1 Madd. 290.

(*m*) *Atty.-Gen. v. Alford*, *ante*, p. 1755.

(*n*) 5 M. & Cr. 258.

followed interest, such balance direction so much year: An compound direction to Lord judgment in question the balance of the balance which in to year t

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(*o*) *Heighington v. Grant*, Cr. 258.

(*p*) *Parker v. Brown*, 277. H. 126. S.

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followed by a direction that the party shall be charged with interest, "after the rate and in the manner aforesaid upon such balances," could, without more, be considered as a direction to charge the defendant with compound interest, as so much principal received into the account of the following year: And his Lordship expressed his opinion that where compound interest is intended to be charged, a specific direction for that purpose should be given. But on appeal to Lord Cottenham, C., his Lordship, in an elaborate judgment, arrived at a different construction of the direction in question, and held that, under it, the interest computed on the balance due at the end of the first year was to form part of the balance due at the end of the second year, and upon which interest was then to be computed, and so on from year to year to the end of the account (o).

An executor or administrator is entitled to be allowed all reasonable expenses which have been incurred in the conduct of his office (p), except those which arise from his own default (q). But it is a general principle, that an executor or administrator shall have no allowance, at law or in equity, for personal trouble and loss of time in the execution of his duties (r). Nor is the case altered by the executor's renunciation of the executorship, and his afterwards assisting in it; nor although it should appear that he has deserved more, and has benefited the estate to the prejudice of his own affairs (s). And even where an executor in trust, who had

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(o) *Heighington v. Grant*, 5 M. & Cr. 258.

(p) *Potts v. Leighton*, 15 Ves. 277. *Hyde v. Haywood*, 2 Atk. 126. Stat. 22 & 23 Vict. c. 35, s. 31, *ante*, p. 1735. In these should be included the expenses of keeping up the testator's domestic establishment for a reasonable time after his death: *Field v. Peckett*, 29 Beav. 576.

(q) *Pannel v. Fenn*, Cro. Eliz.

348. He shall not be allowed the costs of an action against him as executor, which he ought never to have defended: *Chambers v. Smith*, 2 Coll. 742. *Smith v. Chambers*, 2 Phil. Ch. C. 221.

(r) *Robinson v. Pett*, 3 P. Wms. 251. *Scattergood v. Harrison*, Mosely, 130. *Brocksopp v. Barnes*, 5 Madd. 90.

(s) *Robinson v. Pett*, 3 P. Wms. 249.

no legacy, in a case in which the execution of the office was likely to be attended with trouble, at first declined, but afterwards agreed with the residuary legatee, in consideration of a hundred guineas, to act in the executorship, and on his dying before the execution of the trust was completed, his executors filed a bill to be allowed that sum out of the trust money in their hands: the Court refused the claim, observing, that independently of the executor's having died before the trust was executed, such bargains ought to be discouraged, as tending to dissipate the property (*t*). So a surviving partner, being executor, is not entitled, without expressed stipulation, to any allowance for carrying on the trade after the testator's death (*u*). Again, in *New v. Jones* (*x*), it was held by Lord Lyndhurst, C. B., that if a solicitor or attorney, who is an executor, does professional business himself for the benefit of the estate, he is not entitled to be paid his bill of costs for such services: it would be placing his interest at variance with the duties he has to discharge (*y*). Accordingly in *Moore v. Frowd* (*z*), Lord Cottenham held, that a trustee, who is a solicitor, is entitled to be repaid such costs, charges and expenses only as he has properly

(*t*) *Gould v. Fleetwood*, 3 P. Wms. 251, note (A). So in *Ayliffe v. Murray*, Atk. 58, two persons, executors and trustees under a Will, would not prove the Will, nor suffer the *cestui que trust* to take out letters of administration *cum testamento annexo*, till he had executed a deed, by which he was to pay a hundred pounds to one executor, and two hundred pounds to the other, within six months after they should have exhibited an inventory: Lord Hardwicke declared the deed was unduly obtained, and decreed that no allowance should be made for the sum of 100*l.* and 200*l.* to the plaintiffs.

(*u*) *Burden v. Burden*, 1 Ves. & B. 170. *Stocken v. Dawson*, C. Beav. 371. Nor is an executor and legatee of such surviving partner: *ibid.*

(*x*) Exchequer, Aug. 9, 1833. The writer is indebted to the kindness of Mr. Younge, for the note of this decision, which is inserted in 9 Bythewood's *Convey.* pp. 337, 338. It is also reported in a note to *Craddock v. Piper*, 1 Mac. & G. 668.

(*y*) See also *Willson v. Carmichael*, 2 Dow & Clark, 51. 1 Mac. & G. 678, 679. *Nicholson v. Tutin*, 3 Kay & J. 159.

(*z*) 3 Mylne & Cr. 45.

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paid out of his pocket; and that it makes no difference in this respect, that the instrument creating the trust may have directed that the trust monies should be applied (*inter alia*) in payment of all expenses, disbursements and charges to be incurred, sustained or borne by the trustee, in professional business, journeys or otherwise, and that the trustee might retain all reasonable costs, charges and expenses which he might sustain or be put unto, such costs, charges and expenses to be reckoned, stated, and paid as between attorney and client. Again, in *Collins v. Carey* (a), where business relating to a trust estate had been transacted by two solicitors in partnership, one of whom was a trustee of the estate, Lord Langdale, M. R., held, that, in passing the accounts of the trustee, costs out of pocket alone could be allowed (b). And the general rule, that a trustee acting as solicitor in the trust matters is merely entitled to costs out of pocket, has been firmly established by several subsequent decisions (c). And the rule is not restricted to cases of express

Trustee acting as solicitor merely entitled to costs out of pocket:

(a) 2 Beav. 128.

(b) And the rule is the same, though the business be done by one of the partners who is not trustee: *Christophers v. White*, 10 Beav. 523.

(c) *Fraser v. Palmer*, 4 Y. & Coll. 515, *coram* Alderson, B. 1 Mac. & G. 679. *Re Sherwood*, 3 Beav. 338. *Bainbrigge v. Blair*, 8 Beav. 588. *Told v. Wilson*, 9 Beav. 486. The costs in such cases, of a defendant, are ordered to be taxed as between solicitor and client, without any special directions: *York v. Brown*, 1 Coll. 260: And under such an order, or under an order to tax costs generally, the Taxing Masters may take notice that the solicitor is also a trustee, and apply the rule: *Cradock v. Piper*, 1 Mac. & G. 664. But the rule does not preclude an executor who acts as

solicitor in a cause in which he is a party in his representative character, from being allowed, as against the estate, that proportion of the whole costs which his town agent in the cause was entitled to receive: *Burge v. Brutton*, 2 Hare, 373. See *Re Taylor*, 18 Beav. 165. And it must be observed, that the rule does not disentitle a solicitor, who is a trustee, from claiming his professional charges under a special contract, nor under a Will authorizing him expressly to make such charges: *Re Sherwood*, 3 Beav. 341. *Christophers v. White*, 10 Beav. 524, by Lord Langdale. See also *Broughton v. Broughton*, 5 De G. M. & G. 166, by Lord Cranworth. *Harbin v. Darby*, 28 Beav. 325, *post*, p. 1769. Where, however, a testator by his will authorised any trustee thereof

but not as to costs incurred in a suit where solicitor acts for himself and co-trustees.

trust, but applies to the case of an executor or trustee, though there be no express trust (*d*). But the rule does not apply to the costs incurred in a suit where the solicitor acts in the suit for himself and his co-trustees: In such a case he shall be allowed the full costs which would be properly chargeable by a stranger to the trust, taking care that they are not to be increased by his being one of the parties (*e*). This excep-

who might be a solicitor, to make the usual professional or other proper and reasonable charges for all business done and time expended in relation to the trusts of the will, whether such business was usually within the business of a solicitor or not, it was held that the Taxing Master had power to allow a trustee, who was a solicitor, the proper charges for business not strictly of a professional nature transacted by him in relation to the trust estate: *Re Ames*, 25 C. D. 72. But where the direction of the will was that one of the executors and trustees should continue to act as solicitor in relation to the property and affairs of the testatrix, and should make his usual professional charges, and that notwithstanding his acceptance of the office of trustee and executor, he should be entitled to make the same professional charges and to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendances, time, and trouble given and bestowed by him in or about the execution of the trusts and powers of the will, as if he not being himself a trustee or executor were employed by the trustee or executor, it was held that all items which were not of a strictly professional character

ought to be disallowed: *Re Chapple*, 27 C. D. 584. Where a solicitor-trustee is an attesting witness of a will, a declaration that he shall be allowed profit costs for transacting the business of the trust estate will not entitle him to such costs, the right to take such costs being a beneficial interest within s. 15 of the Wills Act: *Re Barber*, 31 C. D. 665, approved by the Court of Appeal in *Re Pooley*, 40 C. D. 1. Compensation may, in special cases, be made, under the authority of the Court, to a trustee acting as solicitor in the trust matters; though not by allowing him to make the usual professional charges; *Bainbridge v. Blair*, 8 Beav. 588.

(*d*) *Pollard v. Doyle*, 1 Drew. & Sm. 319.

(*e*) *Cradock v. Piper*, 17 Sim. 41. 1 Mac. & G. 664. See also the observations of Lord Cranworth on this case in *Broughton v. Broughton*, 5 De G. M. & G. 164, 195, and see *Re Barber*, 34 C. D. 77, in which case, Chitty, J., after stating the rule as to solicitors not being entitled to profit costs says: "Consequently, if an executor, being a solicitor, acts solely for himself or acts for himself and his co-trustee in the business of a trust, he, in the absence of any provision to the contrary in the

tion, how case when

instrument not entitle trust estate the rule done not Court; t where the in Court, solicitor, v an action, the defen however, cestuis que because the business called, an cestuis que sometimes out of the the solicitor not deprive costs by re trustee." right of charge pr sidered b in the C. D. 67 held (1) solicitor-t profit cos trustees an applic a next infant u cedure coming v. Piper made by trustee v appointe action, t the defen

tion, however, in favour of the solicitor, does not extend to a case where a solicitor, who is a trustee, acts in a suit for him-

instrument creating the trust, is not entitled to receive out of the trust estate profit costs. That is the rule where the business is done not in a suit but out of Court; the same rule applies where the solicitor does business in Court, acting for himself as solicitor, where he is plaintiff in an action, and also where he is the defendant. He is allowed, however, to act as solicitor for *cestuis que trustent* in an action, because that is not part of the business of the trust properly so called, and in cases where the *cestuis que trustent* obtain as they sometimes do, in fact generally do, out of the trust estate, their costs, the solicitor who acted for them is not deprived of his proper bill of costs by reason of his also being a trustee." This question of the right of a solicitor-trustee to charge profit costs was much considered by the Court of Appeal in the case of *Re Corsellis*, 34 C. D. 675. In that case it was held (1) that the firm of the solicitor-trustee was entitled to profit costs made in acting for the trustees who were respondents to an application for maintenance by a next friend on behalf of an infant under the summary procedure of the Court, such costs coming within the rule of *Craddock v. Piper*; (2) that profit costs made by the firm of the solicitor-trustee when acting for a receiver appointed in an administration action, the solicitor-trustee being the defendant in the action, could

not be retained by the firm, on the principle that the trustee's interest and duty conflicted; (3) that profit costs made by preparing leases and agreements for leases of parts of the trust estate could not be retained, because, although actually paid by the lessees, the solicitors were employed on behalf of the trust estate; and (4) that steward's fees of a manor which formed part of the trust estate, and of which trustees had appointed a partner in the firm steward, might be retained, even though such fees were brought into the partnership account. The Court of Appeal, in this case, while disapproving of the decision in *Craddock v. Piper*, expressly refused to depart from a rule so long followed, or to fritter away the decision by saying that it only applied to a hostile action. Cotton, L.J., in his judgment (p. 681), thus sums up the general principle: "It is a well-established rule, and one founded on sound principles, that a trustee who is a solicitor, cannot as a rule, make any profits as a solicitor on business which is done by himself or by the firm of which he is a member in matters relating to the estate. There is one very obvious principle which applies, namely, that the trustee must discharge his duty without making any profit out of it. If there is business which a layman cannot properly perform, he may employ a solicitor to do that legal business. If it is business which a trustee in his

self alone, or by his partner for himself alone (*f*), nor to a case of a solicitor, being a trustee and acting as solicitor for himself and his co-trustees in the administration of the trust out of Court (*g*). And where an executor and trustee under a Will employs his co-trustee, who is a solicitor, to transact the legal business of the trust, the solicitor is only entitled to costs out of pocket (*h*).

When executor
entitled to
commission.

Again, an agent, who is appointed executor of his principal, is not entitled to charge commission on business done subsequently to the testator's death (*i*). So an executor, who is one of a banking firm, cannot charge the ordinary banker's commission against his testator's estate (*k*). So an executor, who acts as auctioneer in the sale of assets, is not entitled to charge commission (*l*). But where a testator, a victualler, directed his trade to be carried on by his executors, brewers

position cannot be expected to discharge, such as receiving rents from a number of small properties, he may employ an agent to collect those rents, but if he chooses to do work, he cannot make a charge against the estate; that is the rule as regards work done out of Court by a trustee, whether acting for himself or for the other trustee as well. From the rule I have stated one exception was established by *Cradock v. Piper*: that is to say, where there is work done in a suit not on behalf of the trustee, who is a solicitor, alone, but on behalf of himself and a co-trustee, the rule will not prevent the solicitor or his firm from receiving the usual costs if the costs of appearing for and acting for the two have not increased the expense; that is to say, if the trustee himself has not added to the expense which would have been incurred if he or his

firm had appeared only for his co-trustee. For that there is an obvious reason—that it is not the business of a trustee although he is a solicitor, to act as solicitor for his co-trustee. But the exception in *Cradock v. Piper* is limited expressly to the costs incurred in respect of business done in an action or a suit.”

(*f*) *Lyon v. Baker*, 5 De G. & Sm. 622.

(*g*) *Lincoln v. Windsor*, 9 Hare, 158.

(*h*) *Broughton v. Broughton*, 5 De G. M. & G. 160. 2 Sm. & G. 422.

(*i*) *Sheriff v. Axe*, 4 Russ. Chanc. Cas. 33.

(*k*) *Heighington v. Grant*. 5 M. & Cr. 258, 262.

(*l*) *Kirkman v. Booth*, 11 Beav. 273. Nor if he is a partner with others, can the partnership make a charge: *Matthison v. Clarke*, 3 Drewr. 3.

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and spirit merchants, who had been in the habit of serving him in his lifetime, and supplies were furnished for that purpose by them, the Court would not declare that the executors were entitled to receive the cost price only for these supplies, but directed an inquiry whether the supplies were proper, and furnished at the ordinary market price (*m*). So in *Willis v. Kimble* (*n*), a testator devised and bequeathed his freehold and leasehold estate to trustees for sale, and he declared, that his trustees respectively should be entitled to have and receive out of the trust-moneys, all costs, charges, and expenses, fees to counsel and for advice, and for professional assistance, and loss of time, paid, incurred, sustained, or occasioned in or about the execution of the said trusts, or in anywise relating thereto: One of the trustees was a land surveyor, and he superintended the management and sale of the estates: And Lord Langdale, M. R., held, that he was entitled, upon the terms of the Will, to a compensation for loss of time. Again, it is competent for the Court to appoint an executor and trustee consignee with the usual profits (*o*). And when the Court, in its discretion, has made such an appointment, and the appointment has been acted upon, the Court will not afterwards withdraw its sanction from it (*p*).

It has been holden that agents, being also appointed executors, are not entitled to commission upon remittances from India to this country by the testator, not received until after his death (*q*). The Courts of India, in order to induce proper persons to accept the office of executor, at one time adopted a rule, opposed to the principles above stated,

Commission on remittances from India to this country by testator.

(*m*) *Smith v. Langford*, 2 Beav. 362.

(*n*) 1 Beav. 559.

(*o*) *Marshall v. Holloway*, 2 Swanst. 432.

(*p*) *Morison v. Morison*, 4 My. & Cr. 215.

(*q*) *Hovey v. Blakeman*, 4 Ves. 596. However, in *Scattergood v.*

Harrison, Mosely, 130, Lord King held, that where a factor was made executor, if anything appeared to have been consigned to him by the testator in his lifetime, though it came to his hands after his death, since the executor acted as factor, he should be allowed commission for it.

by permitting an executor to charge a commission upon the amount of assets collected by him in India. And if assets, collected in India, came to be administered, not in India, but by the Courts in England, the Courts here were of necessity bound to follow that rule of policy which was adopted in India. But now by the Indian Act, No. II., of 1874, re-enacting Act No. XXIV. of 1867, it is provided by sect. 56 that no person other than the Administrator-General, acting officially, shall receive or retain any commission or agency charges for anything done as executor or administrator under any probate or letters of administration, or letters *ad colligenda bona* granted by the Supreme Court or High Court of Judicature at Fort William in Bengal, since the passing of Act No. VII. of 1849, or by either of the Supreme or High Courts of Judicature at Madras and Bombay, since the passing of Act No. II. of 1850, or by any Court of competent jurisdiction within the meaning of sections 187 and 190 of the Indian Succession Act, 1865, but this enactment shall not prevent any executor or other person from having the benefit of any legacy bequeathed to him in his character of executor or by way of commission or otherwise. Sections 52—55 prescribe the commission to which the Administrator-General is entitled (r).

The same exception to the general rule was established with respect to the West Indies. The principle upon which the Court of Chancery has gone, in this respect, appears to be this: that the commission is in the nature of a remuneration to a trustee, who, besides the usual trouble belonging to the execution of his trust, has also to undergo all the inconveniences arising from being in a foreign country, and conducting the business of a merchant there: And although, as it has above appeared, no commission is allowed to a trustee in this country for what he does, however laborious his duty may be, yet inasmuch as it is of great importance

(r) See a pamphlet by Mr. Broughton, late Administrator-General of Bengal, on "The Custody and Preservation of the Property in India of Deceased Persons."

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to get persons to assume the character of trustees in the East and West Indies, therefore, so long as they are actually in the country there discharging the duty of trustees, the Court allows the commission (*s*). But no commission is payable where the remittant himself is actually, at the time of the remittance, in this country (*t*): And it should seem, that, in order to entitle himself to the commission, the party must himself be actually in the colony where the remittance was made: For if, by any means, money, which has not been received by him upon the spot and remitted by him from the spot to this country, is remitted to this country, it appears to be the settled rule of the Court of Chancery, that the commission shall not be allowed (*u*). And accordingly, in *Campbell v. Campbell* (*x*), it was held that if an executor in India collected part of the assets there, and then came to England, and had the remainder remitted to him by his agent, he was entitled to commission on that part only which he had collected in India.

Generally speaking, an executor who has proved the Will, or a person taking out letters of administration, cannot retire from his duty, but must collect the estate himself (*y*). However, an executor is justified in having recourse to an agent to collect the assets, in cases where a provident owner might well employ a collector: and the executor will, there-

Allowances for
payments to
collectors, &c.

(*s*) 1 Moo. P. C. 40.

(*t*) 4 Ves. 72. *Ibid.* 596.

(*u*) *Chambers v. Goldwin*, 5 Ves. 834. *Denton v. Davy*, 1 Moo. P. C. 15, 32. In this last case it was holden by the Lords of the Privy Council, that the commission of 6l. per cent. given by the Jamaica Act, 24 Geo. II. c. 12, to agents, trustees, guardians, executors, &c., for the management and disposal of the rents and profits of an estate, being in the nature of a remuneration for

the trouble and responsibility of conducting the business of a merchant on the island, is payable only to persons actually resident on the island, and capable and willing to act in the trusts of the estate; and the commission of 6l. per cent. given by the same Act for receiving and remitting monies can only be claimed where the receipts or payments are actually made on the island.

(*x*) 13 Sim. 168.

(*y*) *Weiss v. Dill*, 3 M. & K. 26.

fore, be allowed the expense so incurred, in his accounts (z). Accordingly, where a testator gave annuities to his executors for their trouble in the execution of his Will, and died possessed of several houses, let at weekly rents, it was held, that the executors were justified in paying a person to collect the rents, and did not, therefore, lose their annuities (a). So if there are assets in India, the executor shall be allowed the expense of an agent to collect them: And, therefore, the Court will appoint a receiver in India of a testator's assets, on the application of an executor resident in England (b).

So, on one occasion (c), it was holden that, from the nature of the accounts, the executor was justified in employing an accountant, and that the expense ought to be allowed to the executor.

Again, if an executor pays an attorney for his trouble and attendance, in the transacting and conduct of the testator's affairs, he ought to be allowed and repaid what he so

(z) See *Bonithon v. Hockmore*, 1 Vern. 316. *Davis v. Dendy*, 3 Mad. 170. See also *Hopkinson v. Roe*, 1 Beav. 180, in which case Lord Langdale, M. R., held, that the executors under the circumstances were justified in appointing an agent to get in the testator's debts, and in allowing him a salary for his trouble: But the costs of transferring funds, from the name of a testator into the names of the executors, were disallowed: And his Lordship held, that the sum to be allowed executors for the expenses of transferring a large sum of money into Court is one guinea; and extra brokerage was, therefore, disallowed. But where an executor, upon transferring stock to a legatee, paid one-sixteenth per cent.

to a stock-broker for identifying him (the executor) at the Bank, it was held, that he ought to be allowed this payment: *Jones v. Powell*, 6 Beav. 418.

(a) *Wilkinson v. Wilkinson*, 2 Sim. & Stu. 237. S. P. as to an administrator, *Trezevant v. Frazer*, Hil. Term. 1832, before Sir L. Shadwell, V.-C. So, even at law, it should seem, that an executor, under a plea of *plene administravit*, will be allowed the reasonable charges of collecting the testator's debts: *Giles v. Dyson*, 1 Stark. N. P. C. 32.

(b) *Cockburn v. Raphael*, 2 Sim. & Stu. 453: But the receiver must give sureties resident in England: *Ibid.*

(c) *Henderson v. M'Iver*, 3 Madd. 275.

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pays (d). But an executor is not entitled to be allowed, without question, the amount of the bill of costs which he has paid, *bonâ fide*, to the solicitor to the trust; and the officer of the Court, without regularly taxing the bill, will moderate their amount (e). And it may here be observed, that an executor will not be allowed the charges of his solicitor for doing things which the executor ought strictly to do himself (f). And therefore, where a solicitor is appointed executor, and is to be at liberty to charge for his professional services, he is only entitled to charge for services strictly professional, and not for matters which an executor ought to do without the intervention of a solicitor, such as for attendances, to pay premiums on policies, attending at the bank to make transfers, attendances on proctors, auctioneers, legatees and creditors (g).

With respect to the allowance of interest to executors upon sums advanced by them for the purposes of their trust, it has been held, that if an executor borrows money, or advances it out of his own pocket, to pay the debts of his testator which carry interest, or satisfy some of his testator's creditors who are very importunate and threaten to bring actions, he is entitled not only to be paid in full in priority to the creditors (h), but also to an allowance of interest for the money so advanced or borrowed (i). It may be observed, that it is contrary to the course of practice to allow interest to an executor on costs paid by him, pending a suit regarding the estate (k). Where interest is allowed on sums carrying interest, it should be calculated from the time of a balance

Allowance of interest to executor for money advanced by him.

(d) *Macnamara v. Jones*, Dick. 325.
587. In *Stackpoole v. Stackpoole*, 4 Dow. P. C. 226, an administrator was not allowed to set off a charge for poundage alleged to have been paid to his agent in the administration.

(e) *Johnson v. Telford*, 3 Russ. Chanc. Cas. 477.

(f) *Harbin v. Darby*, 25 Beav.

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(g) *Harbin v. Darby*, 25 Beav. 325.

(h) *Spackman v. Holland*, 2 Giff. 198.

(i) *Small v. Wing*, 5 Bro. P. C. 72, Toml. edit.

(k) *Gordon v. Trail*, 8 Price, 416. *Lewis v. Lewis*, 13 Beav. 82.

being struck on the general report; for, until that time, it cannot be ascertained that the executor had not the money in his hands (l).

Executor receiving money, to which he is not entitled, must refund, although he has paid it away to creditors.

In *Pooley v. Ray* (m), a mortgage came to an executor who received the mortgage-money, and paid it away to his testator's creditors: Afterwards it appeared, that the mortgage had been satisfied in the testator's lifetime: And Lord Cowper held, that the executor must refund, although he had before paid the money away in debts, which he had not otherwise assets to pay, and that he must have his remedy against such creditors as by mistake he had paid: His Lordship observed, that "though this might be a hard case, yet if the plaintiffs had a right to be paid their money, which they had overpaid on the mortgage: this right could not be overthrown by the defendant, the executor, applying the money in any manner he should think fit; any more, than if an executor at law should recover a debt, and pay the testator's debts with it, and afterwards this judgment recovered by the executor is reversed in error; the executor must restore the money to the plaintiff in error; and his having paid it away, in debts of his testator, will not excuse him from paying it back. So in the same manner, if there were a decree for the executor to be paid a sum of money by the defendant, and the executor, having received the money, pays it away in debts, and then the defendant, against whom the executor had recovered the decree, brings an appeal, an' reverses the decree; the plaintiff in the appeal shall be restored to the money."

This doctrine of Lord Cowper was approved of by Lord Alvanley, in *Pickering v. Stamford* (n), but his Lordship remarked, that it would be otherwise, if the defendant had delayed the appeal, and willingly stood by, while the executor paid away the money; for that would be drawing the executor into a snare.

(l) 8 Price, 416.

(m) 1 P. Wms. 355.

(n) 2 Ves. 583.

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It may be proper in this place to mention the case of *Brown v. Spooner* (o). There the executor gave an annuity of 50*l.* to be purchased by his executor, and, till purchased, directed him to pay the annuitant 40*l.* a-year: The executor, instead of purchasing, paid 50*l.* a-year from the testator's rents: And Lord Thurlow held, that although the executor was bound to purchase the annuity immediately after the expiration of the first year from the testator's death, and therefore the Court might charge him for the overpayment from the estate, yet the Master, on a general reference of just allowances, could not do so. So in *Garland v. Littlewood* (p), a case was alleged, on the pleading, to charge executors for what they might, but for their wilful default, &c., have received: At the hearing the common accounts only were directed against them; The case coming on for further directions on the Master's report, Lord Langdale, M. R., held that the executors would not be charged as for their wilful default, &c., and that no inquiry could then be directed on the subject, although the Master's report laid a foundation for such an inquiry.

What an executor may be charged with under a reference of just allowances.

Just allowances are now made in any account directed by any order or judgment without any direction for the purpose (q). Accounts, on the basis of wilful default, are still not made on a common administration judgment or order (r), but the principle laid down in *Garland v. Littlewood* seems to have been departed from. The old practice was that a decree on the footing of wilful default could not be got except at the hearing; now it seems, that if wilful default is charged in the pleadings and evidence of it is adduced, accounts and enquiries on that footing may be directed at any stage of the proceedings, although the judgment at the trial gives no relief on that footing, provided, however, the claim to such relief has not been dismissed (s).

When an executor may be charged on the footing of wilful default.

(o) 1 Ves. 291.

(r) *Laming v. Gee*, 10 C. D.

(p) 1 Beav. 527.

715.

(q) R. S. C., 1883, Ord. XXXIII.,

(s) *Re Symons*, 21 C. D. 757.

By Order XXXIII., r. 2 of R. S. C. 1883, it is enacted that:—"The Court or a Judge may at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner."

This section does not enable a Judge to make an order against an executor or administrator on the footing of wilful default either at the hearing or at any subsequent time, unless wilful default has been pleaded; but where wilful default has been alleged and a case is made for it on the pleadings, an account on the footing of wilful default can be directed either at the hearing or trial of the action or at any subsequent stage (t).

If wilful default has not been charged in the pleadings and in the course of the inquiries directed a case of wilful default is disclosed, it would seem that by the leave of the Court fresh proceedings may be taken charging wilful default in the same way in which, under the old practice, a supplemental bill could be filed (u).

(t) *Barber v. Mackrell*, 12 C. D. 534, 538, *per* Fry, J. See also *Job v. Job*, 6 C. D. 562, as explained in *Mayer v. Murray*, 8 C. D. 424. *Re Symons*, 21 C. D. 757.

(u) *Laming v. Gee*, 10 C. D. 715. And see *Dowse v. Gorton* [1891], A. C. 190, 204, *per* Lord Macnaghten.

PART THE FIFTH

OF REMEDIES.

BOOK THE FIRST.

OF REMEDIES FOR EXECUTORS AND ADMINISTRATORS.

IN a previous part of this Treatise (a), there has been occasion to investigate, what rights of action are comprised in the estate of an executor or administrator: It remains to consider the remedies by which those rights may be enforced.

It has been thought desirable in the following four chapters to keep the former headings "At Law" and "In Equity."

CHAPTER THE FIRST.

OF REMEDIES FOR EXECUTORS AND ADMINISTRATORS AT LAW.

IT must be observed, in the commencement of this subject, that there are some cases where an executor or administrator, although he has an interest in a *chose in action*, is not entitled to the remedy: Thus, where one of two *joint* obligees, covenantees, or partners dies, the action on the contract must be brought in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately: For example, two joint-merchants appoint a person to be their factor: one dies, leaving an executor; this executor and the survivor cannot

Instances
where the
executor has
not the
remedy.

(a) *Ante*, p. 693, *et seq.*

join in an action against the factor; for the remedy survives, though not the duty; and therefore, on the recovery, the survivor must be accountable to the executor for that (b). And the general rule is that though the right of a deceased partner devolves on his executor (c), yet the remedy survives to his companion, who alone must enforce the right by action, and will be liable, on recovery, to account to the executor or administrator for the share of the deceased (d).

Again, where two have the legal interest in the performance of a contract, though the benefit be only to one of them, the remedy survives, upon the death of the latter, and the executor or administrator of the deceased cannot be made a party, or sue separately: Thus, in *Anderson v. Martindale* (e), there was a covenant to and with A., his executors, administrators, and assigns, and to and with B. and her assigns, to pay an annuity to A., his executors, &c., during B.'s life: and it was held, that this was a joint covenant to A. and B., in which they had joint legal interest, although the benefit was for A. only; and that therefore, on the death of A., the right of action survived to B., and A.'s administrators could not sue on the covenant (f).

It follows, that where a contract is made jointly with several persons, and they all die, the executor or administrator of the survivor alone can sue, and the personal representatives of those who died before him cannot be joined.

But if the interest of the covenantee is several, and one of them dies, his executor may maintain a separate action on the covenant, notwithstanding the other covenantee be living: And if the interest be several, it shall make no difference that the language of the covenant is joint: Thus,

(b) *Martin v. Crump*, 2 Salk. 444.

(c) *Ante*, pp. 570, 734.

(d) *Martin v. Crump*, 1 Lord Raym. 340. *Kemp v. Andrews*, Carth. 171. *Golding v. Vaughan*, 2 Chit. Rep. 437, *per cur.* *Rex v. Collectors of Customs*, 2 M. & S.

225, by Dampier, J. 2 Saund. 117, note to *Coryton v. Litheby*. It appears, therefore, that the case of *Hall v. Huffam*, 2 Lev. 118, is not law.

(e) 1 East, 497.

(f) See *Barford v. Stuckey*, 2 Brod. & Bingh. 333.

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in *Withers v. Bircham* (g), by deed reciting the grant of two distinct annuities to A. and B. during the life of the grantors and the survivor, it was witnessed, that C. covenanted with A. and B. and their executors, to pay the annuities, or either of them, when the grantors should make default in payment : A. died : And it was held, that, the interest in the annuities being several, the covenant was also several, and that the annuity granted to A. being in arrear, his executor might maintain an action against C.

On the other hand, wherever the interest of the covenantees is joint, the rule of survivorship above stated will be enforced, although the covenant be in terms joint and several (h).

The rule is the same with respect to remedies in form *ex delicto* as those in form *ex contractu* : Therefore, if one or more of several parties jointly interested in property, at the time an injury was committed, is dead, the action must be in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately (i).

By the 37th section of the stat. 6 & 7 Vict. c. 73, it is enacted that no action shall be brought by any attorney or solicitor, or by their executors, administrators, or assignees, for the recovery of any fees, &c., until the expiration of one month after the delivery of a bill, &c., and upon the application of the party chargeable (k) with the bill delivered, the

Executor of
solicitor
bringing
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taxation of bill
of deceased
solicitor.

(g) 3 B. & C. 254. See *White v. Tyndall*, 13 A. C. 263, in which the House of Lords refused to treat a joint covenant in a lease as several, merely because the demise was to two as tenants in common. And Lord Fitzgerald pointed out that the rule that the covenant shall be measured and moulded according to the interest of the covenantees had no application to the case of separate interests in

covenantors.

(h) See the authorities cited in the note to *Eccleston v. Clipsham*, 1 Saund. 154. See also 3 B. & C. 256 ; and *Lane v. Drinkwater*, 1 Cr. M. & R. 599.

(i) *Ante*, p. 734.

(k) The personal representative of the party chargeable, though not named, may also make the application : *Jefferson v. Warrington*, 7 M. & W. 137.

bill and the attorney's or solicitor's, or his executor's or administrator's, or assignee's demand thereon, may be referred to be taxed; and if the bill, when taxed, be less by a sixth part than the bill delivered, then the attorney, his executor, administrator, or assignee, shall pay the costs (l).

By sect. 38 where any person, not the party chargeable, shall be liable to pay or shall have paid the bill, he or his personal representative may apply to have it taxed just as if the application were made by the party chargeable.

Parties.

If there are several executors or administrators, they must all join in bringing actions (m), though some be within the age of seventeen years (n), or have not proved the Will (o). Where, however, an executor renounces probate, or, being cited to take probate, does not appear, his rights in respect of the executorship shall wholly cease, and the representation of the testator devolve as if he had not been appointed (p), and he, therefore, need not be a plaintiff. Nor is an absconding executor a necessary party (q).

But if one alone of several executors or administrators brought an action either in form *ex contractu* or *ex delicto*, the defendant could formerly only take advantage of it by pleading in abatement (r).

(l) If a solicitor dies pending an order for taxation, the proceedings may be revived by the client against the solicitor's representatives by an *ex parte* order: *Re Nicholson*, 29 Beav. 665; and they may, in the same way, revive the proceedings against the client: *Re Waugh*, *ibid.* 666.

(m) Bro. Exors. 88.

(n) Smith v. Smith, Yelv. 130.

(o) Brookes v. Stroud, 1 Salk. 3.

(p) 20 & 21 Vict. c. 77, s. 79. 21 & 22 Vict. c. 95, s. 16.

(q) Drage v. Hartopp, 28 C. D. 414. As to parties generally, see R. S. C. 1883, O. XVI.

(r) 1 Saund. 291, l. note. Tuckey v. Hawkins, 4 C. B. 655. Apparently, since the Judicature Act, the only mode of taking the objection of non-joinder of one of several executors as a plaintiff, is by taking out a summons to add the executor as a plaintiff: *Werderman v. Société Générale d'Electricité*, 19 C. D. 246. The objection cannot be raised by plea in abatement or by demurrer, and the Court will never dismiss an action for want of parties. In some cases, if a person who ought to be a plaintiff refuses, the Court will make him a defendant: *Van*

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Now by R. S. C., 1883, Ord. XXI. r. 20, no plea or defence shall be pleaded in abatement, and by Ord. XVI. r. 11, "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter be added. No person shall be added as a plaintiff, suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto."

It must be observed that if one executor of several alone sell goods of the testator, he alone may maintain an action for the price, not naming himself executor (*s*). So if goods be taken out of the possession of one of several executors, he may sue alone to recover them (*t*). And, generally, if one executor alone contracts on his own account alone, he must sue alone on such contract, notwithstanding the money recovered will be assets (*u*).

It is clear that two out of three co-executors may recover lands of their testator in ejectment on a joint claim (*x*).

Formerly, though the plaintiff sued as executor or adminis- Process.

Gelder & Co. v. Sowerby Bridge, &c., 44 C. D. 374. Fairclough v. Marshall, 4 Ex. D. 37. As to the old practice, see 8th edition of this Work, p. 1875, note (*r*).

(*s*) Godolph. Pt. 2, c. 16, s. 1. Wentw. Off. Ex. 224, 14th edit.

Brassington v. Ault, 2 Bingh. 177.

(*t*) Godolph. *ubi supra*. Wentw. Off. Ex. *ubi supra*.

(*u*) Heath v. Chilton, 12 M. & W. 632. *Ante*, p. 765.

(*x*) Doe v. Wheeler, 15 M. & W. 623.

Indorsement
of writ.

Executors may
sue and be
sued as
representing
the estate.

Claims by or
against an
executor or an
administrator
as such, may
be joined with
claims by or
against him
personally.

Claim :
when executor
shall claim
as such.

trator, the writ of summons need not have stated his special character. But R. S. C., 1883, Order III. r. 4, provides that if the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, the indorsement of claim shall show in what capacity the plaintiff or defendant sues or is sued. And Order XVI. r. 8, provides that " Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may, at any stage of the proceedings, order any of such persons to be made parties either in addition to or in lieu of the previously existing parties " (y).

By R. S. C. 1883, Ord. XVIII. r. 5, it is enacted that, " Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator."

Every action brought by an executor or administrator, where the cause of action accrues in the time of the deceased, must be brought in his representative capacity (z). But where the cause of action accrues after the death of the testator or

(y) Where an administration order has been made, the Judge of the Chancery Division in whose Court such administration is pending may order the transfer to himself of any cause or matter pending in any other Court or Division brought by or against the executors or administrators of the testator or intestate whose assets are being administered : R. S. C. 1883, Ord. XLIX. r. 5. In *Chapman v. Mason*, 40 L. T. 678, it was decided

that an action in another Division against an executor will not be transferred under this rule if he is to be deemed personally liable : but in *Re Timms*, 26 W. R. 692, the action was ordered to be transferred, with liberty to continue it in the Chancery Division.

(z) 1 Saund. 112, note to *Dean of Bristol v. Guyse*. Com. Dig. Pleader (2 D. 1). *Gallant v. Bouteflower*, 3 Dougl. 36, by Buller, J.

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intestate, the executor or administrator may sue as such, or not, at his option (a). Thus, there has already been occasion to show (b), that, in respect of injuries done to the goods and chattels of the testator, after his death, the executor has his option, either to sue in his representative capacity or to bring the action in his own name and in his individual character. So it has already appeared, with respect to contracts made with the executor or administrator in that character, that the same option exists, wherever the money recovered will be assets (c).

It was formerly necessary for an executor when he declared as such, to make a *profert in curia* of the letters testamentary; and for an administrator to make a *profert* of the letters of administration with a statement of the grant of the latter. But by the Common Law Procedure Act (1852), s. 55, "It shall not be necessary to make *profert* of any deed or other document relied on in any pleading, and if *profert* shall be made, it shall not entitle the opposite party to crave oyer, or set out upon oyer such deed or other document."

Profert of letters of administration or probate unnecessary since the Common Law Procedure Act :

oyer abolished :

Before the law was thus altered, if an executor, declaring as such, made *profert* of the letters testamentary, not having, in fact, at that time obtained probate, the defendant, in order to raise the objection, must have demanded oyer; for if he had pleaded that the plaintiff never was nor is executor in manner and form as alleged in the declaration, the plaintiff would have succeeded on this issue, if he had obtained probate at any time before the trial (d); but by demanding oyer, the defendant made it impossible for the plaintiff to proceed, till he could produce the probate. The alteration of the law as to *profert* and oyer, has rendered this course impracticable; and it may place a debtor to the deceased in a situation of some hardship and difficulty, if he is

(a) 3 Dougl. 36, by Buller, J.

(b) *Ante*, p. 761 *et seq.*

(c) *Ante*, p. 762 *et seq.* See also *Abbott v. Parfitt*, L. R. 6 Q. B.

346. *Moseley v. Rendell*, L. R. 6 Q. B. 338.

(d) *Thompson v. Reynolds*, 3 C. & P. 123. See *ante*, p. 251.

sued for the debt by one assuming to be the executor of the creditor, but who has not proved the Will. For if the debtor pays the debt into Court, he may be paying it to one who perhaps may never acquire a title to it by obtaining probate, and so be forced to pay it over again: On the other hand, if he pleads *ne unques executor*, and goes to trial of an issue joined on that plea, and the plaintiff has obtained probate in the meantime, it will, by relation, sustain the plaintiff's title to maintain the action, and the debtor will have to pay all the costs of the suit; though he has never disputed the debt and always been willing to pay it, if he could ascertain the person who was authorized to receive it. In order, therefore, to protect a defendant under such circumstances, the Court, on its being shown that the plaintiff, who has declared or claims as executor, has not obtained probate, will stay proceedings until probate shall have been taken out and a reasonable time has elapsed after it shall have been submitted to the inspection of the defendant (e).

Set-off.

By R. S. C. 1883, Ord. XIX. r. 3, "A defendant in an action may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim." But this rule gives no right of set-off where none existed before the passing of the rule (f). And the cases on the repealed statutes of set-off (2 Geo. II. c. 22, s. 18; 8 Geo. II. c. 24, s. 4), which enacted that where either party sues or is sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, would seem still to be applicable, except in so far as they conflict with the

(e) Webb v. Adkins, 14 C. B. 294.
 401. Tarn v. Commercial Bank- (f) Re Milan Tramways Co., 22
 ing Co. of Sydney, 12 Q. B. D. C. D. 122. 25 C. D. 587.

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rules of Equity. These cases have established that in an action by an executor in his own name to recover money due to the testator in his lifetime and received by the defendant after his death, the defendant cannot set off a debt due to him from the testator (g): And the same rule holds where the plaintiff claims, as executor, for a debt due after the death of the testator (h). Again, if a stranger receives rent due to the testator in his lifetime, and afterwards, by desire of the tenant in possession, pays the demand of ground rent, due at the same time, for the same premises, he may deduct

(g) *Shipman v. Thompson*, Willes, 103. *Tegetmeyer v. Lumley*, 25 G. 3, B. R., reported in Durnford's note to *Hutchinson v. Sturges*, Willes, 264. So it was held, by Romilly, M. R., that where a creditor had purchased part of the intestate's goods from his administrator, he could not set off the price against a debt due to him from the intestate at his decease: *Lambarde v. Older*, 17 Beav. 542. *Wrouth v. Dawes*, 25 Beav. 369.

(h) *Kilvington v. Stevenson*, cited by Erskine from Yates' MS. in *Tegetmeyer v. Lumley*, *ubi supra*. *Schofield v. Corbett*, 11 Q. B. 779. *Rees v. Watts*, 11 Exch. 410, affirming *Watts v. Rees*, 9 Exch. 696, and overruling *Mardall v. Thellusson*, 18 Q. B. 857. See also 6 E. & B. 976. These decisions turned on the terms of the stat. 2 Geo. II. c. 38. The rule that a creditor of a testator cannot set off a debt due to him from the testator against a debt that became due from him to the executor of the testator is the same in equity: *Hallett v. Hallett*, 13 C. D. 232. *Lambarde v. Older*, 17 Beav. 542. Thus where G. died insolvent,

having mortgaged an estate for his own life to secure an annuity granted by himself for his own life, and had also mortgaged a policy on his own life to the same mortgagees, to secure a sum of 4,000*l.*, and after the death of G. the mortgagees received in respect of the policy a sum more than sufficient to satisfy the amount secured on the policy, it was held that the mortgagees had no right to set off the balance against the executor in respect of arrears of the annuity: *Re Gregson*, 36 C. D. 223. The Judicature Act, by giving defendants a right to counterclaim, does not enable a defendant who has had notice of an administration suit to rely, in the shape of a counterclaim, on such set-off, since under the provisions of stat. 23 & 24 Vict. c. 38, s. 14, the Court of Chancery would have restrained an action in respect of it, and all proceedings by the defendant on the counterclaim would consequently be stayed by the Court of the Division of the High Court of Justice in which the action is brought. *Newell v. National and Provincial Bank of England*, 1 C. P. D. 496.

such payment in an action, by the executor, for the rents received; but he cannot deduct a payment of ground rent arising after the death of the testator (*i*).

In *Henderson v. Henderson* (*k*), an action was brought on a decree on the equity side of the Supreme Court of Newfoundland, awarding a sum of money to be paid by the defendant to the plaintiff; and the defendant, by his plea, after alleging that the plaintiff had sued in the Supreme Court, as the representative of a deceased person, proceeded to rely on a set-off for debts due from the deceased, or his estate, to the defendant: And it was held that this plea was bad; because the plaintiff was now suing in his own right, and the defence, if available at all, was one which ought to have been made in the Supreme Court.

There is no right either at law or in equity to deduct a loss on a policy, underwritten by a testator with a broker, from the amount due to the executors for premiums from the same broker (*l*).

Neither can a defendant set up by way of counterclaim against the claim of the plaintiff suing only in a distinct personal character claims against him personally and also as an executor (*m*), since Ord. XVIII. r. 5 (*n*) does not apply to a counterclaim.

Under J. A. 1873, sec. 24, the Court will give effect to equitable defences and grant relief on equitable grounds, and although the rule was as fully established in equity as at law, that demands due in different rights cannot be set off,—the principle being, that one's money shall not be applied to pay another man's debts,—yet a Court of Equity would have regard to the beneficial ownership of the debts, and would give effect to the right of set-off accordingly, notwithstanding any technical difficulties as to forms of action or the like (*o*). In *Jones*

(*i*) *Wilkinson v. Cawood*, 3 Anstr. 905.

(*k*) 6 Q. B. 288.

(*l*) *Beckwith v. Bullen*, 8 E. & B. 683.

(*m*) *Macdonald v. Carington*, 4

C. P. D. 28.

(*n*) *Ante*, p. 1778.

(*o*) *Jones v. Mossop*, 3 Hare, 568.

See also *Baillie v. Edwards*, 2 H. L. C. 74.

v. Mossop, died, l. admini &c., we the bo missor compen under bonis r A. mig pay as case w the bo that h benefic in his

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v. *Mossop* (oo), where A. was indebted on bond to B.: B. died, leaving C. his sole next of kin, who obtained letters of administration of his estate: The estate of B., after all debts, &c., were paid, left a clear residue exceeding the amount of the bond debt: A. became surety for C. by joining in promissory notes: C. became an insolvent debtor, and A. was compelled to pay the notes: C. died, and then the assignee under his insolvency took out letters of administration *de bonis non* of B., and sued A. on the bond; it was held, that A. might set off the sums which he had been compelled to pay as surety for C. against the bond debt (p). But this case was decided on a clear admission by the defendant that the bond had become legally and equitably the property of C., that he had become the beneficial owner, and it was that beneficial ownership which had become vested in the assignee in his insolvency (q).

The only exception which equity has introduced into the principle of a legal set-off, is when the money is really and truly the property of one man in the name of another, not when the result of taking the accounts would be to show that the ultimate balance would be his property. Therefore, where an executorship account was kept with bankers in the joint names of two executors, and one of the executors, who was residuary legatee under the Will, kept another account of his own with the bankers, and the bankers filed a liquidation petition, and at that time there was a balance standing to the credit of the joint account, but the other account was overdrawn, it was held that the one account could not be set off against the other in the liquidation of the bankers (r).

(oo) 3 Hare, 568.

(p) It must not, however, be understood that the mere existence of cross-demands was sufficient to constitute an equitable set-off as contradistinguished from the set-off at law. It will be found that this equitable set-off exists in cases where the party seeking the bene-

fit of it could show some equitable grounds for being protected against his adversary's demand: *Rawson v. Samuel*, 1 Craig & Ph. 161, 178.

(q) See *per James, L. J.*, in *Ex parte Morier*, 12 C. D. 491, 497.

(r) *Ex parte Morier*, 12 C. D. 491.

In *Bailey v. Finch* (s), where a bank stopped payment and the trustee brought an action against a customer to recover the amount for which his account was overdrawn, the customer was allowed to set off a sum due to him on an account which he had opened as executor but to which as residuary legatee he was beneficially as well as legally entitled. But in this case there was a legal right of set-off because both the accounts were the accounts of one person and at law there was a right of set-off, and it was attempted to preclude that right by the fact that one of the accounts had been opened in the name of the customer as executor. There was a legal right to set-off, and the question was whether there was a sufficient equitable ground for preventing the legal right from taking effect.

In *Bridges v. Smyth* (t), the Court of Common Pleas held, that a judgment for the plaintiff in that Court might be set off against a judgment for the defendant in the King's Bench, although the plaintiff was dead and the judgment was assets in the hands of her administrator: In that case, Mrs. Bridges had judgment against Miss Smyth in the Common Pleas, in two actions, to the amount of 816*l.* 15*s.*; and Mrs. Bridges dying after the judgments were entered up, Frowd, her attorney, who claimed to be a judgment creditor, had taken out letters of administration: Miss Smyth had a judgment in the King's Bench to the amount of 3,052*l.* against Mrs. Bridges, and Frowd was requested to set off the 816*l.* 15*s.* against the 3,052*l.*: This he refused to do, on the ground that, she being dead, and he being her administrator, the judgments in the Common Pleas were in a different right, and could not be set off, without compromising the interest of the creditors: But the Court of Common Pleas ordered satisfaction to be entered on the judgment rolls in that Court, upon acknowledging satisfaction for 816*l.* 15*s.* on the judgment for 3,052*l.* in the King's Bench.

In answer to a set-off, the executor or administrator may give in evidence the advance of money by him as executor or administrator to the defendant (u).

(s) L. R. 7 Q. B. 34.

(t) 8 Bing. 29.

(u) *Gallant v. Bouteflower*, 3 Dougl. 34.

Where, in *assumpsit* by an executor, in which all the promises were laid to be made to the testator in his lifetime, the defendant pleaded that he did not promise within six years next before the obtaining of the original writ of the plaintiff, and the plaintiff replied that the original was sued on such a day, and that within six years before the day of obtaining thereof, that is to say, on such a day, letters testamentary were granted to him, by which the plaintiff's action accrued to him within six years; this replication was held bad; because the time of limitation must be computed from the time when the action first accrued to the testator, and not from the time of proving the Will; for that gave no new cause of action, and therefore the time of proving the Will is perfectly immaterial (x).

defence of
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But where to an action by an administrator for money had and received to his use by the defendant, who had received the intestate's money *after his death*, six years and upwards before the commencement of the action, but within six years after letters of administration granted to the plaintiff, the defendant pleaded the Statute of Limitations, and the plaintiff replied the special matter above-mentioned; it was held, upon demurrer, that the statute was no bar, because this was not a cause of action in the intestate, the money having been received after his death, and the plaintiff's title commenced by taking out letters of administration, before which time no cause of action accrued to him (y). So where an action was brought by an administrator against the acceptors of bills of exchange payable to the intestate, and accepted after his death, but before the grant of letters of administration, it was held that the statute ran only from the grant of the letters (z).

(x) *Hickman v. Walker*, Willes, 27. 2 Saund. 63, *k*, note to *Hodsdon v. Harridge*.

(y) *Cary v. Stephenson*, 2 Salk. 421. 4 Mod. 372. See *Stanford's* case, cited *Cro. Jac.* 61.

(z) *Murray v. E. I. Company*, 5 B. & A. 204. See also *ante*, p. 552. *Pratt v. Swaine*, 8 B. & C. 285. *Perry v. Jenkins*, 1 My. & Cr. 118.

It must be observed, that where, in *assumpsit* by an executor, on a contract made with *his testator*, all the promises in the declaration were laid to be made to the testator, and the defendant pleaded the Statute of Limitations, the plaintiff could not in his replication set forth a promise made to *himself* within six years, without being guilty of a departure, any more than he could in such case give evidence of a promise made to himself within six years upon an issue joined on the plea of the Statute of Limitations (a). Therefore, where it was necessary to rely on an acknowledgment, made since the death of the testator, to bar the statute, counts were required in the declaration laying promises to the plaintiff as executor (b).

Accordingly, if an executor brought an action on a bill or note, and intended to rely on an acknowledgment or promise made to himself in order to bar the statute, he had to state in his declaration the making of the bill or note, and must then have proceeded to aver that after the death of his testator or intestate, the defendant promised him (the plaintiff) as executor or administrator, to pay him. And where the declaration was so framed, such promise might have been denied by a plea of *non-assumpsit*, notwithstanding the rule of pleading, H. T. 1853, r. 7, that in all actions upon bills of exchange and promissory notes, the plea of *non-assumpsit* should be inadmissible: For the mere production and proof of the note would not prove the promise as made to the executors, as it would if the promise were laid as made to the testator: The right of action indeed is transferred to the executor, but no promise is implied by law to pay him; otherwise the Statute of Limitations would run from the death of the payee, and not from the time of the note becoming due: In order, therefore, to support the action, there must be an express promise to the

(a) *Hickman v. Walker*, Willes, 29. *Dean v. Crane*, 1 Salk. 28. *Executors of the Duke of Marlborough v. Widmore*, 2 Stra. 890. 2 Saund. 63, l.

(b) As to what is sufficient evidence of an account stated with the plaintiff as executor, see *Purdon v. Purdon*, 10 M. & W. 562.

executor, that is to say, an express promise as contradistinguished from a promise contained in the note itself, or anything implied out of it; and the cause of action is the existence of the note, *with* the express promise to the executor to pay the amount of it; whereas the rule is confined to cases where the action is *only* on the note (*c*): The effect of the plea of *non-assumpsit* was in such a case to admit that the bill or note was signed by the defendant, but to deny that he made any promise to the executor.

In *Clark v. Hooper* (*d*), payment of interest on a promissory note to an administrator, who had omitted to take out administration in the diocese in which the note was a *bonum notabile*, was held a sufficient acknowledgment of the debt to bar the statute.

The statute is an answer to an action by an executor for a debt due to the testator for which he might have sued more than six years before the issue of the writ, although the action was commenced within a reasonable time after the death (*e*).

Where a plaintiff died, the obsolete writ by journeys accounts could not be brought by his executor (*f*).

Writ by
journeys
accounts.

(*c*) *Timmis v. Platt*, 2 Mees. & W. 720. *Gilbert v. Platt*, 5 Dowl. 748. *Rolleston v. Dixon*, 2 Dowl. & L. 892.

(*d*) 10 Bing. 840.

(*e*) *Penny v. Brice*, 18 C. B. N. S. 393. If, however, a creditor dies intestate on the day on which a debt becomes payable to him, and there is no evidence to show whether he died before or after the moment when the debt becomes payable, the statute does not begin to run against the creditor's administrator until letters of administration have been taken out: *Atkinson v. Bradford Third Equitable Benefit Building Society*, 25 Q. B. D. 377, 381, in which case there was no cause of action which the testator could have maintained.

(*f*) *Kinsey v. Heyward*, 1 Lord Raym. 432. If a writ abated without the default of the plaintiff, he might have had a new writ by journeys accounts, *i.e.*, *per dietas computatas*: The word *dieta* means a day's journey; and the origin of the expression is said to be, that the Court of Chancery, being a moveable Court, and following the King's Court, and the writs being to be purchased out of Chancery, the party was bound to apply to the King's Court as hastily as the distance of the place would allow, accounting twenty miles for every day's journey; and, for this reason, he was to show that he had purchased it as hastily as possible, accounting the days' journeys he had to the Court: 1 Lord Raym.

Action by
executor or ad-
ministrator
after expiry
of six years.

However, where a party brings an action before the expiration of six years, and dies before judgment, the six years being then expired, it has been held that his executor or administrator may, within the equity of the fourth section of the Statute of Limitations (21 Jac. I. c. 16), bring a new action (*g*); provided he does it recently, or within a reason-

433. Termes de la Ley, Art. Journeys Account. Com. Dig. Abatement, P. There are some authorities for the proposition that the writ by journeys accounts is a continuance of the former writ. But Lord Coke calls it "*quodam modo*, a continuance:" And Lord Lyndhurst, C., in *Davies v. Lowndes*, 1 Phill. 328. 6 M. & Gr. 529, and the Court of Common Pleas in a further stage of the same cause, 7 M. & Gr. 762, expressed a very strong opinion that it is not a continuance, strictly and properly, of the old writ, but is a new writ.

(*g*) *Matthews v. Phillips*, 2 Salk. 425. *Kinsey v. Heyward*, 1 Lutw. 200. The remedy by fresh action would seem, from the case of *Swindell v. Bulkeley*, 18 Q. B. D. 250, to be still open to executors. In this case the defendant died, and a fresh action against his executors within a year of probate was held to lie, though in the meantime the six years had expired. But R. S. C. Ord. XVII. r. 4, also provides a new remedy by enabling the personal representatives to obtain an order to carry on the proceedings between themselves and the other party to the action, where, by reason of death after the commencement of the action, a change or transmission of interest or liability has taken place. By Ord. XVII. r. 1,

"A cause or matter shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*; and whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered, notwithstanding the death." By rule 2, "In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to a cause or matter, the Court or a Judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party, or be served with notice." And rule 4 of the same Order is as follows: "Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or

able time deemed statute provides that be come bring a Heyward the Court Wilcox had equity a year arrested further, the statute been read and had wise, be for: And prosecute the discharge; but tion." was allowed the whole to bring matter desirable already a party, or a party another proceeding between the such new obtained the Court allegation

able time. No precise time is fixed as to what shall be deemed a reasonable time; but it should seem that the statute is the best guide upon the subject, and as that provides that a new action, in the cases enumerated in it, must be commenced *within a year*, so an executor ought also to bring a new action within that period (*h*). In *Kinsey v. Heyward* (*i*), a year is said to be a reasonable time; and the Court of King's Bench appears to be of this opinion in *Wilcox v. Huggins* (*k*), where it is said, that the most that had ever been allowed was a year, and that within the equity of the proviso in the statute, which gives the plaintiff a year to commence a new action, where the judgment is arrested or reversed; and that they would not go a moment further, for it would let in all the inconveniences which the statute was made to avoid: Indeed if the executor had been retarded by suits about the Will or administration, and had shown that in pleading, it would have been otherwise, because the neglect would then have been accounted for: And Lee, J., said, "I think what is or is not a recent prosecution in a case of this nature, is to be determined by the discretion of the Court from the circumstances of the case; but generally, the year in the statute is a good direction." However, in *Lethbridge v. Chapman* (*l*), the action was allowed to be brought within fourteen months after the testator's death, though no reason was assigned for it. Upon the whole, therefore, it was deemed prudent for the executor to bring a new action as soon as he possibly could after the

matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained *ex parte* on application to the Court or a Judge, upon an allegation of such change or trans-

mission of interest or liability, or of such person interested having come into existence." An executor or administrator so joined, even after judgment, becomes personally liable to all the costs *ab initio*: *Boynton v. Boynton*, 4 A. C. 733.

(*h*) 2 Saund. 64, a. note to *Hodsdon v. Harridge*.

(*i*) 1 Lord Raym. 434.

(*k*) 2 Str. 207. Fitg. 170, 259.

(*l*) 15 Vin. 103, *in margine*.

death of his testator, and at all events not to delay it beyond a year (*m*). But in *Curlewis v. Lord Mornington* (*n*), it was expressly held, that the executor was not bound to the year, if under the circumstances he can fairly be said to have used due diligence.

The form of the replication by an executor to a plea of the statute, where he recently brought a new action after the death of a testator, was to state, that the testator, on such a day sued out a writ of summons against the defendant, whereby he was commanded, &c., (and then continuing the writ down to the time of the testator's death); that he appointed the plaintiff as executor, and recently after his death, to wit, on such a day, &c., the plaintiff sued out the writ upon which the action is founded; that the several writs so prosecuted by the testator against the defendant were with an intent to have impleaded the defendant upon the several promises in the declaration specified; and that the writ sued out by the plaintiff against the defendant was prosecuted against him with an intent to implead him for the causes of action in the declaration specified, and upon his appearance to declare against him for the said several causes of action, and that he afterwards, on, &c., declared against the defendant, &c., with an averment that the several causes of action accrued within six years next before the suing out of the writ first above specified by the testator (*o*).

Again, if an executor brought *assumpsit*, but died before judgment and the six years run, his executor might, notwithstanding, bring a fresh action, so as he brought it in a reasonable time, which is to be decided at the discretion of the justices upon the circumstances of the case (*p*).

The principle of these cases, according to the judgment of Lord Chief Justice Treby, in the above-mentioned case of *Kinsey v. Heyward* (*pp*), is, that when once the proviso in the Statute of Limitations is complied with by the commence-

(*m*) 2 Saund. 64, b. note.

(*n*) 7 E. & B. 283. S. C. in error. 27 L. J. Q. B. 439.

(*o*) 2 Saund. 64, c. note.

(*p*) Bull. N. P. 150, a.

(*pp*) 1 Lord Raym. 434.

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ment of an action within due time, the party is out of the purview of the Act, and set at liberty out of the restraint of the said statute. But the true ground of these decisions appears to be that they proceed upon the equity of the fourth section of the statute, and that the Courts have extended that section to the case of an executor whose testator has died pending an action brought by him; which, though not within the words of it, was evidently within the mischief (*q*). And the same equitable construction that has been applied, as above mentioned, to the 4th section of the Statute of James, has been followed as to the limitation of actions on bonds, &c., imposed by the stat. 3 & 4 Wm. IV. c. 42, s. 3 (*r*).

Where the right of action accrued to the testator during his residence abroad, and he died abroad, never having returned to this country after the accrual thereof, the statute was held to be no bar to an action by his executors, although the right of action accrued more than six years before action brought; at all events if it be brought within six years after his death (*s*), the case being saved by the 7th section of the statute of James, (which provides that if the person entitled shall be abroad at the time the cause of action accrued, such person may bring his action within six years of his return from beyond the seas), though not strictly within the words of it (*ss*). It has, indeed, been affirmed that the executor may bring the action at any time, on the ground that the case is out of the statute altogether:

(*q*) *Adam v. The Inhabitants of the City of Bristol*, 2 A. & E. 385, 403.

(*r*) *Sturgis v. Darrell*, 4 H. & N. 622. S. C. in error, 6 H. & N. 120.

(*s*) *Townsend v. Deacon*, 3 Exch. 706. See also *Forbes v. Smith*, 11 Exch. 161.

(*ss*) The 7th section of 21 Jac. c. 16, remains unrepealed, but so far as absence beyond seas of a plaintiff is concerned seems to be

impliedly repealed by 19 & 20 Vict. c. 97, s. 19, which statute was passed subsequently to the above cases of *Townsend v. Deacon* and *Forbes v. Smith*. Probably, however, an executor would not be barred till after six years from the death of the testator, on the ground suggested in the text, viz., that the right of action of the executors did not accrue until the testator's death.

But the more reasonable equity, perhaps, is to consider the right of action as accruing to the executor at the death of the testator, and that the action ought to be brought within six years after that time.

Denial of right
of person in
representative
capacity.

By R. S. C. 1888, Ord. XXI. r. 5, it is provided that:—
“If either party wishes to deny the right of any other party to claim as executor . . . or in any representative or other alleged capacity . . . he shall deny the same specifically.”

Where the plaintiff claims in trespass or trover, on his *constructive* possession as executor or administrator, he should sue as executor or administrator (*t*).

But where the executor has been in *actual* possession of the property which was the subject of the suit, it would not be necessary for him to claim or give evidence of his title as executor or administrator, in an action against a wrongdoer (*u*).

What is suffi-
cient proof of
the plaintiff
being execu-
tor, &c. :

It remains to consider, what shall be sufficient evidence of the plaintiff's title as executor or administrator, when it becomes necessary to prove it, either when the representative character of the plaintiff is specifically denied, or in a suit on a cause of action arising in the plaintiff's own time.

probate :

Although the executor derives his title from the Will by which he is appointed, and not from the probate of the Will, yet it is the probate alone which authenticates his right, and the probate, or something tantamount thereto, is the only legitimate evidence of personal property being vested in an executor, or of the executor's appointment (*x*). Therefore, the original Will cannot be read in evidence for that purpose, although produced by the officer of the Court of Probate, unless it bears the seal of the Court, or some other mark of authentication (*y*). The seal of the Court of Probate on the probate proves itself (*z*).

(*t*) *Ante*, p. 252.

(*u*) *Ante*, p. 253. But see also
Waller v. Drakeford, 1 E. & B. 49.

(*x*) *Ante*, p. 243. Hamilton v.
Aston, 1 Carr. & Kirw. 379.

(*y*) R. v. Barnes, 1 Stark. N. P.
C. 243. Pinney v. Pinney, 8 B. &
C. 385 : Nor is a copy of the Will
evidence : Bull. N. P. 246.

(*z*) Court of Probate Act, 20 &

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If the probate is lost, it was not the practice of the Ecclesiastical Court to grant a second, but only an exemplification from the records of the Court; which would be evidence of the proving the Will (a). And an examined copy of the probate is evidence of the person there named being executor; because the probate is an original, taken by authority, and of a public nature (b).

When probate is lost.

It must be observed, that all that is required, either in the case of an executor or administrator, is to show by legitimate evidence that the Court of Probate has given authority to the person to administer: It is only the act of the Court of Probate that is to be proved: The probate is only a copy of this act: The original book containing the entry of the act of Court is the original, and therefore the primary evidence: Hence the Act-book, containing an entry of a Will having been proved, and of probate granted to the executors therein named, is admissible evidence of those persons being the executors, without accounting for the non-production of the probate (c).

And now, since it is provided by R. S. C. 1883, Order XXXVII. r. 4, that office copies of all writs, records, pleadings, and documents filed in the High Court shall be admissible in all causes and matters, and between all persons or parties, to the same extent as the original would be admissible, it would seem that an office copy of the record from the Probate Registry is good evidence of the executor's or administrator's title.

To prove that the probate of a Will had been revoked, an entry of the revocation in a book of the Prerogative Court, in which all causes were entered by the Registrar, and which was kept as the only record of such proceedings, and of the decree of the Court, was admitted to be good evidence (d).

Proof of revocation of probate.

21 Vict. c. 77, s. 22. See also S. P. before the Act passed, *Kempton v. Cross*, Cas. temp. Hardw. 108.

(a) *Shepherd v. Shorthose*, 1 Stra. 412. Bull. N. P. 246.

(b) *Hoe v. Nelthorpe*, 3 Salk.

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154. S. P. by Holt, C. J., in *R. v. Haines*, Skinn. 584. Bull. N. P. 246.

(c) *Cox v. Allingham*, Jacob. 514.

(d) *Ramsbottom's case*, 1 Leach,

The title of several plaintiffs, claiming as executors, is well evidenced by probate, granted to one only, of the Will appointing them all (e): And the rule was the same whether they sued in their representative character or not (f); for probate granted to one of several executors enures to the benefit of all (g).

Proof of
letters of ad-
ministration:

The title of an administrator *de bonis non* is sufficiently proved by the letters of administration *de bonis non*, without those granted to the first executor or administrator (h).

Where an executor or administrator produces the probate or letters in proof of his representative character, and his case shows that he sues for a greater value than is covered by the probate or administration stamp, he cannot recover (i).

The title of the plaintiff, as administrator, may be proved by the production of the letters of administration, or of a certificate or exemplification thereof granted by the Court of Probate (k), or, without producing the letters of administration, by the original book of acts, directing the grant of the letters (l); or by a copy of it under R. S. C. 1883, Order XXXVII. r. 4. The original book of acts, directing letters of administration to be granted, with the Surrogate's *fiat* for the same, was held to be evidence of the title of the party, to whom administration of the intestate's effects is granted, without producing the letters of administration themselves (notwithstanding subsequent letters of administration granted to another), if the first are not recalled; for the original book was the authority for the proper officer to make out letters of administration, and the letters of admi-

Or. C. 60, n. (e). And see R. S. C. 1883, Ord. XXXVII. r. 4, *supra*.

(e) *Walters v. Pfeil*, 1 Mood. & Malk. 362. *Scott v. Briant*, 6 Nev. & M. 381.

(f) *Mood. & Malk.* 362.

(g) *Ante*, p. 320. *Watkins v. Brent*, 7 Sim. 512.

(h) *Catherwood v. Chabaud*, 1 B. & C. 150. See also *Gradell v.*

Tyson, 2 Stra. 716.

(i) See *ante*, p. 508 *et seq.*, as to the amount of stamp. *Hunt v. Stevens*, 3 Taunt. 113. *Carr v. Roberts*, 2 B. & Ad. 905.

(k) *Kempton v. Cross*, Cas. temp. Hardw. 108.

(l) *Ibid.* *Elden v. Keddel*, 8 East, 187. *Ramsbottom v. Buckhurst*, 2 M. & S. 567.

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(m) *Elden*
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(o) *Ante*, p.
(p) *Ante*, p.

nistration were only the copy of the original minutes of the Court, drawn up in a more formal manner (*m*). So an examined copy of the Act-book, stating that administration was granted to the defendant at such a time, is proof of his being administrator in an action against him, without giving him notice to produce his letters of administration (*n*).

There has already been occasion to consider how far a probate or letters of administration, when produced by the plaintiff, are conclusive upon the defendant (*o*). But it may be convenient, in this place, to recapitulate some of the points established on this subject.

The defendant cannot prove that another person was appointed executor or administrator, or that the testator was insane, or that the Will, of which probate had been granted, was forged: for that would be directly contrary to the seal of the Court of Probate in a matter within its immediate jurisdiction (*p*).

Evidence for
defendant.

But it may be proved that the supposed testator or intestate is alive; for in such case, the Court of Probate can have no jurisdiction (*q*). And it may be shown, that the seal attached to the supposed probate has been forged, or that the letters have been revoked (*r*).

Again, the defendant may plead in his defence, that he has paid the debt, which is the subject of the action, to an executor who had obtained probate of a forged Will, unrepealed at the time of the payment (*s*). But payment of money under the probate of a supposed Will of a living person would be void; because, in such case, the Court of Probate has no jurisdiction, and the probate can have no effect (*t*).

It may be doubted whether admissions made by an executor or administrator, before he was clothed with that character,

Whether ad-
missions made

(*m*) Elden v. Keddell, 8 East, 187. Garrett v. Lister, 1 Lev. 25.

(*n*) Davis v. Williams, 13 East, 232.

(*o*) Ante, p. 464 et seq.

(*p*) Ante, pp. 464 et seq.

(*q*) Ante, p. 478.

(*r*) Ante, p. 478.

(*s*) Ante, p. 466. Allen v. Dundas, 3 T. R. 125.

(*t*) Ibid. 130.

by an executor, &c., before appointment, are receivable against him as executor :

Admissions by co-executor.

Costs.

are receivable in evidence against him in an action brought by or against him in his representative capacity (*u*). However, in *Smith v. Morgan* (*x*), Tindal, C. J., admitted the declaration of the assignees of a bankrupt made by them before their appointment, stating that he was not aware of any distinction between the admissions of parties suing in a representative character and in their own right (*y*).

The admission of one of several executors or administrators will not bind the others; at all events, unless it is made in the character of executor. Therefore where two executors were sued as such on a covenant of their testator for quiet enjoyment, and the question was whether the defendants who had evicted the plaintiff had done so under lawful title, it was held that an admission of one of the defendants was no evidence of such title (*z*).

Executors and administrators instituting or defending actions are subject to the same rules as to costs, as they would be if they were suing or defending in their own right (*a*). The awarding of costs in the Supreme Court is governed by R. S. C. 1883, Order LXV. r. 1, which provides as follows:—"Subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division (*b*): Provided also that, where any action, cause,

(*u*) See *Stewart v. Edmonds*, 12 M. & W. 510.
ante, p. 344, note (*c*).

(*x*) 2 M. & Rob. 257.

(*y*) See *contra*, *Fenwick v. Thornton*, M. & M. 51, *coram* Lord Tenterden.

(*z*) *Fox v. Waters*, 12 A. & E. 43. See also *Scholey v. Walton*,

(*a*) 2 Dan. C. P. 6th edit. c. 19, s. 2, p. 1175.

(*b*) As to when payment of costs out of the fund will be ordered, see Dan. C. P. 6th edit. c. 19, s. 3 pp. 1206 *et seq.*

matter, or event, or issue in order."

Plaintiff be compelled to sue as executor.

By Order of the Court, (a) the date of the judgment, otherwise the party apply to the court according to the cases where judgment is given.

Until the party to the action of a debt due to the Judicature Order XL. a party to

(c) *Cheverton v. Bingham*, 12 Chamberlain v. De Blaquiere, an action by whom is claimed and the defendant is of proceedings security for L. R. 4 C. 1. (d) See *Hard*, 43 C. execution of the testator's lifetime executed at Griffith, 16

matter, or issue is tried with a jury, the costs shall follow the event, unless the Judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order."

Plaintiffs who live out of the jurisdiction of the Court may be compelled to give security for costs, though such plaintiffs sue as executors (c).

By Order XLII. r. 23, it is provided: "In the following cases, viz., (a) where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution. . . . the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly." This seems to be the proper procedure in cases where the executor seeks to issue execution upon a judgment obtained by the testator (d).

Remedy on judgment obtained by testator.

Until the executor or administrator had made himself a party to the judgment, he was not entitled, under the 61st section of the Common Law Procedure Act, 1854, to attach a debt due to the judgment debtor (e). Whether under the Judicature Act he would be entitled to proceed under Order XLII. r. 23, or whether he would have to make himself a party under Order XVII. r. 4, would seem to depend on

(c) *Chevalier v. Finnis*, 1 Brod. & Bingh. 277. *Chamberlain v. Chamberlain*, 1 Dowl. 366. *Knight v. De Blaquière*, Sau. & Sc. 658. In an action by two executors, one of whom is out of the jurisdiction and the other insolvent, the defendant is not entitled to a stay of proceedings until they give security for costs: *Sykes v. Sykes*, L. R. 4 C. P. 645.

(d) See *ante*, p. 780. *Re Shephard*, 43 C. D. 131. If the writ of execution was issued in the testator's lifetime, it might have been executed after his death: *Ellis v. Griffith*, 16 M. & W. 106. The

executor of a creditor who has obtained a final judgment is not entitled to issue a bankruptcy notice against the judgment debtor, unless he has obtained leave from the Court, under Ord. XLII. r. 23, to issue execution on the judgment. Under sub-sect. 1 (g) of sect. 4 of 46 & 47 Vict. c. 52, Bankruptcy Act, 1883, the creditor who issues a bankruptcy notice must be in a position to issue execution on the judgment: *Ex parte Woodall*, 13 Q. B. D. 479, 53 & 54 Vict. c. 71, s. 1, Bankruptcy Act, 1890.

(e) *Holmes v. Tutton*, 5 E. & B. 65.

whether the judgment of Lord Coleridge, C. J., or that of Stephen, J., in *Fellows v. Thornton* (f) is right.

Relief by
auditâ querelâ
now abolished.

If an executor or administrator obtained judgment, and then the probate or letters of administration were revoked, the regular mode for the defendant to obtain relief was by an *auditâ querelâ* (g); but now, by Order XLII. r. 27, it is provided that "no proceeding by *auditâ querelâ* shall hereafter be used; but any party against whom judgment has been given may apply to the Court or a Judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the Court or Judge may give such relief and upon such terms as may be just."

County Court
Act, 1888.

By stat. 51 & 52 Vict. c. 48, s. 95, "it shall be lawful for any executor or administrator to sue and be sued in the County Court in like manner as if he were a party in his own right, and judgment and execution shall be such as in the like case would be given or issued in the High Court."

Presentment
of bill of
exchange by
executor.

If the holder of a bill be dead, and the executor has not yet proved the Will, it is said that the bill must, nevertheless, be presented for payment at the regular time: but it should seem, that the drawer and indorsers would not be discharged, provided presentment be made, and notice given of the dishonour, by the executor or administrator, in a reasonable time (h).

(f) 14 Q. B. D. 335.

(g) *Turner v. Davies*, 2 Saund. 148.

(h) See Roscoe on Bills, 147. Mr. Justice Byles, in his book on Bills, 14th ed., Chap. V., pp. 60, 61, says: "If the holder be dead, and the executor have not proved the Will, still it seems that the executor is bound to present the bill when presentable, for his title to his testator's property is derived exclusively from the Will, and vests in him from the moment of the testator's death. But as the title of an administrator is derived wholly from

the ecclesiastical court, and he has none till the letters of administration are granted, he probably would be excused by impossibility." The Bills of Exchange Act, 1882, does not directly deal with the matter, but sect. 46 provides that "delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence."

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CHAPTER THE SECOND.

OF REMEDIES FOR EXECUTORS AND ADMINISTRATORS IN
EQUITY.

THE executor or administrator is entitled to all equitable rights and interests of the deceased and can enforce them in the same way as the deceased.

General
equitable
rights of
executor, &c.

The one exception to this rule, which is founded on the maxim *actio personalis moritur cum persona* (a), has but little application in equity: for instance, it does not prevent the executor of a person wronged from obtaining an equitable remedy by a mandatory injunction, in order to prevent the continuance of some injury to the property of a deceased person. An executor can sustain an action to have an obstruction to light removed if it affects land of his testator, although his right to damages for the injury to the real estate of the deceased may be barred, because the action was not brought within the limit of time provided by 3 & 4 Will. IV. c. 42, s. 2 (b), and where injury to the dead man's estate is shown the remedy is not confined to injunction, but extends to damages also (c).

Exception.

A great many of the equitable rights and interests of the deceased the executor or administrator can enforce in the Chancery Division by precisely the same form of action as the deceased would employ if he was living.

Many rights
the executor
enforces in the
same way as
the deceased
would have
done.

For instance, an action in equity can be successfully maintained to protect the literary property of the deceased, as in *Thompson v. Stanhope* (d), where the executors of Lord

(a) This maxim will be found fully treated of, *ante*, p. 697.

(b) *Phillips v. Homfray*, 24 Ch. D. 439. *Jones v. Simes*, 43 Ch. D. 607.

(c) For recent instances of pro-

tecting trade-marks, see *Hatchard v. Mege*, 18 Q. B. D. 771. *Oakley v. Dalton*, 35 Ch. D. 700.

(d) *Ambl.* 734. See also *Graham v. Duukin*, 1 Ball & B. 207.

Chesterfield obtained an injunction against Mrs. Stanhope, restraining her from publishing the letters which had been received by her husband, the natural son of Lord Chesterfield; or *Queensberry v. Shebbeare* (e), where the representatives of Lord Clarendon obtained an injunction to restrain the printing of an unpublished copy of his *History of the Rebellion*, which had been given by a former representative of the author to a person under whom the defendant claimed, but not with an intention that he should publish it.

Scope of this chapter.

It is not proposed in this chapter to discuss such remedies as are before mentioned; they are common to all litigants in the Chancery Division, and they do not become exceptional merely because they are adopted by executors or administrators.

In this chapter and in the chapter on remedies against an executor in equity it is only proposed to discuss those remedies by or against the executor or administrator which are peculiar and exceptional.

Retainer and set-off not exceptional remedies.

In the exceptional remedies by and against executors and administrators in equity hereinafter mentioned, questions of retainer and set-off by the executor or administrator frequently arise, but retainer and set-off are legal rather than equitable remedies, and are fully dealt with in another part of this work (f).

Right of executor, &c., to pay statute-barred debt.

An executor or administrator, can before an administration order, pay or retain a statute-barred debt (g), or may admit it so as to take it out of the statute (h), but he cannot revive it after decree (i).

Statute of Limitations.

The Statute of Limitations may be set up in resistance to an application to continue the proceedings, if the executor or administrator does not proceed within six years after the abatement of an action, provided there has been no judg-

(e) 2 Eden, 329.

(f) *Ante*, p. 884 and p. 1780.

(g) *Stahlschmidt v. Lett*, 1 Sm. & G. 415. *Hill v. Walker*, 4 K. & J. 166.

(h) *Moodie v. Bannister*, 4 Drew. 432. *Blair v. Nugent*, 3 J. & Lat. 673.

(i) *Phillips v. Phillips*, 32 Beav. 26.

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ment (k); for the Statute of Limitations cannot be applied to a judgment (l). If an executor or administrator, trustee for an infant, neglects to sue within six years, the Statute of Limitations binds the infant (m).

An administrator claiming the estate or interest in lands of the deceased person of whose chattels he has been appointed administrator, is to be deemed to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration (n). The effect of this is, that time for the purpose of the Statute of Limitations commences to run, as against an administrator claiming a chattel interest in land, from the date of the death of the intestate and not from the date of the grant of administration (o).

In the case of an administrator time runs from the death, not from grant of letters of administration.

The Chancery Division has power to restrain proceedings in a foreign Court against an executor or administrator by persons within the jurisdiction (p) by the exercise of jurisdiction *in personam* against such persons. It will do so where proceedings are improperly or vexatiously instituted or prosecuted in the foreign Court to determine questions which ought to be adjudicated upon in this country (q).

Restraining proceedings in foreign Courts by injunction.

This jurisdiction can be exercised whether an administration order has or has not been made (r).

Proceedings in a foreign Court will not be restrained on the ground of mere hardship or inconvenience (s).

(k) Hollingshead's case, 1 P. Wms. 742. Mitf. Pl. 272, 273, 4th edit.

(l) *Supra*, note (k).

(m) *Wych v. East India Company*, 3 P. Wms. 309.

(n) 3 & 4 Will. IV. c. 27, s. 6.

(o) *Re Williams*, 34 Ch. D. 558. *Re Bonsor & Smith's Contract*, 34 Ch. D. 580.

(p) The Court has no such jurisdiction if the persons sought to be restrained are not within the jurisdiction: *Re Boyse*, 15 Ch. D. 591.

(q) *Carron Iron Co. v. Maclaren*, 5 H. L. C. 416. *Lord Portarlington v. Soulby*, 3 M. & K. 104. *Venning v. Lloyd*, 1 D. F. & J. 193. *McHenry v. Lewis*, 22 Ch. D. 397. *Hyam v. Helm*, 24 Ch. D. 531.

(r) *Bushby v. Munday*, 5 Madd. 297. *Baillie v. Baillie*, L. R. 5 Eq. 175. *Bunbury v. Bunbury*, 1 Beav. 336. *Cord v. Cord*, 33 Beav. 314.

(s) *Fletcher v. Rodgers*, 27 W. R. 96. Although judgment has been given in the foreign Court.

The staying of actions against an executor or administrator, after an administration order has been made, will be found dealt with in a subsequent chapter (t).

Where the executor, in an action at law against him by a creditor of the deceased, had pleaded according to the truth of the case, he was always held entitled, when the assets were taken from him and administered by the Court of Equity, to all the protection which that Court could give him against any personal liability in respect of the judgment at law (u).

But with respect to restraining a creditor from proceeding, after a decree for administration, upon a verdict or judgment recovered by him against an executor or administrator, the following distinction was taken by Lord Eldon, in *Brook v. Skinner* (x): That if the plaintiff at law had recovered judgment *de bonis testatoris*, the Court would restrain the creditor from taking execution on such judgment; and that if he had recovered *de bonis propriis*, the Court would not restrain the execution. So, in *Clarke v. Ormonde* (y), his Lordship said, that if a creditor has obtained judgment by which the executor is personally liable, *de bonis propriis*, the Court had nothing to do with it; but if a judgment *de bonis testatoris*, it certainly would be a case for an injunction. That is, that the Court would interfere to protect the assets, but not to protect the executor against any liability to which he might have personally subjected himself. And, in *Drewry v. Thacker* (z), his Lordship intimated his opinion, that there was no instance in the history of the Court of Chancery, where, after a judgment at law *de bonis testatoris*, *et si non*, *de bonis propriis* of an executor, and execution issued, the proceedings at law had been restrained, on a decree subsequently obtained for administration of the assets. But, in *Lord v. Wormleighton* (a), the executor pleaded, to an action by a creditor, *non assumpsit*, a set-off, and *plene adminis-*

(t) See *post*, p. 1908.

(u) *Gaunt v. Taylor*, 2 Hare, 413.

(x) 5 Meriv. 481, note.

(y) *Jacob*, 124.

(z) 3 Swanst. 542, 543, 547, 548.

See also *Terrewest v. Featherby*, 2 Mer. 480.

(a) *Jacob*, 148.

travit, and the verdict was against him on all these pleas: And, on a decree for the administration of the estate having been pronounced pending the action, Lord Eldon granted an injunction against the creditor, with a direction that the executor should pay the costs at law, including the costs of the trial: And his Lordship observed, that the case had been argued as if it was the case of a judgment *de bonis testatoris, et si non, de bonis propriis*: but that, in fact, it was a judgment for the damages *de bonis testatoris*, and for the costs only *de bonis propriis*.

In the modern case of *Etheridge v. Wormsley* (b), a creditor had previously to any administration decree, obtained judgment in a county court against the defendant, a sole executrix. Pearson, J., refused to restrain the creditor from pursuing his remedy in the county court against the executrix personally, but ordered payment to the creditor by the receiver of the estate, without prejudice to the question whether the executrix should be allowed the payment.

One executor or administrator can in equity bring an action against another (c).

An executor or administrator (d) can in equity as at law sue before grant to him of probate, or letters of administration, but he must obtain a grant of probate or letters of administration before the hearing (e). It appears to be unnecessary for an executor to allege in his pleading that a valid grant of probate has been made to him (f).

Right of executor or administrator to sue before probate or letters of administration.

In an old case (g), it was held that production by a plaintiff, suing as administrator to A., of the letters of administration, was not *prima facie* evidence of A.'s death (h), but at the

Evidence of death of testator.

(b) 29 Ch. D. 557.

(c) *Allen v. Story*, Toth. 150. *Peake v. Ledger*, 8 Hare, 313. See the American case of *Beall v. Hilliary*, 1 Maryland, 186. 54 American Decisions, 649.

(d) *Humphreys v. Humphreys*, 3 P. Wms. 350.

(e) See *ante*, pp. 255, 256.

(f) *Re Masonic and General*

Life Assurance Co., 32 Ch. D. 373.

The old practice was to allege that probate had been granted or letters of administration taken out: *Humphreys v. Ingledon*, 1 P. Wms. 753.

(g) *Moons v. De Bernales*, 1 Russ. Chanc. Cas. 301.

(h) See *ante*, p. 477.

hearing, liberty was given to the plaintiff to exhibit interrogatories to prove the death, and the cause permitted to stand over for that purpose (i).

Right of executor or administrator to continue an action.

Effect of death of one of several plaintiff co-executors.

Parties to an action by executors.

An action commenced by the dead man can be continued by his executor or administrator, if the interest survives, on obtaining an order for that purpose (k).

An action commenced by co-executors does not abate by the death of one of them, as the whole of his interest survives to the others, nor is any order to continue the proceedings necessary (l).

Where there are several executors, they must all sue, though one of them is an infant (m). If only one of several executors has proved, he may sue alone without making the other executors parties, although they may not have renounced (n), unless they have acted (o). Where one of two or more executors refuses to join as a plaintiff, the other or others can still bring the action, making the executor who refuses to join a defendant.

Any executor, administrator or trustee entitled thereto may have a judgment or order against, any one legatee, next of kin, or *cestui que trust*, for the administration of the estate or the execution of the trusts (p).

An executor or administrator is not allowed to sue or defend as a pauper, "because the indulgence intended poor persons not of ability to sue for their rights *in forma pauperis* only extends to persons suing in their own rights, and not as executor or administrator" (q).

Executor cannot sue or defend *in forma pauperis*.

(i) See *Hood v. Pimm*, 4 Sim. 101. Where money is ordered to be paid to A. or his representatives (the constant course upon payment to creditors) the mere production of the probate is not sufficient to enable the representative to obtain payment: Proof of the death is now required, and that the testator was the party in the cause: *Clayton v. Gresham*, 10 Ves. 289.

(k) R. S. C. 1883, Ord. XVII.

(l) *Toller*, 497.

(m) 16 Vin. Abr. 251, tit. Parties (B.), pl. 20.

(n) *Davies v. Williams*, 1 Sim. 5.

(o) *Vickers v. Bell*, 4 De G. J. & S. 274.

(p) Ord. XVI. r. 38. See also Ord. XVI. rr. 8, 9, 32, 40, 46, and Ord. LV. r. 3.

(q) *Paradise v. Sheppard*, 1 Dick.

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The ordinary method of invoking the aid of the Chancery Division is by writ of summons; in some cases a special mode of procedure by originating summons, motion, or petition applies, but in all cases to which such special procedure does not apply, proceedings can only be commenced by writ. An originating summons is by far the most important form of special procedure. It is only in cases specially defined by statute or the Rules of Court that the Court can exercise jurisdiction on an application by originating summons.

Writ or
originating
summons.

The chief difference between proceedings commenced by writ and originating summons is, that the proceedings in the former case are in Court, and there are usually pleadings delivered by the parties; in the latter case the proceedings are in chambers, without pleadings.

Difference
between
proceedings
commenced
by writ and
originating
summons.

In all cases where proceedings can be commenced by originating summons they can also be commenced by writ of summons; but if proceedings are commenced by writ of summons, which ought to be commenced by originating summons, the extra costs incurred are usually thrown upon the plaintiff (r).

Costs of
proceedings
wrongly
commenced.

If there be any real doubt as to whether proceedings should be commenced by originating summons or by writ, the preference should be given to originating summons, as, should the procedure ultimately turn out to be wrong, the Court will usually give the executor or administrator issuing the summons his costs out of the estate, where a mistake has *bonâ fide* been made. Where an originating summons had, in the first instance, been taken out and dismissed on the ground of want

Why a
summons is
preferable in
case of doubt.

136. Beames on Costs, 78. Oldfield v. Cobbett, 1 Phill. Ch. C. 613. Fowler v. Davies, 16 Sim. 182. See Bayly v. Bayly, 11 Beav. 256.

(r) In many cases the costs of proceeding by writ are actually less than the costs of proceeding by summons would have been. As many orders can only be made

by the Judge personally (see Ordl. LV. rr. 15 and 15A), and as most important matters are adjourned to him, both time and expense can often be saved by proceeding by writ, and the Judge can, and will, upon application by motion, and with the consent of the parties, at once make the order required.

of jurisdiction, North, J., on a subsequent application by petition to deal with the same fund, allowed the costs of the summons, because it had been issued in the reasonable expectation that the order could be made in chambers, and it was a meritorious application (s).

Matters of special difficulty.

The difficulty or importance of the question involved is no reason for refusing to deal with it on originating summons, but in matters of special difficulty, or where questions of large amount are involved, the Court usually looks with indulgence on proceedings commenced by writ (t).

Heading of writ, &c., in an administration action.

In an administration action the writ and pleadings must be entitled, "In the matter of the estate of A. B., deceased, Between," &c. (u). If this be omitted the chief clerk or registrar will require the writ to be amended before drawing up any order in the action (x). An originating summons for administration must be entitled in the same way (y).

Or administration summons.

The Court can make an order for general administration of the personal and real estate of a deceased person on originating summons (z).

The rules giving special remedies to executors and administrators by originating summons are rules 3 and 4 of Order LV. of the Rules of the Supreme Court, 1883.

Rule 3 of Order LV. is as follows: "The executors or administrators of a deceased person, or any of them, and any person claiming to be interested in the relief sought as a creditor, devisee, legatee, next of kin, or heir-at-law or customary heir of a deceased person, or as *cestui que trust* under the trust of any deed or instrument, or as claiming by assign-

(s) *Re Gellard's Trusts*, W. N. 208. 1888, p. 43. The Judge usually allows the costs where there is room for doubt as to the jurisdiction on summons, and a mistake has been made *bond fide*.

(t) See hereon *Bond v. Walford*, 54 L. T. N. S. 672.

(u) *Eyre v. Cox*, 24 W. R. 317.

(x) Annual Practice, 1893, p.

(y) See Table of Titles, &c., of petitions, &c., issued out of the Central Office, and Form No. 25 R. S. C. 1883, App. L.

(z) R. S. C. 1883, Ord. LV. r. 4. An order cannot be made to serve an originating summons out of the jurisdiction: *Re Busfield*, 32 Ch. D. 123.

ment or otherwise under any such creditor or other person as aforesaid, may take out, as of course, an originating summons returnable in the chambers of a judge of the Chancery Division for such relief of the nature or kind following as may by the summons be specified and as the circumstances of the case require (that is to say), the determination, without an administration of the estate or trust, of any of the following questions or matters :—

- “(a) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or *cestui que trust* ;
- “(b) The ascertainment of any class of creditors, legatees, devisees, next of kin, or others ;
- “(c) The furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts ;
- “(d) The payment into Court of any money in the hands of the executors or administrators or trustees (b) ;
- “(e) Directing the executors or administrators or trustees to do, or abstain from doing, any particular act in their character as such executors or administrators or trustees (c) ;
- “(f) The approval of any sale, purchase, compromise, or other transaction (d) ;
- “(g) The determination of any question arising in the administration of the estate or trust (e).”

Questions which can be determined on originating summons.

(b) Trustees can be ordered, under this rule, to pay into Court moneys improperly applied by them : *Re Chapman*, 54 L. T. 13.

(c) The act must be something within their trust : *Suffolk v. Lawrence*, 32 W. R. 899.

(d) The Court cannot order a sale under this rule. It can only approve one as to which the trustees have a discretion : *Re Robinson*, 31 Ch. D. 247. See on this rule, *Re Household*, 27

Ch. D. 553, where trustees were authorized to advance to the tenant for life part of the personal estate for the purpose of stocking and cultivating a farm forming part of the settled real estate.

(e) Under this rule only those questions can be determined which before the existence of the rule could have been determined under a judgment for the administration of an estate or the execution of a trust : *Re William Davies*, 38 Ch.

Administra-
tion on
originating
summons.

Under rule 4 of Order LV. the Court can, on an application by originating summons, order :

1. The administration of the personal estate of the deceased ;
2. The administration of the real estate of the deceased ;
3. The administration of the trust.

" The persons to be served with the originating summons under the preceding rules (f) are as follows :—

" A. Where the summons is taken out by an executor or administrator or trustee ;

" (a) For the determination of any question, under sub-sections (a) (e) (f) or (g) of rule 3, the persons, or one of the persons, whose rights or interests are sought to be affected ;

" (b) For the determination of any question, under sub-section (b) of rule 3, any member, or alleged member of the class ;

" (c) For the determination of any question, under sub-section (c) of rule 3, any person interested in taking such accounts ;

" (d) For the determination of any question, under sub-section (d) of rule 3, any person interested in such money ;

" (e) For relief under sub-section (a) of rule 4, the residuary legatees, or next of kin, or some of them ;

" (f) For relief under sub-section (b) of rule 4, the residuary devisees, or heirs, or some of them ;

" (g) For relief under sub-section (c) of rule 4, the *cestuis que trust* or some of them ;

" (h) If there are more than one executor or administrator or trustee, and they do not all concur in taking out the summons, those who do not concur :

" B. Where the summons is taken out by any person other

D. 211. This subject will be found further treated of in the subsequent chapter dealing with the remedies against executors and administrators in equity.

(f) Rules 3 and 4 of Ord. LV.

than the executors, administrators or trustees, the said executors, administrators or trustees (g)."

The Court which has, under the before-mentioned rule (h), power to dispense with service upon more than one member of a class, can, in any case, order any persons beneficially interested in the trust or estate to be made parties, either in addition to, or in lieu of, the previously existing parties (i).

Court can order any persons it thinks fit to be added as parties.

In a case where it was necessary to determine on the construction of a Will whether the members of a class took *per capita* or *per stirpes*, as the members of the class were known, the Court could not appoint the persons before it to represent the class under Ord. XVI. r. 32, it was held that the proper course to adopt was to apply in chambers, to have it ascertained who were the parties interested, and who ought to be served (k).

Application in chambers as to parties to be served.

The above rules give an executor or administrator a cheap and speedy method of getting the assistance and directions of the Court, and he is of course protected where he acts under an order so obtained. In all cases to which the rules apply, the executor or administrator, where there is any doubt or difficulty, should issue an originating summons and have the matter decided by the Court, and not rely on the advice of a solicitor or opinion of counsel, which, according to the circumstances, may, or may not, afford him some indemnity. The tendency of the Court seems rather to encourage than to discourage applications by executors or administrators under this rule (l).

Advantage to an executor of having questions decided by the Court.

An application should, for instance, always be made to the Court for its directions under this rule (where it applies)

Questions of construction of wills.

(g) Ord. LV. r. 5. These rules are, for the sake of convenience, set out in this chapter, although they as fitly fall within the subject-matter of the subsequent chapter dealing with the remedies against executors and administrators in equity.

(h) Ord. LV. r. 5. See also Ord. XVI. r. 32.

(i) See R. S. C. Ord. LV. r. 6.

(k) *Re Gardiner*, W. N. 1887, p. 59.

(l) See, for example, the remarks of Stirling, J., in *Re Partington*, 57 L. T. N. S. 660.

where there is difficulty in construing the Will; as an executor or administrator who, although acting *bonâ fide*, distributes the estate on what turns out to be an erroneous construction, is liable to make good the funds he has parted with (*m*), and he is also liable to be charged with interest at 4 per cent. on the money he has to make good (*n*); but in a case where the legatee, to whom the money has to be made good, had full knowledge of the erroneous payment and acquiesced in the erroneous view of the Will, the Court did not make the executor pay interest (*o*).

The Court has the same jurisdiction as in an action commenced by writ.

New practice in administration actions.

The Court has the same jurisdiction as to costs on a summons properly taken out under Ord. LV. as in an ordinary administration action, and it can on such a summons, if the proper parties are before it, deal with the question of costs, although no estate or fund be sought to be administered (*p*).

The practice as to administration actions was changed by the Rules of the Supreme Court, 1883. "There were formerly in the Court of Chancery numbers and numbers of cases in which an administration suit was necessarily instituted, not because the parties desired the administration of the estate generally, but because there were certain questions—they may have been minute, they may have been limited, they may have been very important—over which the Court would have had no control without the existence of an administration suit. There were no means, according to the old practice, of bringing isolated questions under a Will before the Court for its determination except by an administration suit. It was felt that that very often involved parties in an amount of expense which was unnecessary, and which they ought to be relieved from" (*q*).

Partial administration

In order to avoid this expense, power is expressly given to the Court by the rules of 1883 to determine any question without making a judgment or order for the administration of

(*m*) *Saltmarsh v. Barrett*, 31 Beav. 349.

(*n*) *Atty.-Gen. v. Köhler*, 9 H. L. C. 654.

(*o*) *Re Hulkes*, 33 Ch. D. 552.

(*p*) *Re Medland*, 41 Ch. D. 476.

(*q*) *Pearson, J.*, in *Re Wilson*, 28 Ch. D. 457, 460.

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(*r*) *R. S.* r. 10.
(*s*) *Re L*
(*t*) *Ibid.*
(*u*) *Re D*
p. 139.
(*x*) See

a trust or of the estate of a deceased person, if the question between the parties can be properly determined without such judgment or order (r).

This power is not confined to the cases which can under Ord. LV. rr. 3 and 4, be raised by originating summons, but under Ord. LV. r. 10, the Court has this power, whether the question arise on summons "or otherwise."

This power extends to administration actions commenced before, but tried after, the rule came into operation (s).

The question, whether in any particular case it is necessary that a general administration of the estate should be directed, can be referred by the judge to be decided in chambers (t).

One ground on which the Court has since the rules of 1883 directed a general administration is, that without it the executors or administrators cannot be adequately protected. For instance, where a testator had up to his death been engaged in the businesses of a merchant, shipbroker, insurance broker, and farmer, and was also the managing owner of six steamers, the proprietor of a colliery, and a partner in two other collieries—in addition, he was the sole defendant in a partnership action relating to one of the collieries, in which heavy claims were made against him by the partners—under these circumstances, questions arose whether any and which of his businesses ought to be carried on, and what ought to be done by his executors as to the defence of the pending action, and how and when his property ought to be realised. On these facts, Chitty, J., directed a general administration, and in addition directed special enquiries with regard to the testator's businesses and shares in ships (u).

It appears that no order short of a general administration order will bind creditors (x).

Question as to whether general administration is necessary can be referred to chambers. Grounds on which the Court still makes a decree for general administration.

Binding creditors.

(r) R. S. C. 1883, Ord. LV. r. 10.

(s) *Re Llewellyn*, 25 Ch. D. 66.

(t) *Ibid.*

(u) *Re Dickinson*, W. N. 1884, p. 199.

(x) See *Re Mills*, W. N. 1884,

p. 21, where Pearson, J., expressed such a view; and *Re Barrett*, 43 Ch. D. 70, where North, J., held that an order for an account under Ord. XV. r. 1, did not put an end to the executor's right to prefer a particular creditor. Orders for

Smallness of assets.

In considering whether an order for general administration should or should not be made the Court will be governed by the circumstances of each case (*y*); the smallness of the assets is a material circumstance to decide the Court against making such an order (*z*).

A direction in a will to obtain general administration does not deprive the Court of its discretion.

The fact that the testator has by his Will directed his trustees to commence an action for administration does not deprive the Court of its discretion to refuse to make an order for general administration; but the Court gives weight to such a direction in considering whether the order should, or should not, be made (*a*).

Order for general administration must be made by judge.

No order for general administration can be made except by the judge in person (*b*).

Order for administration with a proviso limiting proceedings under it.

Where an executor or administrator either has proceedings commenced against him in respect of debts due from his testator or intestate, or is threatened with such proceedings, it is often very important that an order for general administration of the estate should be obtained, so as to protect it for the general body of creditors, or to give time to properly realise it. Where such a course is necessary there is power for the Court or a judge to make the usual judgment or order for administration, with a proviso that no proceedings are to be taken under such judgment or order without leave of the judge in person. Such an order can only be made where the application for administration is by a creditor or beneficiary, not where the application is by the executor or administrator (*c*).

Order to deliver accounts.

In the same way, upon an application for administration or

limited administration are often productive of expense only, as after a limited order has been made, an order for general administration is frequently found to be necessary. Where it is likely that ultimately an order for general administration will be required, the better way is for the order to be made at once, with a direction that no proceedings are to be taken

under it without the leave of the Judge. See Ord. LV. r. 10A (*b*).

(*y*) See hereon *Re Wilson*, 28 Ch. D. 457, and *Re Gyhon*, 29 Ch. D. 834.

(*z*) *Re Jennings*, 28 Sol. Jo. 477.

(*a*) *Re Stocken*, 38 Ch. D. 319.

(*b*) R. S. C. 1883, Ord. LV. r. 15A.

(*c*) R. S. C. 1883, Ord. LV. r. 10A (*b*).

execution of trusts by a creditor or a beneficiary where no accounts or insufficient accounts have been rendered, the Court or judge may order that the application shall stand over for a certain time, and that the executors, administrators, or trustees, in the meantime shall render to the applicant a proper statement of their accounts, with an intimation that if this is not done they may be made to pay the costs of the proceedings (*d*).

An absolute order for sale made in an administration suit operates as a conversion from the date of the order (*e*).

Under Ord. LXV. r. 1, of the Rules of the Supreme Court, 1883, the costs of and incident to all proceedings in the Superior Court are in the discretion of the Court or judge, with certain exceptions specified in the rule. This general rule applies to all cases in which executors, administrators, or trustees, are instituting suits against strangers to their trust on behalf of their trust estate; and they are, when plaintiffs, subject to the same rules, and personally liable to pay costs, as if they were suing in their own right (*f*).

Costs.

General rule as to an executor's costs.

An executor or administrator fairly instituting an action for the direction of the Court, with regard to the trust, will not only be entitled to his own costs, but any person made a party to the suit, for the protection of the executor or administrator, will also have his costs out of the fund (*g*).

The question of an executor or administrator's costs will be found dealt with in a subsequent chapter.

It is a common mistake for executors and administrators in taking in their costs for taxation to include in them items of charges and expenses; this is wrong, as the charges and expenses should be included in their accounts, and allowed for when the accounts are taken.

Charges and expenses should not be included in the "bill of costs."

(*d*) Ord. LV. r. 10A.

(*e*) Hyett v. Mekin, 25 Ch. D. 735.

(*f*) Dan. Ch. Pr. 1175, 1219, Vol. II. Pt. 1, 6th edit. His right

to reimbursement out of the estate will be found dealt with *ante*, pp. 850, 851.

(*g*) Dan. Ch. Pr. 1203, Vol. II. Pt. 1, 6th edit.

Executors and administrators are not entitled to their charges and expenses on taxation without an express direction that they are to be included in the taxation, as the executor or administrator is presumed to retain them out of the estate (*h*).

Practice in allowing charges and expenses.

The ordinary practice now is to allow executors or administrators their costs of action (out of their estate) as between solicitor and client, together with any charges and expenses, properly incurred relating to the trust, beyond costs of action, on the suggestion of counsel, of some particular expenses incurred, and the case must be supported before the taxing master; it is not the practice in taking the account in chambers to allow the charges and expenses incurred since the suit, but they are provided for on further consideration (*i*).

The charges and expenses of an executor or administrator do not include funeral and probate expenses (*k*), nor the costs of other actions unless specially provided for (*l*).

"Just allowances."

In taking any account directed by any judgment or order, all "just allowances" are made without any direction for that purpose (*m*).

The question what are just allowances is usually left to be decided on the taking of the account (*n*).

What are just allowances depends very much upon the circumstances of each case: it is, however, the settled rule, that whatever a trustee or personal representative has expended, in the fair execution of his trust, may be allowed him in passing his accounts (*o*).

Instances of allowances under this head.

Under the head of "just allowances" money which has

(*h*) *Humphreys v. Moore*, 2 Atk. 108.

(*i*) *Seton*, 4th edit. 482.

(*k*) *Collis v. Robins*, 1 D. & S. 131.

(*l*) *Payne v. Little*, 27 Beav. 83.

(*m*) Ord. XXXIII. r. 8.

(*n*) *Brown v. De Tastet*, Jac. 284, 294.

(*o*) *Dan. Ch. Pr.* 1055, Vol. II. Pt. 1, 6th edit. For instance, in the case of *Re Bird*, L. R. 16 Eq. 203, an executor was allowed money which he had paid to his solicitor on a misrepresentation by the solicitor, and which the latter had misappropriated.

been reasonably expended in taking opinions and procuring directions (*p*), payments by executors in discharge of legacies (*q*), deductions for dower out of rents received by a widow trustee (*r*), expenses of managing and carrying on a partnership business (*s*), and a mortgagee's expenses of seizing and holding possession of a ship, advertising it for sale, and effecting insurances upon it (*t*), have been allowed.

An executor or administrator will not be allowed the charges of his solicitor for doing things which the executor ought strictly to have done himself (*u*).

When a trader dies, obviously his trade or business descends to his executors or administrators as part of his assets.

It is equally obvious that his trade or business must be either wound up or realized by his executors or administrators or be carried on by them.

The carrying on of the trade or business, too, may be either merely for the purpose of realization or it may be continued for the purpose of making a profit.

In carrying on the trade or business of the deceased for either of the above purposes, the following persons may be affected by the success or failure of the trading :—

- (a) Creditors of the deceased.
- (b) Beneficiaries under his will.
- (c) Creditors whose debts are incurred in the trading subsequently to the death of the deceased.

It is the duty of both an executor and an administrator, where the business of the deceased is a valuable asset, to carry on the business for such reasonable time as may be necessary to enable them to sell it as a going concern (*x*) ; but the

Improper employment of a solicitor

Duty of the executor or administrator with regard to the business of the deceased.

To carry it on until it can be realized.

Liability of

- (*p*) *Fearn v. Young*, 10 Ves. Jac. 607, 621.
 184. (*t*) *Wilkes v. Saunior*, 7 Ch. D.
 (*q*) *Nightingale v. Lawson*, 1 188.
 Cox, 23. (*u*) *Harbin v. Darby*, 28 Beav.
 (*r*) *Graham v. Graham*, 1 Ves. 325.
 Sen. 268. (*x*) See the remarks of Lord Herschell in *Dowse v. Gorton*, [1891]
 284, 299. *Cook v. Collingridge*, A. C. 190, at p. 199.

an executor carrying on the business of the deceased.

Business carried on merely for the purpose of realization.

An administrator is only justified in carrying on the business for the purpose of realizing it.

An executor is on the same footing unless the Will authorizes him to carry on the business.

The executor's right to be indemnified out of the assets.

As against both beneficiaries and creditors.

executor or administrator who carries on the business of his testator makes himself personally liable for all debts so contracted, and it makes no difference that he avowedly acts as executor or administrator (y).

Where the business is merely carried on for the purpose of realization, the executor or administrator is entitled to be indemnified by the estate against all liabilities properly incurred by him in so doing, both as against creditors of the deceased and also as against beneficiaries (z).

An administrator is only entitled to carry on the business of the intestate for the purpose of realization, and if he does any more than this he renders himself personally liable for the debts so incurred without any right of indemnity out of the intestate's estate (a), and any assets acquired in such trading belong to the intestate's estate, subject to the right of the administrator to be indemnified for what he has expended in obtaining such assets (b).

An executor who is not expressly or impliedly authorized by the Will of his testator to employ the whole or some part of the estate in carrying on the business is in the same position as an administrator (c).

Where the executor is authorized by the Will to carry on the business of his testator, and to apply the whole or some portion of the estate to that purpose, although he is personally liable for the debts he incurs in carrying on the business, he has the right to be indemnified out of the specific assets which he is authorized to employ in the business (d). He is entitled under the Will to this protection as against beneficiaries, and if any creditors of the testator

(y) *Labouchere v. Tupper*, 11 Moo. P. C. 198. This subject will be found more fully treated of in an earlier chapter. See p. 1682 *et seq.*

(z) *Dowse v. Gorton*, [1891] A. C. 190.

(a) *Re Evans*, 34 Ch. D. 597. See also *Strickland v. Symons*, 22 Ch. D. 666. 26 Ch. D. 245.

(b) *Re Evans, supra.*

(c) A direction to carry on the testator's business authorizes the employment in it of the capital left in the business by the testator at his death: *McNeillie v. Acton*, 4 D. M. & G. 744.

(d) *Ex parte Garland*, 10 Ves. 120.

know of his carrying on the business, and acquiesce in his so doing, he is entitled to the same indemnity as against them (e).

An executor who carries on the business of his testator can sue as executor for debts incurred to the estate in carrying on the trade since the testator's death (f).

The subject of the rights and liabilities of an executor or administrator carrying on the business of the deceased will be found further dealt with in a subsequent chapter.

Numerous statutes have been passed providing facilities for executors in the discharge of their duties, and relieving them from some of the responsibilities incident to their office.

Thus by stat. 10 & 11 Vict. c. 96, entitled, *An Act for better securing Trust Funds, and for the Relief of Trustees* (g), after reciting that "it is expedient to provide means for better securing trust funds, and for relieving trustees from the responsibility of administering trust funds in cases where they are desirous of being so relieved," it is enacted, "That all trustees, executors, administrators or other persons, having in their hands any money belonging to any trust whatsoever, or the major part of them, shall be at liberty, on filing an affidavit shortly describing the instrument creating the trust, according to the best of their knowledge and belief, to pay the same, with the privity of the Accountant-General (h) of the High Court of Chancery, into the Bank of England, to the account of such Accountant-General in the matter of the particular trust (describing the same by the names of the parties, as accurately as may be, for the purpose of distinguishing it (i), in trust to attend the orders of the

10 & 11 Vict.
c. 96, s. 1.

Trustees may
pay trust
moneys or
transfer stocks
and securities
into the Court
of Chancery.

(e) *Dowse v. Gorton*, [1891] A. C. 190.

(f) *Abbott v. Parfitt*, L. R., 6 Q. B. 346.

(g) The Judicature Act, 1873, s. 34, assigns the jurisdiction under this Act to the Chancery Division of the High Court.

(h) Now the Paymaster-General.

(i) Where executors paid money into Court to an account headed "In the matter of the trusts of the Will of S. J.," the Court held that the account was too general to enable it to act under this statute: *Re Joseph's Will*, 11 Beav. 625. See

said Court; and that all trustees or other persons having any annuities or stocks standing in their names in the books of the governor and company of the Bank of England or of the East India Company, or South Sea Company, or any government or parliamentary security standing in their names, or in the names of any deceased persons of whom they shall be personal representatives, upon any trust whatsoever, or the major part of them, shall be at liberty to transfer or deposit such stocks or securities into or in the name of the said Accountant-General (*k*), with his privity, in the matter of the particular trust (describing the same as aforesaid), in trust to attend the orders of the said Court: and in every such case the receipt of one of the cashiers of the said Bank for the money so paid, or, in the case of stocks or securities, the certificate of the proper officer, of the transfer or deposit of such stocks or securities, shall be a sufficient discharge to such trustees or other persons for the money so paid, or the stocks or securities so transferred or deposited."

Receipt of
bank cashier,
or certificate
of proper
officer, to be
sufficient
discharge.

Trustee Relief
Act, 1849.
12 & 13 Vict.
c. 74.

Under the Amending Act (The Trustee Relief Act, 1849) (*l*), where the major part of the trustees are desirous of taking advantage of the Trustee Relief Act and paying their funds into Court, the Court can make an order authorizing the funds to be paid or delivered into Court by the major part of the trustees without the concurrence of the other trustees.

Legacy Duty
Act.

Where the difficulty arises through the infancy or absence beyond seas of a person entitled to a legacy, it can still be paid into Court under the Legacy Duty Act, after deducting the duty payable in respect of the legacy (*m*).

Funds not
exceeding
500*l*.

Funds which do not exceed 500*l*. in amount or value can be paid by the trustees into a post-office savings bank, established in the town where the Court of the district in which any of the trustees or other persons reside is held, in the name of the Registrar of the Court, in trust to

also *Re Robinson's Trust*, 1 Jur.
N. S. 750.

(*l*) 12 & 13 Vict. c. 74.

(*m*) 36 Geo. III. c. 52, s. 32.

(*k*) Now the Paymaster-General.

attend the orders of the Court, and the payment out can be ordered by the County Court (n).

Foreign bonds do not, it seems, fall within the Trustee Relief Acts (o), but all railway stock and India stock can be brought into Court under the provisions of the Amending Act (The Trustee Relief Act, 1849) (p).

Trustees who hold money belonging to a charity can pay the money to the official trustee of charitable trusts (q), and should not pay it into Court under the above Act, although they have a strict right to do so if they choose (r).

The affidavit may be written or printed; the lodgment schedule annexed to it must be printed (s). It can be made by one of several trustees (t).

A trustee paying money into Court under the Trustee Relief Act must annex to the affidavit to be filed by him pursuant to that Act a schedule in the same printed form as the lodgment schedule to an order, setting forth :

- (a) " His own name and address ;
- (b) " The amount and description of the funds proposed to be lodged in Court ;
- (c) " The ledger credit in the matter of the particular trust to which the funds are to be placed ;
- (d) " A statement whether legacy or succession duty (if chargeable), or any part thereof, has or has not been paid ;
- (e) " A statement whether the money or the dividends on the securities so to be lodged in Court, and all accumulations of dividends thereon, are desired to be invested in any and what description of government securities, or whether it is deemed unnecessary so to invest the same " (u).

(n) See Annual County Court Practice, 1893, pp. 465, 466.

(o) *Re Lloyd*, 2 W. R. 371.

(p) 12 & 13 Vict. c. 74.

(q) Under 18 & 19 Vict. c. 124, ss. 22 and 23.

(r) *Re Poplar School*, 8 Ch. D.

(s) Supreme Court Funds Rules, 1886, r. 41. Ann. Pr. 1893, vol. ii. p. 261.

(t) *Anon.*, 1 Jur. N. S. 974.

(u) Supreme Court Funds Rules, 1886, r. 41.

Investment of
funds paid
into Court.

When funds are paid into Court under the Trustee Relief Acts, the Chancery Division has power under sec. 2 of the Trustee Relief Act, 1847 (*x*), to make orders "for the investment and payment of any such moneys, or of any dividends or interest on any such stocks or securities, and for the transfer and delivery out of any such stocks and securities, and for the administration of any such trusts generally."

This jurisdiction can be exercised upon a petition presented in a summary way, or, in some cases, upon a summons, the petition or summons itself originating the proceedings (*y*).

If it appears in any case that the trust funds cannot be safely distributed without a suit or suits, the Court can direct such suit or suits to be instituted (*z*).

Application for
payment out.

Application for payment or transfer out of Court or investment of funds paid into Court under the Trustee Relief Acts should be by originating summons where the money or securities in Court do not exceed 1,000*l.* or 1,000*l.* nominal value (*a*). In all other cases the application should be by petition.

Costs of
paying the
fund into and
out of Court.

As a general rule, the costs of paying a fund into Court by the executor or administrator, ought to be paid out of the general estate (*b*), but if the fund has already been completely severed from the general estate, and appropriated, the costs of payment in ought to come out of the fund itself (*c*). The costs of paying the fund out of Court generally fall upon the fund itself (*d*), but the Court can, on a proper application, order them to be paid by the general estate, where such general estate remains in the hands of the executor (*e*).

Trustees costs
of payment
into and out
of Court.

The trustee paying money into Court is *primâ facie* entitled to his costs of payment in and of his appearance on

(*x*) 10 & 11 Vict. c. 96.

(*y*) 10 & 11 Vict. c. 96, s. 2. As to the cases in which the application can be by summons, see *post*.

(*z*) *Ibid*.

(*a*) R. S. C. Ord. L.V. r. 2 (5). See *post*, p. 1886.

(*b*) *Re Cawthorne*, 12 Beav. 56.

Re Jones, 3 Drew. 679.

(*c*) *Re Lorimer*, 12 Beav. 521.

(*d*) *Re Dickson*, 1 Sim. 37. *Ross*, *ibid*. *Re Jones*, *supra*. *Re Robertson*, 6 W. R. 405. *Re Wilson*, 14 W. R. 161.

(*e*) *Re Trick*, L. R., 5 Ch. 170.

the petition or summons for payment out, but the Court has a discretion to deprive him of costs if he pays money in vexatiously (*f*), but not when he acts under a mere misapprehension (*g*). Upon the application for payment out, the jurisdiction of the Court is limited to the fund which has actually been brought into Court; and it cannot order repayment by the trustees of costs and expenses deducted by them on the payment in; if it can be shown that the costs and expenses have been improperly retained, separate proceedings must be taken against the trustees to recover the amount (*h*).

The occasions on which trustees should pay funds in their hands into Court have been considerably lessened by the recent rules of the Supreme Court (*i*). Under Ord. LV. r. 8, trustees can now obtain the directions of the Court cheaply and quickly, in many cases in which formerly they would have been properly advised to pay their funds into Court. For instance, trustees who are desirous of ascertaining who are the persons entitled to a fund, or of having the question who are entitled to the fund determined by the Court, should not pay the fund into Court under the Trustee Relief Acts (*k*), but should take out a summons under Ord. LV. r. 8 (*l*), to have such persons ascertained by the Court (*m*). Trustees should also remember that the payment of funds into Court, and the subsequent application for payment out of Court, are expensive processes which ought to be avoided, in the interests of their *cestui que trust*, where any other reasonable and safe course is open to them.

An executor and administrator is entitled, after taking reasonable means of ascertaining the debts owing by the dead man, to distribute the balance of the estate amongst the beneficiaries.

(*f*) See Morgan's Chancery Acts, 6th edit. 54.

(*g*) *Re Jenkins*, 3 N. R. 408.

(*h*) *Re Parker's Will*, 39 Ch. D.

803.

(*i*) R. S. C. 1883.

(*k*) *Supra*, p. 1817 *et seq.*

(*l*) See *supra*, pp. 1806, 1807.

(*m*) *Re Giles*, 55 L. J. Ch. 695.

Trustees
should not
pay funds
into Court
unnecessarily

22 & 23 Vict.
c. 35, s. 29.
Executors,
&c., may dis-
tribute assets
after due
notice to
creditors and
others to send
in claims.

By 22 & 23 Vict. c. 35, s. 29, it is enacted that "where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged, would have been given by the Court of Chancery in an administration suit (*n*), for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively" (*o*).

The section applies to claims of next of kin as well as creditors (*p*). But of course does not protect executors against claims of which they have notice (*q*). It protects them whether they have paid over the legacies or only appropriated them (*r*).

Methods of

There are several ways in which the opinion and directions

(*n*) As to advertisements, see R. S. C. Ord. L.V. r. 44. See also *Wood v. Weightman*, L. R. 13 Eq. 434, and *Dan. Ch. Pr.* 6th edit. 1014. There is no rule of practice that in every case the advertisement must be inserted in the "Times" or some other London daily newspaper, in addition to the "London Gazette": *Re Bracken*, 43 Ch. D. 1. See also *ante*. pp. 1206, 1207.
(*o*) Sect. 27 of this Act enables

executors and administrators to distribute the dead man's estate after providing for liabilities on leaseholds held by him.

(*p*) *Newton v. Sherry*, 1 C. P. D. 246.

(*q*) *Re Land Credit of Ireland*, W. N. 1872, p. 210. *Wood v. Wood*, 21 W. R. 135.

(*r*) *Clegg v. Rowland*, L. R. 3 Eq. 368. *Hunter v. Young*, 4 Ex. D. 256.

of the Court can be obtained where the parties interested are agreed as to the point which they wish to be decided, without going to the expense of an action protracted through all its stages. Two of the methods only are specially applicable to proceedings by and against executors or administrators, but as all can be, and often are, used by executors and administrators, it will be useful to mention all of them.

1. By section 30 of Lord St. Leonards' Act (22 & 23 Vict. c. 35), it is provided that "any trustee, executor, or administrator shall be at liberty without the institution of a suit, to apply by petition to any judge of the High Court of Chancery, or by summons upon a written statement to any such judge at chambers, for the opinion, advice, or direction of such judge on any question respecting the management or administration of the trust property or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the said judge shall think expedient; and the trustee, executor or administrator acting upon the opinion, advice, or direction given by the said judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator in the subject-matter of the said application: Provided, nevertheless, that this Act shall not extend to indemnify any trustee, executor, or administrator in respect of any act done in accordance with such opinion, advice, or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud, or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction; and the costs of such application as aforesaid shall be in the discretion of the judge to whom the said application shall be made."

Rules 19—22 of Order LII. of the Rules of the Supreme Court, 1883, prescribe the form of applying for advice of the judge under the above section.

It has been held that the Court will not, upon a petition or summons presented by a trustee or executor under this

obtaining the advice and direction of the Court.

Trustee, executor, &c., may apply by petition to judge of Chancery for opinion, advice, &c., in management, &c., of trust property.



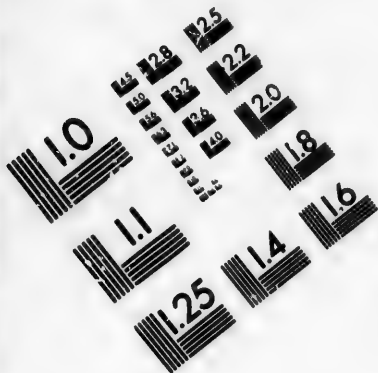
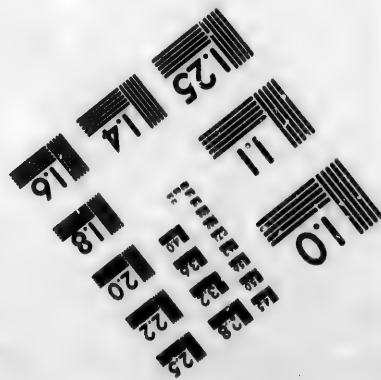
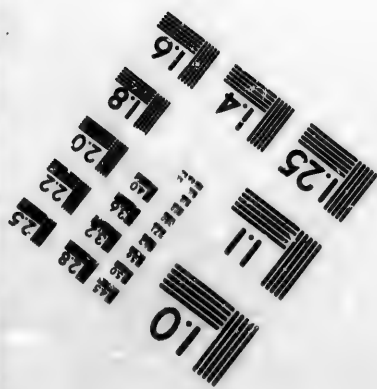
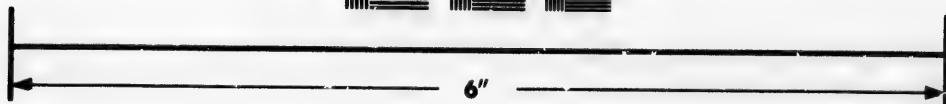
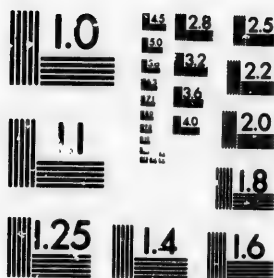


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enactment, construe an instrument or make any order affecting the rights of parties, decide questions of detail where affidavits are required, or decide questions of considerable difficulty, nor will it pronounce an opinion on a hypothetical case (*s*). Such a petition or summons (*t*) should relate only to the management and administration of the trust property in the manner which will be most for the advantage of the parties beneficially interested (*u*).

2. By application by originating summons under Ord. LV. r. 3. The cases in which the opinion and directions of the Court can be obtained on originating summons will be found dealt with in an earlier part of this chapter. This mode of procedure is so much cheaper that it has practically rendered obsolete the procedure under Lord St. Leonards' Act.

3. By special case. A special method of obtaining the opinion of the Court by means of a special case was provided by the 13 & 14 Vict. c. 35 (*x*). The statute was repealed by 46 & 47 Vict. c. 49, but its provisions are kept alive by Ord. XXXIV. r. 3, which provides: "Any special case may hereafter be stated, for the same purposes and in the same manner as was provided by the Act 13 & 14 Vict. c. 35, and the same shall be deemed to be a special case stated in a matter within the meaning of the order" (*y*).

4. On statement of claim. Under the new practice of the rules of the Supreme Court the institution of an action is a not very expensive procedure, and where the facts can be agreed on between the parties they can be stated in the plaintiff's statement of claim, and the action brought on for hearing on the facts so stated. In an action so instituted, the Court has full jurisdiction over the whole matter, and can make binding declarations of right (*z*).

(*s*) See hereon Morgan's Chancery Acts, 6th edit. p. 103.

(*t*) The petition or statement should be signed by counsel: 23 & 24 Vict. c. 38, s. 9.

(*u*) *Re Lorenz*, 1 Dr. & Sm. 401, *per* Kindersley, V.-C. See also *Re Hooper's Will*, 7 Jur. N. S. 695.

(*x*) See sects. 1 and 15.

(*y*) For the practice under the 13 & 14 Vict. c. 35, see Morgan's Chancery Acts, 5th edit. p. 118. And see also Ann. Pr. 1893, p. 635.

(*z*) See Ord. XXV. r. 5.

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5. The questions may be raised on issues of fact without pleadings (a). As this method presents no special advantage to executors or administrators, no further mention need here be made of it.

The Court has sometimes on the principle of salvage, Salvage cases. authorized an expenditure out of capital, for the purpose of preventing loss or destruction to settled property, which ordinarily should be paid for out of income. In a recent case (b), Kekewich, J., authorized trustees of a settlement to lay out 800*l.*, part of settled personalty, in repairs and improvements on a farm forming part of the real estate comprised in the same settlement. This expenditure was authorized on evidence that the farm could not be let or sold, and that it would deteriorate unless the repairs were done, and that the tenants for life could not make the expenditure out of their income (c). The principle seems to have been carried to its fullest extent in the case of *Re Household*, (d) where V.-C. Bacon, in exercise of such a jurisdiction, authorized the trustees of real and personal estate devised and bequeathed on trust for a father for life, with remainder to his children, to advance part of the money to the father (the tenant for life) for the purpose of stocking and cultivating a farm forming part of the real estate, the evidence showing that the farm could not be let at a remunerative rate, and, unless the advance was made, the farm would go out of cultivation and deteriorate in value.

In the case of *Re Crawshaw* (e) an application was made to the Court to sanction the sale of large businesses, in which the testator was interested, to a limited company formed for the object of acquiring such businesses. The testator had given large legacies, some of which were settled, and the evidence showed that it was impossible to satisfy

Sale of
testator's
business to
a company.

(a) Ord. XXXIV. rr. 9—12.

(b) *Conway v. Fenton*, 40 Ch. D. 512.

(c) See also *Frith v. Cameron*, 21 Ch. D. 786. *Re Jackson*, 21

Ch. D. 786. *Glover v. Barlow*, 21

Ch. D. 788, note. *Re Household*, 27 Ch. D. 553.

(d) 27 Ch. D. 553.

(e) 60 L. T. 357.

the testator's creditors and beneficiaries without a realization of the testator's partnership businesses and properties, and it was considered that such businesses and property if sold at once would, in consequence of trade depression, be sold at a serious sacrifice. The proposed scheme provided that the proposed company should pay for the businesses and property by means of debentures and fully paid-up shares in the company, which were to be appropriated to the persons entitled to the pecuniary legacies or their trustees. The Will contained a power to invest in "the stocks, funds, shares and debentures, mortgages or securities of any corporation or company." North, J., held that he had no jurisdiction to sanction the scheme, which he thought an alteration of the trusts of the Will, the investment clause only contemplating a going company, but he gave leave to apply to Parliament for a private Act authorizing the carrying out of the proposed scheme.

The ground on which North, J., held that the investment clause did not apply, namely, that the power contemplated a sale to a going company, not to a company merely formed to define and limit the liability of the persons already interested in the partnership business, seems a narrow one, and the same remark applies to another ground stated by his Lordship, that the power contemplated a sale, and by the scheme the parties would not sell but retain the property in specie, as wherever property is sold for shares in a company the seller to some extent retains an interest in the property sold. The cases in which the Court has exercised its original jurisdiction over settled property in order to prevent its loss or destruction do not appear to have been cited in *Re Crawshaw* (f), but the principle embodied in them would seem to apply to such a case.

(f) 60 L. T. 357.

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(c) See a
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BOOK THE SECOND.

OF REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS.

IN the last place, it is proposed to treat of the Remedies against executors and administrators, by means of which their various duties and liabilities may be enforced in the Queen's Bench and Chancery Divisions of the High Court of Justice respectively.

Before entering on this subject, it may be remarked, that no suit can be brought against any executor or administrator, in his official capacity, in the Court of any country but that from which he derives his authority to act by virtue of the probate or letters of administration there granted to him (a). Therefore, if a foreign creditor wishes a suit to be brought here, in order to reach the effects of a deceased testator or intestate situate in England, it will be necessary, before the suit can be maintained, notwithstanding an executor or administrator has been appointed abroad, that an English personal representative should also be duly constituted by grant from the Probate Court here; for the foreign executor or administrator is not liable to be sued, in his official character, in this country (b). But it must be observed, that if he should collect the effects or debts of the deceased found or due in England, without taking out letters of administration here, he would thereby become liable as executor *de son tort*, to the extent of the assets so received by him (c).

Foreign
executors.

(a) Story's Conf. s. 513.

(b) Tyler v. Bell, 1 Keen, 826, 329. Story's Conf. ss. 513, 514. Flood v. Patterson, 29 Beav. 295.

(c) See *ante*, pp. 208, 209. But in a suit in equity, the presence of

an executor *de son tort* in Court will not dispense with that of a regular representative: Penny v. Watts, 2 Phill. Ch. C. 152. See *post*, pp. 1912, 1914.

CHAPTER THE FIRST.

OF REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS
AT LAW.

No action lay
at common law
against an
executor in
which the
testator could
have waged
his law.

AN action of *debt* did not formerly lie against an executor or administrator upon a simple contract, when the testator or intestate could have waged his law (a).

But stat. 3 & 4 Wm. IV. c. 42, s. 13, abolished wager of law, and by s. 14 enacted that "an action of debt on simple contract shall be maintainable in any Court of Common Law against any executor or administrator."

Action of
account.

No action of account lay against an executor or administrator at common law; because the account rested in the privity and knowledge of the deceased only (b): But this action was given by stat. 4 & 5 Ann. c. 16, s. 27.

No action at
law lies
against an
executor for
a general
legacy:

An action does not lie against an executor for a general legacy (c) even though he may have expressly promised to pay (d).

And an action at law for a distributive share of an intestate's property cannot be maintained against the personal representative, although he may have expressly promised to pay (e).

(a) Barry v. Robinson, 1 N. R. 293.

(b) Co. Litt. 89, b. 2 Inst. 404.

(c) Deeks v. Strutt, 5 T. R. 690.

(d) Jones v. Tanner, 7 B. & C. 542.

(e) See *Accord*. Holland v. Clark, 1 Y. & C. Ch. C. 151, 167, per Knight Bruce, V.-C. See also Johnson v. Johnson, 3 B. & P. 139, where Lord Alvanley, C. J., ob-

served that, "if an executor, thinking that he has settled the affairs of his testator, pay the legacies, I have no difficulty in saying that a Court of Common Law would not entertain an action for money had and received against a legatee, since such a Court cannot take into consideration, as a Court of Equity would do, the mode in which the funds might have been

[Ch. I.]

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But the law is different with respect to *specific* legacies ; secus, as to a specific legacy after assent : for, after an assent by an executor to a specific legacy, he is clearly liable at law to an action by the legatee ; because the interest in any specific thing bequeathed vests at law in the legatee, upon the assent of the executor (*f*). Therefore, a devisee of chattel leaseholds may bring an action to recover them against the executor, after an assent by him to the bequest (*g*). So an action of trover will lie f.r a specific legacy, after the executor has assented (*h*).

It must also be observed, that executors may, by arrangement with the legatees, cease to hold the money bequeathed in their character of executors ; in which case they are obviously liable to be sued at law ; Thus, in *Gregory v. Harman* (*i*), the plaintiff and three others being residuary legatees under the Will of one T. P., the defendants, as the executors named in the Will, accounted with them, and having paid to the latter the respective sums due to them thereon, took from them, and from the plaintiff, a release, but did not pay the plaintiff his share, he having consented to allow it to remain in their hands. And it was held, that the money not being retained by the defendants in their character of executors the plaintiff was entitled to recover it in an action at law. Again, in *Hart v. Minors* (*j*), E. by Will bequeathed, subject to debts and legacies, the residue of his personal estate to his executors, upon trust to divide the same into two equal parts, and to divide one of such parts into six equal shares, and to pay one of such shares unto each of his cousins, E. T., J. W., and J. H., and the remaining shares as therein mentioned, and appointed M. his executor, who duly proved the Will : M., having taken upon himself the execution of the Will, called a meeting of the residuary legatees, at which J. H. was present, and exhibited an account, charging himself with assets, and paid some of

or where he has ceased to hold the money as executor :

applied." See as to an action for a legacy charged on land, *Braithwaite v. Skinner*, 5 M. & W. 313.

(*f*) *Ante*, p. 1231.

(*g*) *Doe v. Guy*, 3 East, 120.

(*h*) *Williams v. Lee*, 3 Atk. 223.

(*i*) 1 Moore & P. 209.

(*j*) 2 Crompt. & M. 700.

the legatees the greater portion of their share of the residue, and was about to pay J. H., but was prevented from so doing: Another meeting was afterwards called, at which J. H. was not present, when the executor exhibited another account, charging himself with assets, and crediting himself with payments and disbursements, and, amongst others, with having paid "cash for legacy duties:" To this was appended a supplemental account. containing, amongst others, the following item: "By cash retained for J. H., 179*l.* 10*s.*:" In an action for money had and received, and on an account stated, brought by J. H. against the executor to recover the amount of the legacy, it was held by the Barons of the Exchequer, that the action was maintainable, on the ground of a certain sum having been received and retained by the defendant for the plaintiff's use, by which the defendant ceased to hold the money in his character of executor (*k*).

51 & 52 Vict.
c. 43:
legacy, &c.,
not exceeding
50*l.* recover-
able in County
Court.

The jurisdiction of the County Courts is, by stat. 51 & 52 Vict. c. 43, s. 58, extended to the recovery of a demand not exceeding 50*l.*, for the amount or part of the amount of a distributive share under an intestacy, or of any legacy under a Will (*l*).

Where money is bequeathed to an executor in trust, that is, where he has trusts to perform with respect to the bequest which do not form part of the ordinary duties of an executor, the case is not within section 58 (*m*), but a bequest, though made in terms to an executor in trust, will be within

(*k*) See also *Gorton v. Dyson*, 1 Brod. & Bing. 219. *Moert v. Moessard*, 1 Moore & P. S. 8. *Rose v. Savory*, 2 Bing. N. S. 145. *Wasney v. Earnshaw*, 4 Tyrwh. 806. *Roper v. Holland*, 3 A. & E. 99. *Edwards v. Bates*, 7 M. & Gr. 590. *Bartlett v. Dimond*, 14 M. & W. 49, 56. *Pardoe v. Price*, 16 M. & W. 459, by Rolfe, B. *Bond v. Nurse*, 10 Q. B. 244. *Edwards v.*

Lowndes, 1 E. & B. 81. *Topham v. Morecroft*, 8 E. & B. 972.

(*l*) The County Court has also, by sect. 67 of the same statute, jurisdiction in administrations and execution of trusts to the extent of 500*l.*

(*m*) *Hewston v. Phillips*, 11 Exch. 699. See further, as to what is a claim for a legacy, *Longbottom v. Longbottom*, 8 Exch. 203.

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the section if the executor has really nothing more to do than he would be bound to do upon a simple bequest to a legatee (*n*). And all cases involving the execution of trusts within and to the amount of 500*l.* are within the Equity jurisdiction conferred on the County Courts by section 67.

It has been shown, that in the case of an action brought Parties. by executors, they should all join, whether they have administered or not (*o*). But the rule as to joinder was different in actions against executors or administrators: Therefore, where the defendant pleaded in abatement that he had one or more co-executors who ought to be joined, he must have averred, not only that the co-executor was alive (*p*), but that he had administered; because it was only necessary to sue so many of the executors as had administered (*q*).

Formerly in an action against a married woman executrix, the husband must have been joined as a defendant, but now by the Married Women's Property Act, 1882, sect. 18, a married woman who is an executrix or administratrix alone or jointly with any other person or persons may sue or be sued without her husband as if she were a *feme sole*.

If one of two executors dies, an action cannot be brought against the surviving executor and the executor of the deceased executor, but must be against the survivor alone (*r*).

By R. S. C. 1883, Ord. III. r. 4, it is provided that if

(*n*) *Pears v. Wilson*, 6 Exch. 833. See also *Re Fuller*, 2 E. & B. 573. The County Court may well try a question of *devastavit* in such a suit: *Winch v. Winch*, 13 C. B. 128. The grant of letters of administration is part of the cause of action: *Re Fuller*, 2 E. & B. 573.

(*o*) This however is subject to the operation of R. S. C. 1883, Ord. XVI. r. 11, *ante*, p. 1777.

(*p*) *Hilbert v. Lewis*, 1 Freem. 268. Pleas in abatement are now abolished. See *ante*, p. 1777.

(*q*) Bro. Exors. 20, 88. *Wentw.*

Off. Ex. 205, 14th edit. *Swallow v. Emberson*, 1 Lev. 161.

(*r*) 1 Roll. Abr. 928, tit. Exors. (Z). But if the executor of the executor administer with the other, an action lies against both as executors: *Ibid*. It is not necessary as a rule in an action for an account in the Chancery Division to add the representative of a deceased executor as a party, but where it is desirable to join such representative R. S. C. 1883, Ord. XVI. r. 11, or r. 48 may be applied. *Re Harrison*, [1891] 2 Ch. 349.

a defendant is sued in a representative capacity, the indorsement of claim must show in what capacity he is sued. And by Ord. XVI. r. 8, it is provided that trustees, executors and administrators may be sued on behalf of, or as representing the property or estate of which they are trustees or representatives without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may, at any stage of the proceedings, order any of such persons to be made parties, either in addition to or in lieu of the previously existing parties(s).

There seems no reason why a plaintiff should not obtain judgment under Ord. XIV. against an executor who does not set up a defence of *plene administravit*, although an executor can of course obtain leave to defend more readily than his testator could have done. When the executor successfully sets up *plene administravit* it would seem to have been decided at Chambers that the plaintiff is entitled to a judgment with costs against future assets *quando acciderint*, but that the executor is entitled to costs of action as against the plaintiff(t).

Service on one of two co-executors, who are in possession of the premises, would seem to be a sufficient service in an action for recovery of land(u).

In an action against an executor, as such, he must be named executor, as it is provided by R. S. C. 1883, Ord. III. r. 4, that if the defendant or any of the defendants is sued in a representative capacity, the indorsement shall shew in manner appearing by such of the forms in Appendix A. Part III. sec. VII. as shall be applicable to the case, or by any other statement to the like effect, in what capacity the defendant is sued. And this was so before the Judicature Act(v). Under the law as it existed prior to the Judicature Act it was settled that if, upon the whole matter, the plaintiff

Statement of
claim.

(s) See *ante*, p. 1778.

(t) See Annual Practice, 1893, 4 D. & L. 431.

p. 312.

(u) Doe d. Strickland v. Ree,

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(v) Com. Dig. Pleader (2 D. 2).

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had declared against the defendant as executor, it was considered that the judgment might well be *de bonis testatoris*, although the defendant was not named executor at the beginning of the declaration (x): Thus it was enough in an action of covenant on a demise to the testator, to state that he made his Will and appointed the defendant *his executor*, who entered and was possessed *as executor*; for this averment might be traversed by the defendant (y).

Practice prior
to Judicature
Act:
how defendant
to be charged
as executor.

Formerly a plaintiff could not have an action against a defendant to charge him as executor, and also in his own right: for the judgment in the one case was *de bonis propriis*, and in the other *de bonis testatoris* (z).

Joinder of
counts.

But now by R. S. C. 1883, Ord. XVIII. r. 5, it is provided that "Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator" (zz). With regard to the corresponding rule of the Rules of 1875 (Ord. XVII. r. 5), Hall, V.-C., made the following observations in *Padwick v. Scott* (a): "In suing an executor or administrator it frequently becomes a question whether he should be sued as legal personal representative or personally; and the minds of the framers of Order XVII. Rule 5, were directed to *Ashby v. Ashby* (b), and

(x) *Dean of Bristol v. Guyes*, 1 Saund. 112, a. *Rann v. Hughes*, 4 Bro. P. C. 27, Toml. edit. Com. Dig. Abatement (F. 20). *Ibid.* Pleader (2 D. 2).

(y) *Holliday v. Fletcher*, 2 Lord Raym. 1510. S. C. 2 Stra. 781. If the plaintiff declared in the *debet* and *detinet* against an executor or administrator, in cases where he ought to have sued in the *detinet* only, the declaration was bad on demurrer; though it was aided by verdict: *Fruen v. Porter*, 1 Sid. 379. But it was held in *Wilson*

v. Hobday, 4 M. & S. 120, that no objection could be made to a declaration in the *detinet*, which might, and strictly ought to have been laid in the *debet* and *detinet*; for a party might abridge his demand, though he could not extend it.

(z) *Herrenden v. Palmer*, Hob. 88. *Hall v. Huffam*, 2 Lev. 288.

(zz) It has been held that this rule does not apply to counter-claims, *Macdonald v. Carington*, 4 C. P. D. 28.

(a) 2 C. D. 736, 743.

(b) 7 B. & C. 448. *Ante*, p. 1664.

cases of the same class, where the executor or administrator has been dealing with the assets, or making contracts in the course of administration properly and fairly in his character of executor or administrator, and then it becomes a question whether, the contracts being personally entered into by him, he should be sued in his character of legal personal representative or in his personal character, being left afterwards to get payment if he could out of the assets in a course of administration. The object of that clause was to get over such difficulties."

Defences :

In an action against an executor or administrator, the defendant may plead any matter which the testator or intestate might have pleaded (c); and in addition thereto he may specifically deny the character in which he is sued, which was formerly done by pleading *ne unques executor or administrator*; or admitting it, he may plead that he has no assets in his hands, and that either generally, or specially, with the exception of assets to a certain amount, which are not sufficient to satisfy the plaintiff; or he may plead a retainer to pay his own debt of equal or superior degree, or debts of a superior degree due to third persons (d).

plea of
executor's
bankruptcy :

Unless a *devastavit* is suggested, a plea by an executor or administrator of his own bankruptcy is not pleadable: as the proceedings in bankruptcy would not bind any effects, upon which, if the plaintiff obtained judgment and execution, the sheriff would have a right to levy under a *fi. fa.* (e).

pleas by
several
executors.

If there are several executors, they may plead different pleas; and that which is most to the testator's advantage shall be received. Therefore, in an action of *assumpsit* against four executors, upon a promise made by the testator, if one executor acknowledges the action, and the other three plead *non-assumpsit*, their plea shall be received (f). Hence,

(c) Com. Dig. Pleader (2 D. 8).

(d) Tidd, 644, 9th edit.

(e) See *Serle v. Bradshaw*, 2 Cr. & Mees. 148. *Ante*, p. 559.

(f) *Chaffe v. Kelland*, 1 Roll.

Abr. 929, tit. Exors. (A.), pl. 1.

Wentw. Off. Ex. 212, 14th edit.

Elwell v. Quash, 1 Stra. 20. So if two executors have judgment, and the one prays a *capias*, and the

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if a warrant of attorney be given by one of several executors to confess judgment against them all, the Courts will order it to be delivered up (*g*). So where one executor pleaded a good plea, and the other a bad one, on demurrer, judgment was given in C. B. for both the defendants; but it was reversed on error, and a new judgment given for the plaintiff against one executor only (*h*).

Where several executors plead a release to the testator or to themselves, and one of them afterwards makes default, this shall not be a total default in the defendants, so as to induce a judgment against them (*i*).

If the defendant intends to deny his being executor or administrator, he must plead such denial specifically (*k*); otherwise he will admit his representative character. The plea of *ne unques executor* or *ne unques administrator* is a plea in bar (*l*): But a plea to an action brought against the defendant as executor, that he was administrator and not executor, was, under the old system, a plea in abatement only (*m*), which now could be easily remedied, if necessary, by amendment. So, in an action against the defendant as administrator, a plea that he was not administrator but executor, could only be in abatement (*o*). So, if he

Plea of *ne unques executor*, &c.:

offer a *fiery facias*, the *capias* shall be awarded, as best for the testator: *Foster v. Jackson*, Hob. 61, cited as the opinion of Cotismore in 7 H. 6, 6. Although the forms of pleading have been altered by the Judicature Acts, there seems to be nothing in those Acts to impugn the general principles laid down in the authorities cited for the propositions under this head in the text.

(*g*) *Elwell v. Quash*, 1 Stra. 20. Tidd, 548, 9th edit.

(*h*) *Baldwin v. Church*, cited 1 Stra. 20. Demurrers are now abolished, but points of law which formerly would have been raised

by demurrer can now be raised by the pleadings under Ord. XXV. r. 2. As to the costs where defendants sever in their pleadings, see *Stumm v. Dixon*, 22 Q. B. D. 99. *Ibid.* 529.

(*i*) *Wentw. Off. Ex.* 213, 14th edit.

(*k*) R. S. C. 1883, Ord. XIX. r. 13.

(*l*) *Com. Dig. Pleader* (2 D. 7).

(*m*) *Pyne v. Woolland*, 2 Vent. 178. *Harding v. Salkill*, 1 Salk. 296. *Granwell v. Sibly*, 2 Lev. 190. *Com. Dig. Pleader* (2 D. 3), (2 D. 7).

(*o*) *Com. Dig. Abatement* (F. 20). *Pleader* (2 D. 12). *Com.*

were sued as administrator generally, he must have pleaded in abatement that he was administrator only *durante minoritate* (p).

On the trial of an issue joined on a plea of *ne unques executor* or *administrator*, the *onus* of proof is on the plaintiff, who has to prove the affirmative of the proposition.

If the fact that a party is executor is denied by the opposite party (q), proof that the defendant has intermeddled with the property, so as to make himself executor *de son tort* (r), is sufficient proof of his being executor (s).

It was said that the plaintiff would fail on an issue joined on a plea of *ne unques executor*, unless he could prove not only the appointment of the defendant as executor, but also that he had taken upon himself to act as such, or had proved the Will. But it is laid down in a book of authority, that an executor who proves the Will, though he does not otherwise administer, cannot plead *ne unques executor*; And that, if there be two executors, and one proves it in the name of both, even against the will of the other, yet he cannot plead *ne unques executor* nor administer as executor (t).

For the purpose of introducing formal and documentary evidence of the defendant being executor or administrator, it is always prudent, and in some cases absolutely necessary,

Dig. Pleader (2 D. 4). Now by R. S. C. 1883, Ord. XXI. r. 20, no plea or defence shall be pleaded in abatement.

(p) Little v. Plant, 1 Lutw. 20. Com. Dig. Pleader (2 D. 12).

(q) Such denial must be specifically pleaded: see R. S. C. 1883, Ord. XIX. r. 13.

(r) As to the acts by which a person will make himself executor *de son tort*, see *ante*, p. 208 *et seq.*

(s) See *ante*, p. 216. The plaintiff may reply that the defendant has administered: *Keble v. Keble*,

Hob. 49. Com. Dig. Pleader (2 D. 7): or that goods of the testator to a certain value came to the defendant's hands before administration granted: *Kellow v. Westcombe*, 1 Freem. 122. *Hinde v. Skelton*, 34 L. J. N. S. Ch. 378. 2 H. & M. 690. As to the proper plea by an executor who has administered under a Will, which has been afterwards disproved, see *ante*, p. 209, note (l).

(t) Com. Dig. Pleader (2 D. 7). See also *Wentw. Off. Ex. c. 16*, p. 339, 14th edit.

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to give notice to the defendant to produce at the trial the probate of the Will, or the letters of administration (u). But it is not also necessary, in order to let in secondary evidence, to prove that the probate or letters are in the defendant's possession; for if he has been duly appointed executor or administrator, they must necessarily be presumed to be in his possession (x). Some evidence of the identity of the party, namely, that the person, described in the documentary evidence as executor or administrator, is the party sued, will be indispensably necessary (y).

If the defendant, being sued as administrator, pleads, that before the date of the writ, his administration was revoked and granted to another, he ought to allege that he has fully administered all the goods in his hands, or else that he has delivered them over to the new administrator (z). Accordingly, if an administrator wastes the goods, and afterwards administration is committed to another, yet any creditor may charge him in debt, and if he pleads the last administration committed to another, the other may reply that before the second administration committed, he had wasted the goods (a).

plea by administrator whose letters have been revoked :

Creditors in respect of debts which the testator or intestate contracted more than six years before the commencement of the suit used formerly to attempt to take the case out of the Statute of Limitations by basing the case on a count or counts upon oral or implied promises by the executor or administrator as such.

plea of the Statute of Limitations :

But by stat. 9 Geo. IV. c. 14, s. 1, after reciting the Statute of Limitations, 21 Jac. I. c. 16, and the Irish Act, 10 Car. I., it is enacted, that "in actions of debt, or upon the case, grounded upon any simple contract, no acknow-

(u) 2 Phill. Ev. 346, 6th edit.

(z) 2 Phill. Ev. 347, 6th edit.

(y) 2 Phill. Ev. 347, 6th edit.

(s) Garter v. Dee, 1 Freem. 13. Ante, p. 506. These goods, as in the case of goods possessed by an

executor *de son tort*, shall not be assets in the hands of the new administrator, until they come to his possession : *Ibid.* Keble v. Keble, Hob. 49.

(a) Packman's case, 6 Co. 18 b.

ledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby (b); and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; provided that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever" (c).

(b) Extended to writings signed by an agent under the provisions of stat. 19 & 20 Vict. c. 97, s. 13.

(c) In an action by an administratrix, to which the Statute of Limitations was pleaded, it appeared that the cause of action arose more than six years before, but that within six years the defendant and the agent of the plaintiff had gone over the items of the account, and struck a balance, which the defendant promised verbally to pay: it was objected that this was within the 9 Geo. IV. c. 14: But Vaughan, B., said, "I think the plaintiff has shown a good cause of action upon the count on an account stated. She does not go upon the original debt at all. I take the statute to apply in cases where you go for the original debt, and then give some evidence of an acknowledgment to rebut the presumption raised by the Statute of Limitations, that the

debt has been satisfied:" *Smith v. Forty*, 4 Carr. & P. 126. See also *Ashby v. James*, 11 M. & W. 542. *Accord.* A testator being, at the time of his death, in 1857, indebted to B. on simple contract, gave by his Will his real and personal estate to his wife for life, and appointed J. and E. executors. The Will was not proved for many years, but the widow took possession of all the property, and paid interest on the debt to February, 1864. In September, 1870, the Will was proved, and then B. filed his bill on behalf of himself and other creditors against the widow and the executors. And it was held that the claim was barred by the Statute of Limitations, for the cause of action having accrued in the testator's lifetime, whether the Will was proved or not was immaterial, and that after six years from the last acknowledgment the Statute of Limitations is a bar to

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But it is also provided by the same section, that "in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited Acts, or this Act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants, against whom he shall recover, and for the other defendant or defendants against the plaintiff."

With regard to the payment of principal or interest, it was held, that a payment by one of the makers of a joint and several promissory note took the case out of the statute, in the same manner as before the statute 9 Geo. IV. (*d*).

But now by the 14th section of the stat. 19 & 20 Vict. c. 97 (Mercantile Law Amendment Act), "where there shall

a simple contract debt of a testator, although there has been no legal personal representative to sue: *Boatwright v. Boatwright*, L. R. 17 Eq. 71. And it would seem that if the remedy of a creditor against the personal estate is barred, while his remedy against the real estate has been kept alive, the real estate can be made liable, although there is no legal personal representative: *per Jessel, M. R.*, *ibid.* p. 74. And in *Re Hollingshead*, 37 C. D. 651, it was decided that payment by a devisee for life on a simple contract debt of his testator is sufficient acknowledgment to keep the debt alive against all parties interested in remainder; the law in regard to payment of interest by a tenant for life on a simple contract debt standing on the same footing as that with re-

spect to payment of interest on a specialty debt. See also *Roddam v. Morley*, 1 De G. & J. 1. *Coope v. Cresswell*, L. R. 2 Ch. 112, 126.

(*d*) By *Parke, J.*, in *Chippendale v. Thurston*, Mood. & M. 411. *Wyatt v. Hodson*, 8 Bing. 309. This was by reason of the proviso that the Act shall not lessen the effect of any payment, &c. See also *Burleigh v. Stott*, 8 B. & C. 36. *Channel v. Ditchburn*, 5 M. & W. 494. *Goddard v. Ingram*, 3 Q. B. 830. But an acknowledgment by one only of two joint mortgagees does not entitle the mortgagor to redeem where the mortgagees have been in possession for more than twenty [now twelve] years. *Richardson v. Younge*, L. R. 10 Eq. 275. L. R. 6 Ch. 478.

"be two or more co-contractors or co-debtors, whether bound
 "or liable jointly only, or jointly and severally, or executors
 "or administrators of any contractor, no such co-contractor
 "or co-debtor, executor or administrator shall lose the benefit
 "of the [Statutes of Limitations], or any of them, so as to
 "be chargeable in respect or by reason only of payment of any
 "principal, interest or other money by any other or others
 "of such co-contractors or co-debtors, executors or adminis-
 "trators" (e).

(e) This section was held to be not retrospective: *Jackson v. Woolley*, 8 E. & B. 778, 784. "The *Mercantile Law Amendment Act*, 1856, dealt with part payment of principal and payment of interest, but only with regard to contractors and executors and administrators. The short effect of the enactment as to executors is that no executor shall 'lose the benefit of' the statute of *James*, 'so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other executor.' . . . It was said that the payment of interest by one executor affected him only, and did not in any way affect his co-executor, and the argument was pushed to the extreme length of saying that the payment involved the executor who made it in a personal liability to pay the debt. Therefore it was urged that where one of two executors having assets in his hand applies those assets, so far as they extend, in payment of interest on a simple contract debt, the result is that after the lapse of six years from the testator's death not only is the co-executor absolved, but the testator's personal estate, whether in

the hands of the co-executor or outstanding, is exempted from all liability to pay the debt, and that the creditor's sole remedy is against the executor personally who made the payment. This argument was founded on the language of the 14th section of the *Mercantile Law Amendment Act*, but it appears to me that the full effect may be given to every word in that enactment without producing so extraordinary a result. Some reasonable interpretation may be put on the words 'so as to be chargeable' which would stop short of such a conclusion; as, for instance, by holding that the co-executor who has not paid is not to be personally chargeable as for a *devastavit* in paying over to beneficiaries assets which have come to his hands. But I dissent altogether from the proposition that the executor by whom the payment is made is thereby involved in any personal liability. The promise to pay the debt arising from the payment of interest, whether such promise is an inference of fact or an implication of law, is a promise to pay as executor, that is, out of the personal assets of the testator. The inference or implication must be

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But independently of this enactment where an action is brought against the executor of a deceased contractor, a payment by a surviving joint contractor, made *after the death of the testator*, will not take the case out of the Statute of Limitation: Thus, in *Atkins v. Tredgold* (f), A. and B. made a joint and several promissory note: A. died, and ten years after his death B. paid interest upon the note: In an action brought upon the note against the executor of A., it was held that the payment of interest by B. did not take the case out of the Statute of Limitations, so as to make A.'s executors liable. Nor will it make any difference that the surviving joint contractor is the executor of the deceased: for it is clear that acts done by a surviving partner, who is executor of the deceased partner, and which the surviving partner was in that character bound to do, cannot *prima facie*, be considered to have been done in the character of executor (g). Again, where a joint contract is severed by the death of one of the contractors, nothing can be done by the personal representative of the deceased to take the case out of the statute as against the survivor (h). Therefore, in *Slater v. Lawson* (i), it was holden, that after the death of one maker of a joint and several promissory note, signed by two, a payment upon it by the executor of the deceased party would not take the debt out of the Statute of Limitations as against the survivor.

In *Douglas v. Forrest* (k), an action was brought against an executor on a Scotch judgment recovered against his testator: The defendant after pleading the general issue, pleaded, that the plaintiff's cause of action did not accrue

consistent with the facts from which it is drawn or raised, and it would be wholly inconsistent with the facts to hold that in such a case as that supposed the executor had incurred any personal liability: *per Chitty, J., Re Hollingshead*, 37 C. D. 651, 657.

(f) 2 B. & C. 23.

(g) *Way v. Bassett*, 5 Hare, 55. *Brown v. Gordon*, 16 Beav. 302. But see *Braithwaite v. Britain*, 1 Keen, 206. *Griffin v. Ashley*, 2 C. & K. 139.

(h) 1 B. & Ad. 398.

(i) 1 B. & Ad. 396.

(k) 4 Bing. 686.

within six years before the commencement of the suit: To this there was a replication, that the deceased, at the time the action accrued, was beyond seas, and remained there till he died, and that the plaintiff sued out his writ against the defendant within six years after he first took on himself the burthen and execution of the Will: And it was holden, that this replication was a good answer to the plea, the Court being of opinion, that although the injury of which the plaintiff complained had existed more than six years, yet he had no "cause of action," until there was some person within the realm against whom the action could be brought; and that, as the deceased never was in England after the cause of action accrued against him, there was no person in England against whom the plaintiff could proceed, until the defendant took upon him the execution of the Will (l).

(l) See also *Story v. Fry*, 1 Y. & Coll. Ch. C. 603. *Accord.* It must be observed, that it seems to have been the better opinion, that even before the statute of *Anne* the exception in the statute 21 Jac. I. c. 16, in favour of persons being beyond sea, extends only to the case where the *creditors* or *plaintiffs* were so absent, and not where the *debtors* or *defendants* were; because *creditors* are only mentioned in the statute: *Hall v. Wyborn*, 1 Show. 99. 2 Saund. 121, b. note (4). And now by the statute 4 Ann. c. 16, s. 19, it is enacted, that if any person *against whom* any action lies for seamen's wages, trespass, detainue, trover, replevin, action of account, or upon the case (or other actions mentioned in 21 Jac. I. c. 16, s. 3), was beyond sea at the time that such action accrued, the *plaintiff* shall be at liberty to bring his action against him within the

same time after his return as is limited for such action by the statute of 21 Jac. I. c. 16, and 4 Ann. c. 16. The latter statute, however, does not appear to have been relied on either by the counsel or Court, in the above case of *Douglas v. Forrest*. But the decision is stated by Lord Denman in delivering the judgment of the Court of Exchequer Chamber, in *Rhodes v. Smethurst*, 6 M. & W. 353, to have proceeded on the equity of that statute. See further, as to the construction of the statute of *Anne*, *Towns v. Mead*, 16 C. B. 123. Absence beyond sea of the plaintiff or one of the plaintiffs is no longer a disability, and the period of limitation will run as to joint debtors within the jurisdiction, though some be without it: 19 & 20 Vict. c. 97, ss. 10, 11. See *ante*, p. 1792, note (ss). Section 10 is not retrospective: *Pardo v. Bingham*, L. R. 4 Ch. 735.

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But it is no answer to a plea of the Statute of Limitations, that, after the cause of action accrued, and after the statute had begun to run, the debtor, within the six years, died, and that (by reason of litigation as to the right to probate) an executor of his Will was not appointed, until after the expiration of the six years, and that the plaintiff sued such executor within a reasonable time after probate granted: For, as soon as there is a cause of action, a plaintiff that can sue and a defendant that can be sued from that time the date of six years begins to run; and when the statute once begins to run, it must continue to run (*m*).

A writ of summons remains in force under R. S. C. 1883, Ord. VIII. r. 1, for twelve months, and may with leave be renewed from time to time for six months, and when so renewed will prevent the cause of action being barred under the Statute of Limitations from the date of the issuing of the original writ; but Malins, V.-C., under the corresponding section (s. 11) of the Common Law Procedure Act, 1852, held where a writ was issued in the Common Pleas against an administrator for a debt not then barred by statute, and within six months after the issuing of the writ (which was never served), at which time the debt was barred unless saved by the writ, the creditor took out an administration summons, that the writ only saved the bar for six months in the Court of Common Pleas, and that the statute was a bar to the administration suit (*mm*).

By 51 & 52 Vict. c. 59, in which act the term "trustee" shall be deemed to include an executor or administrator (*n*), it is provided as follows:—

Statute of
Limitations
may be pleaded
by trustees.

Sect. 8. (1.) (*nn*). In any action or other proceeding against

(*m*) *Rhodes v. Smethurst*, 4 M. & W. 42, affirmed in the Excheq. Chamber, 6 M. & W. 351. *Freake v. Cranefeldt*, 3 My. & Cr. 499. As to the remedy of a creditor where there is no personal representative, see *Webster v. Webster*, 10 Ves. 93. *Re Lovett*, 3 C. D. 198

and the cases there cited.

(*mm*) *Manby v. Manby*, 3 C. D. 101.

(*n*) Sect. 1, sub-sect. 3.

(*nn*) This section is again referred to when the subject of Remedies against Executors in Equity is dealt with, *post*, p. 1928.

a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

(a.) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:

(b.) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit or and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

Although, where the plaintiff died, a writ by journeys accounts could not be brought by his executor (o), yet if a *defendant* died, the plaintiff might pursue this writ against the personal representative, provided the action was of a nature such as would survive against an executor or administrator (p): and in such case, if the defendant pleaded the

(o) See *ante*, p. 1787, note (f), Raym. 432. But there is some conflict between the authorities for an account of this writ.

(p) *Kinsey v. Heyward*, 1 Lord on this point. See the judgment

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Notwith death (x) i dies to brin from proba Limitation issued, but from prob the execut time the s of Limitat native proce r. 2, to ad of Lord Ly Lowndes, 6 Ch. C. 340. (q) *Kinsey* Raym. 432. (P).

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Statute of Limitations, the plaintiff might reply a writ newly brought by journeys accounts (*g*); and the executor of an executor must have pleaded that he had fully administered on the day of the first writ purchased (*r*). So if the plaintiff commenced an action against the deceased within six years of the accruing of the cause of action, and such action abated by his death, a reasonable time was allowed to the executor for bringing a fresh action either according to the principle of the old writ by journeys accounts, or according to an equitable construction of the 4th section of the statute (*s*). A year has been said to be a reasonable time, but the executor, if he use due diligence, is not bound to bring the action within a year from the death of the deceased, *e.g.*, if the defendant has made it impossible to do so by delaying to take out administration (*t*). The same equitable construction has been applied to the limitation of actions on bonds, &c., imposed by the statute 3 & 4 Wm. IV. c. 42, s. 3 (*u*).

Notwithstanding the fact that actions no longer abate by death (*x*) it is still open to a plaintiff where the defendant dies to bring a new action against the executors within a year from probate and thus to take the case out of the Statute of Limitations. Thus in *Swindell v. Bulkeley* (*y*), a writ was issued, but before service the defendant died. Within a year from probate of the Will a fresh writ was issued against the executors for the same cause of action, but in the meantime the six years had expired. It was held that the Statute of Limitations afforded no defence to the action. An alternative procedure is to apply under R. S. C. 1883, Ord. XVII. r. 2, to add the executors as parties (*z*).

of Lord Lyndhurst, in *Davies v. Lowndes*, 6 M. & Gr. 534. 1 Phill. Ch. C. 340.

(*g*) *Kinsey v. Heyward*, 1 Lord Raym. 432. Com. Dig. Abatement (P.).

(*r*) *Spencer's case*, 6 Co. 10, b. Doct. Plac. Exors. 2, p. 170, edit. 1677.

(*s*) See *ante*, pp. 1788, 1789.

(*t*) *Curlew v. Lord Mornington*,

7 E. & B. 283. S. C. in error, 27 L. J. Q. B. 489.

(*u*) *Sturgis v. Darell*, 4 H. & N. 622. S. C. in error, 6 H. & N. 120.

(*x*) R. S. C. 1883, Ord. XVII. r. 1.

(*y*) 18 Q. B. D. 250.

(*z*) See also r. 4 of the same order, which provides for carrying on the proceedings between the continuing parties and the new parties.

Plea of set-off: A defendant sued as executor or administrator, cannot set off a debt due to himself personally, nor, if sued for his own debt, can he set off what is due to him as executor or administrator: because the debts sued for and intended to be set off must be mutual, and due in the same right (*a*). But it has been held that to a declaration in debt or assumpsit against an executor, on an account stated by him as executor, a set-off for debts due from the plaintiff to the testator may well be pleaded; for that an account stated by an executor as such must be taken to show a debt due from his testator to the plaintiff (*b*).

(*a*) Bishop v. Church, 3 Atk. 691. Gale v. Luttrell, 1 Y. & Jerv. 180. In Bailey v. Finch, L. R. 7 Q. B. 34, the trustee in bankruptcy of certain bankers brought an action against the defendant for the amount of his overdraft. A., a customer of the bank, died, leaving the defendant her executor, and the balance of her account, which was in credit, had been, before action, transferred to the account of the defendant, "executor of the late Mrs. A." The defendant was residuary legatee, and it was shown that there would be, after satisfying legacies not then provided for, a surplus coming to the defendant exceeding the amount to the credit of the executorship account. It was held that the defendant could set off the amount standing to the credit of the executorship account, the ground of the decision being, not that there was an equitable right of set-off, but that in this state of accounts there was a legal right of set-off, which was not precluded in equity by any beneficial rights of third persons for whom the defendant could be deemed to

be trustee. *Ex parte Morier*, 12 C. D. 491. Set-off is now governed by R. S. C. 1883, Ord. XIX. r. 3, as to which, and as to set-off against an executor, see *ante*, p. 1740 *et seq.* An administrator is entitled to set off against the share of one of the next of kin the whole of a debt due from him to the intestate's estate, part of which debt has become barred by the Statute of Limitations: *Re Cordwell's Estate*, L. R. 20 Eq. 644.

(*b*) Blakeley v. Smallwood, 8 Q. B. 538. But it may be argued that the debt, on which the action is founded, is the debt which arises, after the death of the testator, on the account stated between the executor and the plaintiff; and that, therefore, in truth, this case, as well as *Mardall v. Thellusson*, 18 Q. B. 857, 6 E. & J. 976, was overruled by *Rees v. Watts*, 11 Exch. 410. *Newell v. Nat. Prov. Bank of England*, 1 C. P. D. 496. *Ante*, p. 1781, note (*h*). See also *Re Gregson*, 36 C. D. 223. In *Mardall v. Thellusson*, the defendants were sued as executors for a debt which accrued due from their tes-

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If the executor or administrator has not assets to satisfy the debt, upon which an action is brought against him, he must take care to plead *plene administravit* or *plene administravit prater*, &c. (c). For it was said prior to the Judicature Acts that a judgment against an executor or administrator, whether by default or on demurrer (d), or upon verdict upon any plea pleaded by the executor or administrator, except *plene administravit*, or admitting assets to such a sum and *riens ultra* (e), was conclusive upon him that he had assets to satisfy such judgment (f). But that if the executor pleaded either a general or special *plene administravit*, he was liable only to the amount of assets proved to be in his hands; and a judgment against an executor, on a verdict upon *plene administravit*, was only an admission of assets to the extent of assets proved to be in his hands (g). And the substance of these propositions would still seem to be true, as showing the onus of pleading even under the Judicature Acts.

The essential part of the plea of *plene administravit* was, that "the said defendant has no goods, which were of the said A. B. (the testator), at the time of his death in the hands of the said defendant, as executor, to be administered, or had, at the time of the commencement of the suit, or ever since": and the omission of any of the above averments was always held fatal on demurrer, as well in a general as a special *plene administravit*.

Under the old pleading rules there was a great deal of discussion (h) as to whether the words "*or ever since*" were

tator in his lifetime, and it was held that they might set off a debt which had accrued due from the plaintiff to them as executors since the death of their testator.

(c) For forms of these pleadings, see Bullen & Leake, 4th edit. vol. ii. pp. 179 *et seq.*

(d) Rock v. Leighton, 1 Salk. 310. S. P. admitted 3 T. R. 686. Leonard v. Simpson, 2 Bing. N. C. 176.

(e) Ramsden v. Jackson, 1 Atk. 292. Erving v. Peters, 3 T. R. 685.

(f) 1 Saund. 219, b. note to Wheatley v. Lane.

(g) 1 Saund. 219, b. note. Cousins v. Paddon, 2 Cr. M. & R. 558, per Parke, B. Re Higgins' Trusts, 2 Giff. 562.

(h) See Wms. Exors. 8th edit. pp. 1964, 1992.

plea of *plene administravit*:

essential to the plea of *plene administravit*, and whether the judgment of assets *quando acciderint* would embrace assets received between writ and judgment, and it seems ultimately to have been decided that the words were not essential, and that the judgment of assets *quando acciderint* embraced all assets received after writ. All this seems immaterial since the Judicature Acts, except in so far as it shows, on the one hand, that if a defendant executor wishes to rely upon a payment of a creditor, since writ issued, as a *pro tanto* discharge under the rule in equity, he would have to specifically allege the fact in his defence, as was done in *Vibart v. Coles* (i), and not rely on a general statement that the defendant had fully administered the estate, and that there were no assets for the payment of the plaintiff's debt: and, on the other hand, that if a plaintiff wishes to rely on the receipt of assets after writ he should allege such receipt in his reply to the defence of *plene administravit* (j). The importance of these matters is, however, largely diminished by the power of amendment under the Judicature Act, but these amendments sometimes involve adjournment and payment of costs.

Again, in an action brought against the executor of an executor, it was not sufficient to plead that the defendant had not any goods or chattels of the original testator in his hands to be administered; but he must also plead, either that the first executor fully administered, or that he the said defendant had no assets of the first executor out of which he could satisfy any *devastavit* committed by the first executor (k). And such matters would seem to be essential to the substance of the defence.

plene administravit præter.

Again, an executor was *bound* to plead a debt of a higher nature, of which he had notice, in bar of an action brought against him for a debt of an inferior nature, and *riens ultra*, if he had not assets for both: otherwise it would be an admission of assets to satisfy both debts (l). Thus the executor was

(i) 24 Q. B. D. 364. 315.

(j) See *post*, p. 1850, note (t). (l) *Rock v. Leighton*, 1 Salk.

(k) *Wells v. Fydell*, 10 East, 310. *Ante*, p. 879.

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bound to plead a judgment recovered against the testator, in bar of an action on a bond; otherwise he would admit that he had assets to satisfy the judgment (*m*).

It will be remembered that since 32 & 33 Vict. c. 46 specialty debts have not, in the administration of the estate of any person dying on or after January 1st, 1870, any priority, but a plea or defence such as that in the text will still be necessary in some cases, *e.g.*, in the case of an outstanding judgment (*n*).

If the judgment pleaded was recovered against the testator and another, the plea had to aver the survivorship of the testator (*o*).

An unregistered judgment obtained against the executor himself before administration decree has priority over all debts of equal degree, and under 32 & 33 Vict. c. 46, specialty and simple contract debts are of the same degree (*p*).

A recovery against one of several executors or administrators, and no assets *ultra*, may be pleaded in an action against all the executors or administrators for another debt of the testator or intestate (*q*).

It may be observed, that a plea of judgment recovered against the executor himself, and no assets *ultra*, is a plea in bar of the action generally, and not with an *ulterius manutenere non debet*, even where the judgment has been confessed after action brought, and pleaded *puis darrein continuance*; contrary, apparently, to the general rule, that a matter of defence, arising after action brought, cannot be properly pleaded in bar of the action generally, but must be pleaded in bar of the further maintenance of the suit (*s*).

(*m*) Earle v. Hinton, 2 Stra. 732.

(*n*) See *ante*, Pt. III. Bk. II. Ch. II. And note that an unregistered judgment ranks only as a simple contract debt: Van Ghe-
luive v. Nerinckx, 21 C. D. 189.
Ante, p. 862.

(*o*) Trethewy v. Ackland, 2

Saund. 50.

(*p*) *Re Williams' Estate*, L. R. 15 Eq. 270. *Re Stubbs' Estate*, 8 C. D. 154.

(*q*) *Further v. Further*, Cro. Eliz. 471.

(*s*) *Le Bret v. Papillon*, 4 East, 502.

But this arises from the peculiar nature of the action, which is brought against the executor, not only on the foundation of a debt due from the testator to the plaintiff, but in respect also of assets, supposed to be in his, the executor's, hands, liable to its satisfaction; and the executor has by law a power of confessing a judgment to another creditor in preference to the plaintiff, in the suit first brought, and thereby, to the extent of the assets then in hand, to create a perpetual bar to the plaintiff's suit, the same being pleaded in the usual way, *viz.*, that he has not assets except so much, which are not sufficient to satisfy that judgment. But the plaintiff may, and constantly does, avoid the effect of the plea as an absolute bar, and protect himself from costs at the same time, on the ground of his original right of suit, by praying judgment of such assets as should come to the executor's hands, after satisfying the judgment so confessed. So that the plea of judgment recovered against the defendant as executor, pending the writ, enures in point of effect, if the judgment itself be not questioned by the replication, as only a plea in bar of the further maintenance of the suit against the executor in respect of his present assets (*t*).

(*t*) *Le Bret v. Papillon*, 4 East, 508. Matters arising pending action may be pleaded by way of defence under the provisions of R. S. C. 1833, Ord. XXIV., and inasmuch as an executor or administrator may prefer one creditor to another, the payment of one creditor, after an action has been commenced by another, may be set up in answer to such action. Thus in *Vibart v. Coles*, 24 Q. B. D. 364, following *Re Radcliffe*, 7 C. D. 733, the defendant, an administratrix, after action brought against her for money lent to the intestate by the plaintiff, consented to a Judge's order for judgment in a subsequent action by another

creditor for a debt due from the intestate, and, judgment being signed accordingly, she paid the amount of the debt, and thereby exhausted the assets, and it was held that she was entitled to make such payment, and thereby defeat the plaintiff.

There was formerly a conflict between the rules of common law and equity on this point, the common law holding that an executor or administrator, though he could confess judgment, could not, and equity that he could, pay one creditor before another; but since the Judicature Act, 1873, s. 25, sub-s. 11, the equity rule prevails: *ibid.* Whether or not suc'. a de-

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The nature and extent of the right of an executor or administrator to retain a debt due to him from the deceased, have been investigated in a previous part of this Treatise (*u*). It was held to be optional in the executor or administrator either to *plead* a retainer for such a debt, or to give it in evidence under a plea of *plene administravit* (*x*). So he might either plead, or show in evidence under that plea, that he retained assets to a certain amount, for the expenses of the funeral (*y*), or of taking out administration (*z*), or to reimburse himself for payments made out of his own pocket, in discharge of debts not inferior in their kind to the debt of the plaintiff before the commencement of the suit (*a*). But a retainer for unsatisfied debts of the testator or intestate, of a higher degree than that on which the action is brought, must be pleaded (*b*).

Plea of
retainer :
for debt due
from testator
to executor ;

for disburse-
ments by
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for debts
outstanding.

Where an executor pleaded that he had no assets *ultra* a judgment, which, in truth, was recovered against him upon an unjust or fictitious debt, the plaintiff might reply, that the judgment was had and obtained by fraud and covin between the executor and the creditor (*c*). But the plaintiff could not traverse the averment that the debt, for which the judgment was had, was a just and true debt (*d*).

Replication to
a plea of *plene
administravit
propter*.

fence requires to be pleaded as a matter arising after action brought or after the expiry of the time limited for defence under Ord. XXIV., does not seem ever to have been decided. If it is necessary so to plead it, and the defendant cannot merely give in evidence under a plea of *plene administravit* the fact that since action brought he has paid a creditor other than the plaintiff, and thus exhausted the assets, the plaintiff, according to the words of the rule, would be entitled to confess the defence and sign judgment for his costs, unless he elected to take a judgment of assets *quando acciderint*.

(*u*) *Ante*, p. 884 *et seq.*

(*x*) 1 Saund. 333, note (6). Having regard to the terms of R. S. C. 1883, Ord. XIX. r. 4, it would seem prudent in every case to allege the facts upon which any retainer, which it is sought to set up, is based.

(*y*) See *R. v. Wade*, 5 Price, 621, as to the form of such a plea.

(*z*) *Gillies v. Smither*, 2 Stark. N. P. C. 528.

(*a*) Co. Lit. 283, a. Bull. N. P. 140.

(*b*) Bull. N. P. 141. Specialty debts have now no priority. See *ante*, p. 869.

(*c*) *Williams v. Fowler*, 1 Stra. 410. 2 Saund. 50, note (3).

(*d*) *Robinson v. Corbett*, 1 Lutw.

So the plaintiff might reply that the judgment is kept on foot by covin to defraud the creditors, *viz.*, "that the said defendant defers procuring acknowledgment of satisfaction to be entered of the said debt and damages, so recovered, &c. with intent to defraud him the said plaintiff:" As where the executor compounded for a less sum and did not procure the judgment to be discharged, but pleaded it to an action brought against him by another creditor, he might reply the composition, and that the judgment was kept on foot by covin: for nothing shall be allowed to the executor but what he actually pays (*e*).

The executor, in his rejoinder to replications of this description, was bound to traverse the fraud. And the plaintiff might, upon this issue, give in evidence, either that the debt was not a just one, or that less was due than the sum for which judgment had been given (*f*).

In answer to the latter evidence, which is *prima facie* proof of fraud, the defendant might show that the judgment was entered for more than was due, by mistake (*g*). If a judgment was pleaded, and *per fraudem* replied, upon which issue was taken, and it appeared in evidence that the creditor was willing to take less than was recovered, it was proof of fraud; but if it were shown that the administrator had not assets to pay that sum, it was no fraud (*h*). It should be observed, that where a judgment was obtained against an executor by covin, but for a just debt, the creditor could not avoid the judgment by alleging that it was obtained by covin to defraud him (*i*).

662, by Powell, J. 2 Saund. 50, note (3). Indeed, it was not necessary for an executor who pleaded an outstanding judgment, to aver that the debt, upon which the judgment was obtained, was a just and true debt: 1 Saund. 329, note (3).

(*e*) 1 Saund. 334, note (9).

(*f*) 2 Saund. 50, note (3).

(*g*) Pease v. Naylor, 5 T. R. 80.

(*h*) *Per curiam*, in Parker v. Atfield, 1 Salk. 312.

(*i*) Veale v. Gatesdon, W. Jones. 92, 3rd Resolution. Williams v. Fowler, 1 Stra. 410. 1 Saund. 334, note (9).

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If an executor or administrator pleads *plene administravit* and the plaintiff replies that the defendant had assets at the commencement of the suit, whereupon issue is joined, the burthen of proof lies upon the plaintiff, who must prove that assets existed, or ought to have existed, in the hands of the defendant at the time of the writ sued out (*k*). The question, as to what shall be considered assets come to the hands of the executor or administrator, has been already discussed (*l*).

Evidence for plaintiff upon issue joined on plea of *plene administravit*.

The plaintiff could not have proved, under this issue, that assets have been received subsequently to the commencement of the suit; to be admitted to such proof, he should have replied this matter specially (*m*).

If, upon the issue of *plene administravit*, it shall appear that the executor or administrator has been guilty of a *devastavit*, which has caused a failure of assets, the jury must find that the defendant has assets to that amount, and not find a *devastavit* (*n*).

(*k*) *Mara v. Quin*, 6 T. R. 10. *Webster v. Blackman*, 2 Post. & F. 490.

(*l*) *Ante*, p. 1534 *et seq.* In *Britton v. Jones*, 3 Bing. N. C. 676, upon a plea of *plene administravit* and replication of assets in hand at the time of the commencement of the suit, it appeared at the trial, that the testator, twelve months before his decease, purchased twelve mahogany chairs, which were seen in the house where he lived shortly before his death: The defendant proved that the deceased died poor, that he lodged in the same house with his mother and his sister, the defendant; and that money was borrowed to bury him: It was contended that, as it had not been proved that the furniture in question ever came to the hands of the defendant, there was

no evidence to charge her with it as assets: but the Court of C. P. held that there was a *prima facie* case for that purpose. See also *Stroud v. Dandridge*, 1 Car. & K. 445.

(*m*) *Mara v. Quin*, 6 T. R. 11. 2 Phill. Ev. 347, 6th edit. *Roscoe*, *Nisi Prius Evidence*, 16th edit., 1218.

(*n*) *Wentw. Off. Ex. c. 13*, p. 312, 14th edit. This finding by the jury of assets in the hands of the executor is not against truth, though they be wasted, and so not to be had in kind; for the executor had them in right, since he has not rightfully parted from them; according to the rule, *pro possessore habetur qui dolo aut injuria desit possidere*: *Ibid.* See *Reeves v. Ward*, 2 Bing. N. C. 235. S. C. 2 Scott, 206.

Proof of assets
by production
of inventory.

In order to prove assets, the plaintiff may give in evidence the inventory exhibited by the defendant in the Court of Probate: And after the inventory is put in, it is for the defendant to discharge himself of the items (o).

In *Shelly's case* (p), Lord Holt said, that all sperate debts mentioned in the inventory shall be counted assets in the executor's hands; for that is as much as to say that they may be had for demanding, unless the demand or refusal be proved. Again, in *Smith v. Davies* (q), Lord Hardwicke held, that if in the inventory produced the article concerning debts does not distinguish between sperate and desperate, it will be sufficient to charge the executor with the whole *primâ facie* as assets, and put upon him to prove any of them desperate; as if the article were, "Item, for debts due and owing, which I admit myself to be charged with when recovered or received" (r). And the authority of these cases appears to have been recognized and acted upon in the Common Pleas, in a case in the time of Dallas, C. J. (s). But in *Gyles v. Dyson* (t), where on the trial of an issue joined on a plea of *plene administravit*, it was contended, on the authority of *Smith v. Davies*, that certain debts which the defendant had, in an inventory exhibited in the Ecclesiastical Court, allowed to be due to the estate and which he did not represent to be desperate, were to be considered as actual assets in his hands, Lord Ellenborough said, "You must prove, presumptively at least, that these debts have been paid; that presumption may depend on the time and a number of other circumstances; but upon the plea of *plene administravit*, it is necessary to prove that effects

(o) *Giles v. Dyson*, 1 Stark. N. P. C. 32.

(p) 1 Salk. 296.

(q) Bull. N. P. 140. S. C. Selwyn's N. P. 779, note, 6th edit.

(r) The defendant proved, by a witness, who went to demand several of them, that he could not

recover them, and accordingly they were allowed as desperate: See *ubi supra*.

(s) *Young v. Cawdrey*, 8 Taunt. 734. S. C. *nomine* *Young v. Cordery*, 3 B. Moore, 69.

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came into the hands of the defendant; this is the universal practice (u).

The inventory would seem to be only *primâ facie* evidence and it may be doubtful whether an inventory made or exhibited by one executor or administrator would be even *primâ facie* evidence against another (x).

Inventory only
primâ facie
evidence.

The amount of the probate stamp is *admissible* in evidence, on the issue joined on a plea of *plene administravit* (y). And the Court of King's Bench, in *Foster v. Blakelock* (z), held that the probate stamp was *primâ facie* evidence that the executor had assets to the amount covered by the stamp (a). But this decision, it should seem, must now be considered as overruled. In the case of *Stearn v. Mills* (aa), Littledale, J., and Parke, J., expressed their dissent from it: And in the subsequent case of *Mann v. Lang* (b), Littledale, J., said, that he could not say that the stamp on the probate was not *admissible*; but it was not *primâ facie* evidence of the amount of assets: In the same case Lord Denman expressed his opinion, that if there be evidence of a long acquiescence by the executor, without demanding any of the duty, it is *primâ facie* evidence of such amount; though it is not of itself evidence of such amount: But Paterson, J., was of opinion, that it is not such *primâ facie* evidence, even if a long acquiescence is shewn. This subject was again considered in the Court of Chancery, in the case of *Lazonby v. Rawson* (c), where Lord Cranworth, C., in giving judgment, said, "The circumstance of an executor having paid probate duty up to a particular amount, may be *primâ facie* evidence of his having thought that the testator had died possessed of

Amount of
probate stamp
admissible in
evidence.

(u) See *ante*, p. 1536.

(x) *Stearn v. Mills*, 4 B. & Ad. 657. The same would probably be true of the account of the personal estate to be delivered pursuant to 43 Vict. c. 14, s. 10.

(y) *Mann v. Lang*, 3 Ad. & E. 699.

(z) 5 B. & C. 328.

(a) See also *Curtis v. Hunt*, 1 C. & P. 180, where Lord Tenterden ruled to the same effect.

(aa) 4 B. & Ad. 657.

(b) 3 Ad. & E. 699.

(c) 4 De G. M. & G. 556.

property represented by the amount of the stamp duty paid: But the probate duty is, in the first instance, payable on the whole of the personal estate left by the testator: If it cannot all be got in, and it should be ascertained that it was not of the value represented, in such a case provision is made for enabling the executor to get a return of the amount overpaid: Where, therefore, an executor has not made any application for the return of the duty which he may have paid in excess, it is a step in evidence towards proving an admission of assets to the amount, though by no means conclusive evidence that the executor had made a correct estimate of the testator's property. Much might depend on the amount overpaid, and the pecuniary condition in life of the executor, whether he would be at the trouble of getting a return of the excess of duty overpaid. Here the executor paid 40*l.* in respect of probate duty, and never got back any of it, and I think it certainly amounts to strong presumptive evidence that he had received assets to the extent covered by that amount of duty; but it is not an absolute admission that he did."

An admission by the defendant, that a debt is a just debt, or a promise to pay it as soon as he can, is not evidence to charge him with assets: for such an admission must be understood with a reasonable intendment, and the executor could not mean to pledge himself to commit a *devastavit*, by paying this debt before others of a higher nature (*d*). But if an executor compound with the creditors, and afterwards, at the suit of any of them, plead *plene administravit*, proof of the composition would be conclusive proof of assets, and the Court would not suffer him to give evidence of no assets (*e*). However, an executor will not admit assets by

(*d*) *Hindley v. Russell*, 12 East, 232. 2 Phill. Ev. 348, 6th edit. If the executor refers a party to a third person for information respecting the effects of the testator,

it should seem that an admission of assets by such third person will bind the executor: *Williams v. Innes*, 1 Camp. 364.

(*e*) Bull. N. P. 145.

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paying interest on a bond due from the testator (*f*): for it would be unreasonable that he should be liable for the whole debt, by paying a part out of his own funds, or that, because he has enough in his hands to pay the interest, he should be thereby concluded from disputing assets for the principal (*g*).

In answer to the proof of assets, the executor or administrator may shew under the issue joined on *plene administravit* (*h*), that he has exhausted the assets, by discharging other demands on the estate, not inferior in their nature to that of the plaintiff (*i*), or even by the payment of debts of inferior degree, without notice of the plaintiff's demand (*k*). Again, the executor may show that he has disbursed the assets in the expenses of the funeral, or of probate (*l*), or administration, or, as it should seem, in the reasonable charges of collecting the debts of the deceased (*m*). So he may shew that he has retained money in his hands to pay for the expenses of administration, to which he has made himself liable, without proving that he has paid them (*n*).

evidence for
executor that
the assets
have been
exhausted.

Where the executor shews payments made by him to the extent of the assets proved by the plaintiff to have come to

(*f*) *Cleverley v. Brett*, cited by Buller, J., 5 T. R. 8. 2 Phill. Ev. 348, 6th edit.

(*g*) See further as to what is an admission of assets, *post*, p. 1894.

(*h*) *Reeves v. Ward*, 2 Bing. N. C. 235.

(*i*) See *ante*, p. 879 *et seq.*

(*k*) *The Governors of Chelsea Water-Works v. Cowper*, 1 Esp. N. P. C. 277. *Ante*, p. 881. But according to the judgment of Lawrence, J., in *Hickey v. Hayter*, 6 T. R. 388, these payments without notice must be pleaded.

(*l*) It is a question for the jury whether the executor has committed a *devastavit* by swearing

the property above its value without reasonable ground, and so incurring a greater stamp duty than was requisite, seeing that the executor is bound to act promptly, and therefore is not to be held to too close a search for the testator's property: *Jackson v. Bowley, Carr & M.* 97.

(*m*) *Giles v. Dyson*, 1 Stark. N. P. C. 32. But he cannot be allowed for disbursements in the schooling, feeding, and clothing of the children of the testator, subsequently to his decease: *Ibid.*

(*n*) See *ante*, p. 1851. *Gillies v. Smither*, 2 Stark. N. P. C. 528.

his hands, the plaintiff may shew, in answer, that the funds so applied did not come to the defendant as executor, but were handed to him in trust to pay the testator's debts, and were not part of the assets first proved to have come to his hands (o).

The defendant could not, under a plea of *plene administravit*, give evidence of the existence of outstanding debts of a higher nature; such defence must have been pleaded (p), and probably now also must be pleaded.

Again, the defendant could not shew, in answer to proof of assets, that he had applied them in the payment of debts since the commencement of the suit; for under *plene administravit*, no payments, made after the action commenced, could be given in evidence (q). If, therefore, the executor had paid other creditors of superior degree after action commenced, he must have pleaded that matter specially, and if he has paid other creditors of equal degree, since the writ issued, he ought, it would seem, to plead the fact specifically (r).

It should seem (as there has already been occasion to point out) (s), that if, in the distribution of assets, a creditor misleads an executor, either by laches or express authority, so as thereby to induce him to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets (t). So where a party entitled to

(o) *Marston v. Downes*, 1 A. & E. 31.

(p) Bull. N. P. 141. 1 Saund. 333, a. note (8). *Ante*, p. 879.

(q) *Dyer*, 32, a. in *margin*. Com. Dig. Admon. C. (2). *Nightingale v. Lee*, 1 Freem. 110.

(r) R. S. C. 1883, Ord. XIX. r. 4.

(s) *Ante*, p. 1206.

(t) *Richards v. Browne*, 3 Bing. N. C. 499, by Tindal, C. J. *Ante*, p. 1206. It was held in *Jewsbury v. Mummery*, L. R. 8 C. P. 56, that

a defence of this character could be properly pleaded under a plea of *plene administravit*: probably now it would have to be specifically pleaded under R. S. C. 1883, Ord. XIX. r. 4. A creditor does not lose his right to sue the executors by mere laches. But if the creditor misleads the executors, so that they are thereby induced to part with the assets in a manner which would be a *devastavit*, then the creditor cannot complain of the *devastavit*. Although C. J.

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a legacy under a Will has a claim against the testator, which he conceals from the executors till after he has received his legacy, he cannot afterwards, in an action against the executors, object that the amount of the legacy was not paid in a due course of administration (u).

Whenever the action against an executor or administrator can only be supported against him in that character, and he pleads any plea which admits that he has acted as such, (except a release to himself) the judgment against him must be, that the plaintiff do recover the debt and costs to be levied out of the assets of the testator, if the defendant have so much, but if not, then the costs out of the defendant's own goods (x). So where the executor pleads *plene administravit*, and it is found against him, the judgment is *de bonis testatoris, et si non, &c.*, then the costs *de bonis propriis* (y).

It was formerly held that where the defendant pleaded *ne unques executor or administrator*, or a release to himself, and it was found against him, the judgment was, that the plaintiff do recover both the debts and costs, in the first place, *de bonis*

Judgment
against an
executor :

Tindal uses the word "laches," he does not mean that mere doing nothing will deprive the creditor of his remedy; he means "conduct:" *per Chitty, J., Re Birch*, 27 C. D. 622. There is no rule in equity any more than in law that the mere non-suing by any specialty creditor for any period within the statutory limit of twenty years is such negligence as deprives him of the right of requiring payment of the specialty debt. And therefore if an executor disposes of the estate of the testator without providing for a liability of the testator under a covenant, he will be liable for the amount as upon a *devastavit*, even after the lapse of eighteen years: *Re Baker*, 20 C. D. 230.

(u) *Stroud v. Stroud*, 7 M. & Gr. 417.

(x) 1 Saund. 335, note (10), to *Hancock v. Prowd*. *Gorton v. Gregory*, 3 B. & S. 90. The Court refused, after a lapse of six years, to allow a judgment for the debt *de bonis testatoris*, and for the costs *de bonis testatoris et si non de bonis propriis*, to be altered to a judgment generally *de bonis testatoris et si non de bonis propriis*, even if the latter were clearly the judgment to which the plaintiff was entitled: the distinction being between an alteration to *discharge*, and one to *fix*, the personal liability of the executor: *Burroughs v. Stevens*, 5 Taunt. 556.

(y) 1 Roll. Abr. 931 (D.), pl. 3. *Wentw. Off. Ex.* 344, 14th edit.

testatoris, si, &c., and si non, &c., de bonis propriis (z). The reason alleged was, because the executor could not but know these to be false pleas: But the same reason seems equally to apply to other pleas where the judgment was different (a). And this probably would be held no longer to be law, especially as the rule was rather a pleading result, deduced from pleading admissions, which the Court would not let the defendant remedy by amendment, than a punishment inflicted by the Court, which had indeed no jurisdiction to inflict such a punishment.

With respect to the *amount* for which judgment should be entered against the executor upon a plea of *plene administravit*, if the executor plead either a general or special *plene administravit*, he is liable only to the amount of the assets proved to be in his hands (b). Thus in *Harrison v. Beccles* (c), the plaintiff, having proved a debt of 80*l.*, took a verdict on the *non assumpsit* for the sum, and having proved 25*l.* assets unadministered, he took a verdict on the *plene administravit* for that sum, and judgment *quando, &c.* for the residue (d).

(z) Bro. Exors. 34. 1 Roll. Abr. p. 930 (C.), pl. 2, 8, p. 933, pl. 15. Bull. v. Wheeler, Cro. Jac. 648. Wentw. Off. Ex. 338, 340, 14th edit. 1 Saund. 336, b. note (10). Hooper v. Summersett, Wightw. 20, *per curiam*.

(a) 1 Saund. 336, b. note (10).

(b) 1 Saund. 219, b. note to Wheatley v. Lane. Jackson v. Lyon, Carr. & M. 97.

(c) Cited 3 T. R. 688.

(d) Hancock v. Podmore, 1 B. & Ad. 265, *per* Bayley, J. *Accord*. The following form is taken from Serjt. Williams' note in Sir E. V. Williams' edition, 1 Wms. Saund. 608, 609, for entering up judgment on the two issues of *non assumpsit* by the testator, and of *plene administravit* by the defen-

dant, to which the plaintiff replied that the defendant had assets since the commencement of the suit, where the jury find the first issue for the plaintiff, and, on the second issue, that the defendant has assets to satisfy only *part* of the debt: "As to the first issue between the said parties within joined, [the jurors] upon their oath do say, that the within-named William Clarke (the testator) in his lifetime did undertake and promise in manner and form as the said Francis hath above thereof complained against her the said defendant Mary (the executrix), and they assess the damages of the said Francis by reason of the not performing of the said promises and undertakings, over and above

for what amount judgment shall be upon a plea of *plene administravit*:

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his costs and his suit in to 80*l.*, and charges to 4 issue betw within join upon their the said M commencement said Francis since had g were of the time of his be adminis 40*l.*, parcel above assess said Mary the said F the said da residue of the said M commencement said Francis since, had and chattel said William death in t Mary to be with she co said Francis of the said aforesaid: sidered tha recover aga said 40*l.* by aforesaid fo damages of

When several executors plead *plene administravit severally* by several attornies, and the jury find that one of them only has assets, judgment shall be given against him only and the rest shall go quit (e). So too in *Parsons v. Hancocke* (f), where in an action against several executors, they all pleaded jointly that they had fully administered, &c., and the plaintiff proved assets in the hands of some only of the defendants,

judgment upon *plene administravit*, when one only of several executors is found to have assets :

his costs and charges by him about his suit in this behalf expended, to 80*l.*, and for those costs and charges to 40*s.* And as to the last issue between the said parties within joined, the jurors aforesaid upon their oath aforesaid say, that the said Mary, at the time of the commencement of the suit of the said Francis in this behalf, and since had goods and chattels which were of the said William at the time of his death in her hands to be administered to the value of 40*l.*, parcel of the said damages above assessed, wherewith she the said Mary might have satisfied the said Francis 40*l.*, parcel of the said damages; and as to 40*l.* residue of the said damages, that the said Mary, at the time of the commencement of the suit of the said Francis in this behalf, or ever since, had not any other goods and chattels which were of the said William at the time of his death in the hands of the said Mary to be administered, wherewith she could have satisfied the said Francis the said 40*l.*, residue of the said damages so assessed as aforesaid: Therefore it is considered that the said Francis do recover against the said Mary the said 40*l.* by the said jury in form aforesaid found, parcel of the said damages of 80*l.* above assessed, to-

gether with his costs and charges by the said jury in form aforesaid assessed, and also 35*l.* for his costs and charges of increase by the said Court of our said lord the King here adjudged to the said Francis with his assent, which said damages, costs, and charges, in the whole amount to 77*l.*, to be levied of the goods and chattels which were of the said William at the time of his death in the hands of the said Mary to be administered, if she hath so much in her hands to be administered, and if not, then the said costs and charges, parcel of the damages last mentioned, amounting to 37*l.*, to be levied of the proper goods and chattels of the said Mary, and that, &c., &c., and that the said Francis do recover the said 40*l.* residue of the said damages in form aforesaid assessed, to be levied of the goods and chattels which were of the said William at the time of his death, or which since the pleading of the said second plea of the said Mary, have come or at any time hereafter shall come, to the hands of the said Mary to be administered. And the said Mary in mercy," &c.

(e) *Bellew v. Juckleden*, 1 Roll. Abr. 929 (B.), pl. 5.

(f) 1 Mood. & Malk. 330.

executor. And in debt or *scire facias*, on this judgment proof of the executor's receiving assets was always at the trial confined to a period subsequent to the judgment (o). And it is right that such be the rule at law; for if a creditor was permitted to litigate a second time that which has been once settled between the parties, either by verdict or admission, an executor would be harassed and involved in infinite expense and litigation (p).

When an executor or administrator pleads *plene administravit*, or judgments, &c., outstanding, and *plene administravit præter*, and the plaintiff, admitting the truth of the plea, takes judgment of assets *quando*, &c., the executor or administrator is not liable to costs *de bonis propriis* (q): nor does he seem liable thereto, when he pleads *plene administravit præter*, and the plaintiff takes judgment of the assets admitted in part, and for the residue, of assets *quando*, &c. (r). But it would seem that though an executor or administrator, in such case, is not personally liable to pay costs, yet that judgment may be well entered for them, to be recovered *de bonis testatoris*, *quando acciderint* (s).

costs on judgment of assets in futuro.

Formerly there were two modes of enforcing a judgment obtained against an executor *de bonis testatoris*: 1st, by *fieri facias* (t), or *scire fieri* inquiry; 2nd, by an action of debt on the judgment, suggesting a *devastavit*.

Proceedings on judgment against executor *de bonis testatoris*;

First, as to the proceeding by *fieri facias* or *scire fieri* inquiry: If the sheriff returned, as he might do if he pleased, not only *nulla bona* but also a *devastavit*, to a *fieri facias de*

by *fieri facias*:

(o) Taylor v. Holman, Bull. N. P. 169. 2 Saund. 219, a. note (2).

(p) Mara v. Quin, 6 T. R. 1. 2 Saund. 219, a. note (2).

(q) 1 Saund. 336, b. note. Tidd, 980, 9th edit.

(r) Tidd, 980, 9th edit.

(s) De Tastet v. Andrade, 1 Chitt. Rep. 629, 630, in notis. Cox v. Peacock, 4 Dowl. 134.

(t) He may also proceed to enforce his judgment by attachment of a debt due to the estate of the executor under R. S. C. 1883, Ord. XLV., and a Court of Equity would not restrain such proceedings, notwithstanding there has been a decree for the administration of the estate, if the judgment was obtained before the decree: Fowler v. Roberts, 2 Giff. 226.

bonis testatoris sued out on a judgment obtained against an executor, the plaintiff, according to the ancient practice, sued out execution immediately against the defendant by *capias ad satisf.*, or *feri facias de bonis propriis* (u). And it seems that the sheriff runs no risk by returning a *devastavit*; for the judgment, and no assets to be found, was sufficient evidence of a *devastavit*, in an action against him for a false return (x).

by *scire fieri*
inquiry :

But if the sheriff returned *nulla bona* generally, without also returning *devastavit*, the ancient course was to issue a special writ, for the sheriff to inquire by a jury whether the defendant had wasted any of the goods of the deceased: And if a *devastavit* were found, and returned by the sheriff, a *scire facias* issued for the defendant to shew cause why the plaintiff should not have execution *de bonis propriis*, to which *scire facias* the defendant might appear and plead. Subsequently, for the sake of expedition, the inquiry and *scire facias* were made out in one writ, which was called a *scire fieri* inquiry; reciting the judgment, *feri facias*, and return of *nulla bona*, and after suggesting a *devastavit*, commanding the sheriff to cause the debt or damages and costs to be made of the goods of the testator or intestate, if, &c.; and if not, then, if it shall appear by inquisition that the defendant hath wasted the goods of the deceased, to give notice to the defendant to appear in Court at the return of the writ to shew cause why the plaintiff ought not to have execution *de bonis propriis*: And the same notice of executing such writ was required as of a common writ of inquiry (y).

The most usual mode of proceeding has been by action of debt on the judgment suggesting a *devastavit*.

(u) 1 Saund. 219, note (8), to Wheatley v. Lane. The *feri* inquiry is only for the security of the sheriff: Rock v. Leighton, 1 Salk. 310. Chitty's Archbold, 14th edit. 1126.

(x) Rock v. Leighton, cited 3 T. R. 692. S. C. 1 Salk. 310.

(y) Tidd, 1113, 1114, 9th edit. See the account of the establishment of this practice. 1 Saund. 219, a. note to Wheatley v. Lane.

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The executor could not plead *plene administravit* to the *scire fieri* inquiry; because the judgment against him was conclusive that he had assets to satisfy it (*z*). Neither could he, upon the taking of the inquisition, give in evidence the want of assets (*a*): And it should, therefore, seem, that the jury were bound, upon the judgment being put in evidence, together with the *fi. fa.* and the return, to find a *devastavit*, as suggested in the writ, unless the executor could shew that there were goods of the testator, which might have been taken in execution, and that he showed them to the sheriff (*b*). Accordingly, in a case where the under-sheriff, on taking the inquest, directed the jury that the plaintiff was bound to give evidence of the executor's having property of the testator in his hands, and subsequently returned *nulla bona testatoris*, the Court quashed the return and awarded a new *scire fieri* inquiry (*c*). However, the return of a *devastavit* was not conclusive, whether found by the inquisition, or returned by the sheriff; and therefore the executor might traverse it, by denying the *devastavit*, and taking issue on it (*d*). And upon the trial of such an issue he might shew that he had not wasted the goods of the testator, but was ready to give them to the sheriff, so that it was the sheriff's fault that he did not make the debt out of them (*e*).

The action of debt on the judgment suggesting a *devastavit* was substituted in lieu of the proceeding by *scire fieri* inquiry (*f*). The foundation of this action is the judgment obtained against the executor: which, as there has been already occasion to shew (*g*), is conclusive upon him to shew that he has assets to satisfy such judgment. If, therefore, upon a *fieri facias de bonis testatoris*, on a judgment obtained against an executor, either no goods can be found which were

by action of
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tavit*.

(*a*) See *ante*, p. 1847.

(*b*) *Saund.* 219, *d*.

(*b*) *Ibid.* *Leonard v. Simpson*, 2 Bingham. N. C. 179, 180.

(*c*) *Palmer v. Waller*, 1 Mees. & Wel. 689. S. C. 5 Dowl. 315.

(*d*) 1 *Saund.* 219, *a*. Merchant

v. Driver, *ibid.* 306. Blackmor *v. Mercer*, 2 *Saund.* 402.

(*e*) See 1 *Saund.* 219, *c*. 2 Bingham. N. C. 180, 181.

(*f*) *Berwick v. Andrews*, 2 Lord Raym. 974. 1 *Saund.* 219, *a*. note.

(*g*) *Ante*, p. 1847.

the testator's, or not sufficient to satisfy the demand (or, which is the same thing, if the executor will not expose them to the execution), that is evidence of a *devastavit*; and, therefore, it is very reasonable that the executor should become personally liable and chargeable *de bonis propriis* (h).

This action may be brought upon the judgment against the executor, upon a bare suggestion of a *devastavit*, without any writ of *fi. fa.* first taken out upon the judgment (i). But the usual course is, first to sue out a *fi. facias* upon the judgment, and, upon the sheriff's return of *nulla bona*, to bring the action, and state the judgment, the writ, and return, in the declaration or statement of claim; and, on the trial, the record of the judgment, the *fi. facias*, and the return, will be sufficient evidence to prove the case (k).

In this form of action the judgment was *de bonis propriis* (l). The executor or administrator might plead that he did not waste, &c., in manner and form, &c., and under this plea he might give in evidence, that there were goods of the testator, which might have been taken in execution, and that he showed them to the sheriff (m). But the executor or administrator could not plead *plene administravit*, or any other plea which put his defence upon want of assets: For such plea would be contrary to what was admitted by the judgment: And if the truth were, that he had no assets, he should have set it up as a defence to the original action, and having neglected to do so, he was not permitted to say so afterwards (n). Again, if he had pleaded *plene administravit* to the original action, and the judgment was had upon a

(h) 1 Saund. 219, b. note (8), to *Wheatley v. Lane*. *Blackmor v. Mercer*, 2 Saund. 403. *Erving v. Peters*, 3 T. R. 686. *Farr v. Newman*, 4 T. R. 637.

(i) *Wheatley v. Lane*, 1 Sid. 397. 1 Saund. 219, c. note.

(k) *Challoner v. Challoner*, cited in *Skelton v. Hawling*, 1 Wils. 259. *Erving v. Peters*, 3 T. R.

685. 1 Saund. 219, c. S. P. where an irregular *testatum fi. fa.* had been issued and returned *nulla bona*: *Leonard v. Simpson*, 2 Bing. N. C. 176.

(l) *Warren v. Consett*, 2 Lord Raym. 1502.

(m) 1 Saund 219, c. note. *Ante*, p. 1865.

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verdict finding that *he had* assets, he was equally concluded from saying that he had no assets (*o*). And, for the same reason, he could not *give in evidence* the want of assets on the trial of the *devastavit* (*p*).

If a man obtained judgment against an executor, and died, his executor might bring an action upon the judgment against the executor, suggesting a *devastavit*: for such an action is brought against the same person against whom the judgment was had, and by that judgment assets were admitted (*q*). So, on the other hand, if a judgment was had against an executor, who afterwards died, an action might, after the stat. 30 Car. II. c. 7 (*r*), be brought against his executor or administrator, upon the judgment, suggesting a *devastavit* by the first executor, and the judgment was as conclusive upon the representative of the executor, as it was upon the executor himself. Therefore, if an action of debt, suggesting a *devastavit* by the first executor in his lifetime, was brought against *his* executor or administrator, he could not have pleaded that the first executor fully administered the goods of the first testator, or any other plea, purporting that he (that is, the first executor) had no assets to satisfy the judgment, any more than the executor himself could have done (*s*). For whatever act of the executor would have made him personally liable and chargeable with the payment of the demand *de bonis propriis*, by virtue of the statute, made his *personal estate* liable in the hands of his executor or administrator (*t*). But the executor or administrator of the executor might plead, that he, the defendant, had fully administered all the estate of his own testator or intestate (*u*). Moreover the judgment in the action, when brought against the executor or administrator of the executor, against whom the judgment was obtained, was *de bonis testatoris*, or *intestati* (*x*).

(*o*) *Erving v. Peters*, 3 T. R. 693.

(*p*) *Rock v. Leighton*, 1 Salk. 310.

(*q*) *Berwick v. Andrews*, 2 Lord Raym. 971. S. C. 1 Salk. 314.

(*r*) See *ante*, p. 1601.

(*s*) *Skelton v. Hawling*, 1 Wils. 258.

(*t*) 1 Saund. 219, *d. note*.

(*u*) 1 Saund. 219, *e. note*. See *infra*, p. 1871.

(*x*) 1 Saund. 219, *f. note*.

Remedy on judgment obtained against the testator.

But no action of debt suggesting a *devastavit* by the executor lay against him upon a judgment obtained *against his testator*: because that was no admission of assets by the executor: and, therefore, in such cases, it was necessary to revive the judgment against the executor, to make him a party to it (*y*).

If the testator died after execution was sued out, the writ could be still executed on his goods in the hands of his executors, without taking any further proceeding (*z*).

But generally speaking, if a defendant died after a final judgment against him, and before execution, the plaintiff could not have execution without reviving the judgment against the personal representative of the defendant (*a*). If, indeed, there were two or more defendants, and one of them died after judgment, but before execution, the plaintiff was not put to revive the judgment against the personal representative of the deceased, but execution might be had without it against the survivors, within a year (*b*). But the execution in such case was taken out in the joint names of all the defendants, otherwise it would not have been warranted by the judgment (*c*).

Before the Common Law Procedure Act, 1852, the judgment was revived by a writ of *scire facias*, which stated, that the testator died, having made the defendant his executor, or, in the case of an administrator, the death of the intestate, and the grant of administration; and it called on the defendant to show why the plaintiff should not have execution of the debt or damages, to be levied of the goods and chattels which were of the testator or intestate at the time of his death, in the defendant's hands to be administered (*d*).

(*y*) *Cresby v. Geering*, cited in *Berwick v. Andrews*, 2 Lord Raym. 972.

(*z*) 1 Chitty's Archb. 810, 14th ed.

(*a*) 2 Saund. 6, note (1) to

Jefferson v. Morton.

(*b*) Tidd, 1120, 9th edit.

(*c*) *Ibid*.

(*d*) Tidd, 1119, 9th edit. In a *scire facias* on a judgment recovered by an executor, the death of the tes-

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But, under that statute the plaintiff might either sue out a writ of revivor in the form given by the Act, or apply to the Court or a Judge for leave to enter a suggestion on the roll, that he was entitled to have execution thereon; And the Act, in the 129th and two following sections, prescribes the mode of proceeding, and course to be pursued in respect of each of these substitutes for a *scire facias*.

With respect to the pleas which an executor or administrator might have pleaded in his defence, he could, it seems, have pleaded *plene administravit*, or a plea that he had nothing in his hands at the time of the death of his testator or intestate, or that no goods came to his hands except so much, if any did, and shew how he administered them (e).

After the plaintiff had obtained judgment of execution against the executor, he might bring an action of debt in the *debet* and *detinet* on the latter judgment against the executor, suggesting a *devastavit*: And in such action the judgment was conclusive against the defendant, that he had assets: Therefore he could not plead *plene administravit*; and the judgment was *de bonis propriis* (f).

Since the passing of the Judicature Act it would seem that the judgment creditor, on a judgment against the testator, would have to apply for judgment under R. S. C. 1883, Ord. XLII. r. 23, and if the executor deny on the hearing of the summons that he has in his hands assets of the testator against which execution ought to go, the Judge, if he think fit, may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which an action may be tried: and that the issue would be so framed as to allow the executor to raise any of the defences which he formerly could have raised on the writ of *scire facias*, or under the Common Law Procedure Act.

tator need not have been expressly averred: *Moorfoot v. Chivers*, 1 Stra. 631. S. C. 2 Lord Raym. 1395. *Tidd, ubi supra*.

(e) *Newton v. Richards*, 1 Salk.

296. 4 Mod. 296. 1 Lord Raym. 3, 4. 2 Saund. 72, *dd.* note (4). *Hickey v. Hayter*, 6 T. R. 384.

(f) *Hope v. Bague*, 3 East, 2.

There seems nothing in the order to enable the creditor to raise an issue of *devastavit* under the proceedings directed by it.

Proceedings
on judgment
of assets *in
futuro*.

If a judgment of assets *quando acciderint* has been entered against an executor and administrator, the plaintiff cannot have execution until some assets come into the hands of the defendant.

If assets come to the hands of the executor or administrator the plaintiff can apply for leave to issue execution under R. S. C. 1883, Ord. XLII. r. 23, for this is within the very terms of clause (c) of the rule, which provides that where a party is entitled to execution upon a judgment of assets *in futuro* the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly: And such Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried.

Formerly the plaintiff proceeded by an action of debt upon the judgment, or by the writ of revivor, substituted by the C. L. P. Act, 1852, in lieu of a *scire facias*. And it seems convenient to retain in this edition the statement of the pleadings and necessary allegations under a *scire facias*, because such statement will furnish a guide as to what the judgment creditor must allege in his affidavit to entitle him to leave to issue execution under Ord. XLII. r. 23, and as to the form of the issue should one be directed.

If the judgment was in the ordinary form, it was held necessary to state, in the writ of *scire facias*, that the assets came to the executor's hands *after* the judgment; for that the *scire facias* must pursue the terms of the judgment, which, in this case, were, that the plaintiff do recover his debt to be levied of the goods of the testator which shall *thereafter* come to the hands of the executor: Therefore, where a *scire facias*, on such a judgment as this, of assets

quando acciderint has been entered against an executor and administrator, the plaintiff cannot have execution until some assets come into the hands of the defendant. If assets come to the hands of the executor or administrator the plaintiff can apply for leave to issue execution under R. S. C. 1883, Ord. XLII. r. 23, for this is within the very terms of clause (c) of the rule, which provides that where a party is entitled to execution upon a judgment of assets *in futuro* the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly: And such Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried.

Where taken out given to assets in

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(g) Taylor P. 169. 2
(h) Perry

quando acciderint, stated that divers goods, &c., of the testator, sufficient to pay, &c., had come to, and were in the hands of the defendant to be administered, &c., without stating that those goods had come to the defendant's hands *since the judgment*, and prayed execution against the defendant to be levied of those goods, according to the form and effect of his said recovery, &c., the defendant pleaded, that *after the plaintiff's judgment*, no goods, &c., of the testator had come to the defendant's hands to be administered, &c.; to which the plaintiff replied, that divers goods, &c., had come to the defendant's hands, without adding, *since the judgment*; and on demurrer it was adjudged, that the *scire facias* was wrong, for want of the words "*after the judgment*:" For when an executor pleads *plene administravit*, the plaintiff may either deny, or admit that allegation: if he admits it, he takes judgment, and prays that his debt may be levied of such assets as may *afterwards* come to the hands of the executor to be administered; the praying of judgment is an admission that there are no assets in the executor's hands at that time (g).

Where, upon a suggestion of assets, a *scire facias* was taken out, and assets were found for part, judgment was given to recover so much immediately, and the residue of assets *in future* (h).

For those causes of action which are sustainable against an executor in respect of the acts of the deceased, the plaintiff, on the death of a *sole* executor, may maintain the action against his executor: for the executor of such executor is, to all intents and purposes, the executor and representative of the first testator (i). But, on the death of an executor, without appointing an executor of his own, or on the death of an administrator, the actions above men-

Remedies
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executor.

(g) *Taylor v. Holman*, Bull. N. cited in 1 Ventr. 95, and 1 Sid. P. 169. 2 Saund. 219, a. note. 448.

(h) *Perryman v. Westwood*, (i) See *ante*, p. 204.

tioned must be brought against the administrator *de bonis non* (k).

With respect to the remedies for the *devastavit* of an executor or administrator, in the event of his death, it has already appeared (l) that, at common law, no executor or administrator was answerable for a *devastavit* by his testator or intestate: But, by the statute 30 Car. II. c. 7, and 4 & 5 Wm. & M. c. 24, s. 12, this defect has been remedied (m). So that, since these statutes, if a judgment be recovered against an executor, who afterwards dies, an action may now be brought against his executor or administrator, suggesting a *devastavit* by the first executor (n). And in every case where the executor in his lifetime was in any way guilty of any act which amounts in law to a *devastavit*, such as exhausting the assets by payment of debts of an inferior degree before those of a superior, and the like, an action may be brought against the executor, or administrator of such executor, suggesting a *devastavit*, by the former executor. And the judgment must be *de bonis testatoris* (o).

Executor is within the County Court Act.

By 51 & 52 Vict. c. 43, s. 95, an executor or administrator may sue or be sued in the County Court as if he were a party in his own right (p).

Remedy against executor by distress:

Where the lessee of lands dies before the expiration of the term, and his executor or administrator continues in possession during the remainder, a distress may be taken for rent due for the whole term (q). And the executor or

(k) See *ante*, pp. 408, 411.

(l) *Ante*, p. 1601.

(m) *Ante*, p. 1601. See the observations of Wood, V.-C., on these statutes in *Thorne v. Kerr*, 2 Kay & J. 63, 64. But the statute of 30 Car. II. c. 7, was held not to make an executor of an executrix *de son tort* liable for a breach of contract committed by the person with whose property

the executrix *de son tort* has intermeddled. *Wilson v. Hodson*, L. R. 7 Ex. 84.

(n) See *ante*, p. 1867.

(o) 1 Saund. 219, *c. f.* note (8) to *Wheatley v. Lane*. *Coward v. Gregory*, L. R. 2 C. P. 153, 137.

(p) See *ante*, p. 1798.

(q) *Wentw. Off. Ex.* 291, 14th edit. *Braithwaite v. Cooksey*, 1 H. Black. 465.

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administrator cannot plead *plene administravit* in bar to the avowry (r). So the distress may be taken by virtue of the stat. 8 Ann. c. 14, ss. 6 and 7, within six months after the determination of the tenancy, if the executor or administrator continues in possession (s).

The death of either party is the countermand of a warrant of attorney to confess judgment (t); and, therefore, upon a motion to enter up judgment, if it appears that the defendant is dead, the Court will not grant the motion (u). So a *cognovit actionem* is revoked by the death of the party (x).

judgment cannot be entered on warrant of attorney or cognovit given by testator :

There has already been occasion to consider, in cases of arbitration, the effect of the death of either party, before or after the making of the award (y). It may here be observed, that the Court will not grant an attachment against an executor for the non-performance of an award, which was made under a reference by rule of Court entered into by the testator (z).

Proceeding against executor on reference to arbitration by testator.

If a solicitor's bill against the testator should be referred to taxation after his death, questions of difficulty may arise as to the effect of the order for payment by the executor or administrator of the sum found due. In cases where justice requires that the order for taxation should be made, and it nevertheless, appears probable that, by reason of deficiency of assets, or the like, payment of the amount found to be due ought not to be made without further investigation, the Court or Judge, by whom the order for taxation is made, ought, it

Liability of executor to pay an attorney's bill after taxation.

(r) Wentw. *ubi supra*.

(s) Braithwaite v. Cooksey, 1 H. Black. 465.

(t) See *ante*, p. 781. Tidd, 551, 9th edit.

(u) Tidd, 561, 9th edit. Harden v. Forsyth, 1 Q. B. 177. It will make no difference that the defendant, by the memorandum on the warrant, agreed for himself

and his executor that it should be lawful to enter up judgment at any time, notwithstanding he should be dead : Heath v. Brindley, 2 A. & E. 365.

(x) See Chitty's Archbold, 14th edit. 1030.

(y) *Ante*, pp. 782, 783.

(z) Newton v. Walker, Willes, 315.

Proceedings
against execu-
tors of parties
to bills of
exchange.

should seem, to abstain from adding the usual order for payment or the delivery up of deeds (*a*).

If, when a bill of exchange becomes due, and is dishonoured, the drawer or indorser is dead, notice of the dishonour ought to be given to his personal representative (*b*). Where the drawee, acceptor, or maker, is dead, the bill or note must be presented to his executors or administrators (*c*), unless where the bill is made payable and is presented at a particular place, in which case it is not necessary to present it also at the house of the executor or administrator (*d*). In case there is no representative, the holder should demand payment at the house of the deceased (*e*). If the holder of a bill made the acceptor his executor, and died, this, which at law (*f*) operated as a discharge of the debt, by making the debtor executor (*g*) operated also as a discharge of the drawer and prior indorsers (*h*).

Effect of
injunction.

Where an injunction had issued against the defendants

(*a*) See *Re Dalby*, 8 Beav. 469.

(*b*) Byles on Bills, 14th ed. 235. In America it has been held, that where the indorser of a note is dead at the time it becomes due and there are executors or administrators at that time known to the holder, notice must be given to them: but that if there are no personal representatives at the time, a notice sent to the residence of his family is sufficient, and that it is not necessary afterwards to give notice to executors or administrators, subsequently becoming such: *Merchant's Bank v. Birch*, 17 Johns. R. 25. Bayley, 418, Amer. edit. 45 & 46 Vict. c. 61, s. 49 (9). Chalmers on Bills of Exchange, 3rd edit. p. 149.

(*c*) Byles on Bills, 14th ed. 288. Chalmers on Bills of Exchange, 3rd edit. p. 136. 45 & 46 Vict. c. 61, s. 45 (7).

(*d*) *Philpot v. Briant*, 3 Carr. & P. 244. 45 & 46 Vict. c. 61, s. 45 (5).

(*e*) Roscoe on Bills, 147.

(*f*) The appointment of a debtor as executor to his creditor did not operate as a discharge of the debtor in equity, but it was considered that the debt had been paid to the debtor executor by himself, and he was held accountable accordingly. The equity rule will now prevail. By sect. 61 of 45 & 46 Vict. c. 61, when the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged, but this section does not seem to affect the matter, since the executor acceptor does not become the holder in his own right.

(*g*) See *ante*, p. 1176.

(*h*) Chitty on Bills, 569, 8th edit.

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in an equity suit, restraining them from disposing of the estate of their testator, the Court of Exchequer refused to stay proceedings against them in an action in which the debt was not admitted, observing that the injunction might be a ground for applying to stay execution (*i*).

A verdict against a testator or intestate may be produced in evidence against his executor or administrator, and binds him (*k*).

Verdict against testator evidence against executor.

In an action against executors for money had and received by their testator, the plaintiff relied on an admission of the testator contained in his Will: Notice had been given to the defendants to produce the probate, but no evidence was given to prove that the probate was in their possession: An officer of the Spiritual Court produced a document purporting to be the original Will of the deceased, bearing the seal of the Court, and also an indorsement, made by the officer of the Spiritual Court, purporting that probate had been granted to the defendants on that instrument as of the Will of the deceased, and that they had made oath of the value of the effects accordingly: It was objected, on the part of the defendant, that the Will should have been proved by one of the subscribing witnesses, and further, that probate not being produced, the next best evidence was the act of the Spiritual Court, which was not produced: But it was held that the document produced must be taken as proving that the defendants had obtained probate of the paper, and had therefore treated it as the Will of their testator, and consequently that it ought to be received against them, at all events, as secondary, if not as original, evidence (*l*).

What is good secondary evidence of the contents of the Will.

(*i*) *Davis v. Salter*, 2 Cr. & J. 466.

(*k*) *R. v. Hebden*, Andr. 389. Rosc. Ev. 100, 2nd edit. See *Smith v. Smith*, 3 Bing. N. C. 29, as to the admissibility of the declarations of the deceased, as evidence against the executor or

administrator. See also *Spiers v. Morris*, 9 Bingh. 687, as to the admissibility of entries made by a deceased executor against his interest.

(*l*) *Gorton v. Dyson*, 1 Brod. & Bingh. 219. See *ante*, p. 1837. See also pp. 1792, 1793.

CHAPTER THE SECOND.

OF REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS
IN EQUITY.

What suits in equity may be brought against executors, &c.

Executors and administrators considered in equity as trustees.

Instances of this :

AN executor or administrator is liable, in his representative character, to all equitable demands, with regard to personal property, which existed against the deceased at the time of his death (a).

Again, executors and administrators are for most purposes considered, in Courts of Equity, as trustees; for instance, they are held in equity to be personally liable for all breaches of the ordinary trust of their office (b): Upon this principle, those Courts have exercised a jurisdiction over them, in the administration of assets, by compelling them, in the due execution of their trust, to apply the property to the payment of debts and legacies, and the surplus, according to the Will, or in case of intestacy, according to the Statute of Distributions (c).

Hence a Court of Equity will make an order, for payment of a personal legacy; or for the distribution of an intestate's personal estate (d): and will compel an executor or administrator, in the same manner as it does an express trustee, to discover and set forth an account of the assets, and of his application of them (e): And, even in a case where the

(a) Toller, 479.

(b) *Re Marsden*, 26 Ch. D. 783.

(c) *Adair v. Shaw*, 1 Scho. & L. 262. Auxiliary grounds of jurisdiction also formerly existed; such as the necessity of taking accounts and compelling a discovery, and the consideration that the remedy

at law, when it existed, was not plain, adequate, and complete.

(d) Com. Dig. Chancery (3 D. 1). *Howard v. Howard*, 1 Vern. 134.

(e) In *Brooks v. Oliver*, Amb. 406, the acting executor, to whom the produce of an estate in Antigua,

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testator directed that the executor should not be compelled by law to declare the amount of a residue bequeathed to him, the Court directed an account against him (*f*). So an account has been decreed of an intestate's personal estate, notwithstanding an account before taken, and a distribution decreed in the Spiritual Court (*g*). And a bill was, in the case of *Dulwich College v. Johnson* (*gg*), held on demurrer to be properly brought for the discovery of assets, before the Will was proved, during the litigation thereof in the Probate Court (*h*).

A single creditor may sue in equity for his demand out of the personal assets, and may, as at law, gain a preference, by the judgment in his favour, over other creditors in the same degree, who may not have used equal diligence (*i*). But a person entitled to a share of a sum of money, which is due as a debt from the testator, must sue on behalf of himself and all other parties interested in the debt, or make those other persons parties to the suit (*k*).

Right of individual creditors.

Although an executor has a year allowed him in equity to pay legacies, that does not extend to debts, but he is liable to be sued for debts the moment after the testator's death (*l*).

Executor, &c., liable to be sued for testator's debts from moment of death.

A debtor to a testator cannot maintain a suit against the personal representative, to obtain the directions of the Court as to the disposal of the money due by him, and to restrain an action, brought by the personal representative to recover the debt, on the ground that the debt has been appropriated by the testator for a particular purpose, and that the personal

Suit against executor by testator's debtor to restrain action on ground of intended misappropriation of the fund not maintainable :

belonging to an infant, was assigned, was directed to account annually by affidavit.

(*f*) *Gibbons v. Dawley*, 2 Chanc. Cas. 198.

(*g*) *Bissell v. Axtell*, 2 Vern. 47.

(*gg*) 2 Vern. 49.

(*h*) See also *Phipps v. Steward*, 1 Atk. 285. See, however, the more modern practice of appoint-

ing a receiver pending grant of probate, *ante*, p. 423 *et seq.*

(*i*) See *ante*, p. 882. Mitf. Pl. 166, 167, 4th edit. See Atty.-Gen. v. Cornthwaite, 2 Cox, 44.

(*k*) *Alexander v. Mullins*, 2 Russ. & M. 568.

(*l*) *Nicholls v. Judson*, 2 Atk. 301.

representative intends to apply it for purposes not warranted by the Will (*m*).

Parties :

The general rule is, that if there are several executors or administrators, they must all be sued, though some of them be infants (*n*). Therefore, a person cannot, either as creditor or residuary legatee, maintain a suit in equity against one co-executor only (*o*). But it is only necessary to sue so many of the executors or administrators as have acted : this is the same at law (*p*). Where an executor in trust was outlawed, and a witness proved that he had inquired after, and could not find him, it was held that it was not necessary to make him a party (*q*).

When *cestuis que trust* are necessary parties.

Although one of two executors or trustees may sue the other executor or trustee without making the *cestuis que trust* parties to the suit, yet where such *cestuis que trust* have participated in the breach of trust they are necessary parties (*r*).

Defendant dying pending action.

If during an action the defendant dies the action can be continued against his personal representative, and it makes no difference in this respect whether the defendant dies before or after decree (*s*).

Actio personalis moritur cum persona.

As has been pointed out in an earlier part of this work (*t*),

(*m*) *Darthez v. Winter*, 2 Sim. & Stu. 536.

(*n*) 16 Vin. Abr. 251, tit. Party (B.), pl. 20.

(*o*) *Scurry v. Morse*, 9 Mod. 89. As to adding defendants, see R. S. C., 1883, Ord. XVI. r. 11.

(*p*) *Ante*, p. 1831. And much more therefore in a Court of Equity. *Brown v. Pittman*, Gilb. Eq. Rep. 75. *Strickland v. Strickland*, 12 Sim. 463. *Dyson v. Morris*, 1 Hare, 413.

(*q*) *Heath v. Percival*, 1 P. Wms. 684. An administrator, though insolvent, must be made a party to a bill for a discovery of assets : *Ashurst v. Eyre*, 2 Atk. 51. So although he actually releases, he

must be a party to the suit : *Smithby v. Hinton*, 1 Vern. 31.

(*r*) *Jesse v. Bennett*, 6 De G. M. & G. 609.

(*s*) For the practice where a defendant dies, see R. S. C. 1883, Ord. XVII. In an old case of *Eland v. Davison*, 21 Beav. 312, where the defendant died after institution of a suit against him, but before appearance, the Court, after a long delay, refused to allow the suit to be revived against his heir at law.

(*t*) *Ante*, p. 697. See also chapter on the "Remedies for Executors in Equity," *ante*, p. 1790.

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some causes of action do not continue after the death of the wrongdoer, and, consequently, do not survive against his executor, but the maxim *actio personalis moritur cum persona* does not apply to remedies for breaches of contract, express or implied, nor does it apply to those cases of tort, where by means of a wrongful act done by a deceased person property, or the proceeds or value of property, have been appropriated by the deceased person and added to his estate (*u*). Nor will the maxim prevent a claim by a person standing in a fiduciary relationship to the deceased, where the latter has abused his position (*x*).

By Ord. XVI. r. 46 of the Rules of the Supreme Court, 1883, it is enacted, that "if in any cause, matter or other proceedings it shall appear to the Court or Judge that any deceased person who was interested in the matter in question has no legal personal representative, the Court or Judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the cause, matter or other proceeding on such notice to such persons (if any) as the Court or Judge shall think fit, either specially or generally by public advertisement, and the order so made, and any order consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter or other proceeding."

Where no legal personal representative the Court may appoint or dispense with.

The section of the Chancery Procedure Act (*y*) from which this rule was taken, was held by Lord Romilly (*z*) not to apply to the three following cases: first, where the estate of the deceased person is that which is being administered in the suit; secondly, where the interest of the deceased person is adverse to that of the plaintiff; thirdly, where the repre-

Cases to which rule does not apply.

(*u*) *Phillips v. Homfray*, 24 Ch. D. 439.

(*x*) *Concha v. Murrieta, De Mora v. Concha*, 40 Ch. D. 543.

(*y*) 15 & 16 Vict. c. 86, s. 44.

(*z*) In *Moore v. Morris*, L. R. 13 Eq. 140. See also *Groves v. Levi*, 9 Hare App. xlvii., and cases cited on same page.

sentative of the deceased person has active duties to perform.

Kindersley, V.-C., in the case of *Silver v. Stein* (a) held that the corresponding section of the Chancery Procedure Act (b) only applied to those cases where a certain individual who, when living, was interested in the suit, and was made a party had died, but this ruling does not appear to have been followed in later cases (c).

Sole plaintiff
dying insol-
vent.

In one case (d), where a sole plaintiff died insolvent, the Court, on the application of the sole defendant, appointed a person to represent the deceased plaintiff's estate, so as to enable the defendant to have an opportunity of moving to dismiss the action for want of due prosecution (e).

Protection
of the estate
pending grant
of probate or
administra-
tion.

The Court will, before probate or letters of administration of the estate have been granted, interfere on behalf of a creditor or beneficiary to protect the estate of the deceased by the appointment of a receiver or manager or both (f).

When the
application
can be made
to Ch. Div.

An application for the appointment of a receiver pending probate should not be made to the Chancery Division except there are special circumstances such as danger to assets requiring the appointment (g).

The fact that the executor declines to admit assets, and that consequently if a receiver be not appointed the executor may prefer one creditor to another, is not sufficient (h); in other cases, the proper Court to appoint is the Probate Court (i).

(a) 1 Drew. 295.

(b) 15 & 16 Vict. c. 86, s. 44.

(c) See *Chaffers v. Headlam*, 9 Hare App. xlv. *Swallow v. Binns*, *ibid.* xlvii. *Re Peppitt's Estate*, 4 Ch. D. 230.

(d) *Wingrove v. Thompson*, 11 Ch. D. 419.

(e) For instances of the exercise of jurisdiction, see *Mortimer v. Mortimer*, 11 W. R. 740. *Crossley v. City of Glasgow Assurance Co.*, 4 Ch. D. 427. *Webster v. British*

Empire Co., 15 Ch. D. 169. *Curtius v. Caledonian Fire and Life Insurance Co.*, 19 Ch. D. 534.

(f) *Steer v. Steer*, 2 Dr. & Sm. 311. *Nothard v. Proctor*, 1 Ch. D. 4. *Blackett v. Blackett*, 24 L. T. 276. For form of order, see *Seton*, 5th edit. p. 636.

(g) *Re Henderson*, 2 Times Rep. 322.

(h) *Phillips v. Jones*, 28 Sol. Jo. 360.

(i) *Re Henderson, supra. Re*

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The addition of a claim for administration of the estate to a claim for its protection until the appointment of a legal personal representative has been held to be irregular (*k*).

Claim for protection and administration.

The subject of the appointment of a receiver, during a litigation in the Probate Court for probate or administration, has been already considered (*l*), and mention made of the provisions of the Probate Act, relative to the appointment of receivers of real estate *pendente lite* (*m*).

Receiver pending litigation in Probate Court.

If, in the case of an executor or administrator, any misconduct, waste, or improper disposition of the assets is shown, the Court will instantly interfere and appoint a receiver (*n*). So the bankruptcy of a sole executor and trustee is a ground for such an appointment (*o*). The Court will not appoint a receiver because the executor may, and probably will, exercise his right of retainer to the prejudice of the general body of creditors (*p*), and the administration is not to be taken from the executor upon slight grounds (*q*).

When a receiver is appointed against an executor, &c.

The Court has no jurisdiction to order, in a summary way, the executor of a deceased receiver to bring in and pass his testator's accounts, and pay the balance to be found due out of the assets (*r*).

Executors of receiver.

Parker, 54 L. J. Ch. 694. In the goods of Moore, 13 P. D. 36.

(*k*) Overington v. Ward, 34 Beav. 175. Lawlings v. Lambert, 1 J. & H. 458.

(*l*) *Ante*, pp. 427, 428.

(*m*) *Ante*, p. 429.

(*n*) Anon. 12 Ves. 5, by Sir Wm. Grant. Middleton v. Dodswell, 13 Ves. 268. See also Havers v. Havers, Barnard, Chanc. 24. Richards v. Perkins, 3 Younge & Coll. 299.

(*o*) *Re Johnson*, L. R. 1 Ch. 325. The fact of the assignees not being before the Court was held not a sufficient reason for refusing to appoint a receiver.

(*p*) *Re Wells*, 45 Ch. D. 569.

(*q*) Middleton v. Dodswell, 13 Ves. 268. See Smith v. Smith, 2 Younge & Coll. 353. Whitworth v. Whyddon, 2 Mac. & G. 52. Mere poverty is not sufficient: Hathornthwaite v. Russell, 2 Atk. 126. Anon. 12 Ves. 4. Howard v. Papera, 1 Mad. 142. Manners v. Furze, 11 Beav. 30, 31. See also Dan. Ch. Pr. 1669, 1670, 6th edit.

(*r*) Jenkins v. Briant, 7 Sim. 171. The proper course, in such a case, if the balance is not ascertained so that the recognizances may be put in suit, is to bring an action against the executor for an account: But this course may be avoided, if the executor will consent to an order to pass the Re-

Motion for
payment of
money into
Court.

The Court will, immediately upon admission of assets by an executor or administrator, order so much as he admits to have in his hands to be paid into Court (a): though it was formerly thought necessary for the plaintiff to show that the executor or administrator had abused his trust, or that the fund was in danger from his insolvent circumstances (t).

Former limita-
tion of rule.

The rule appears to have been limited by Lord Redesdale (u) to cases in which there are no debts, or the debts are all paid, and there is no purpose for which the money is to be left outstanding. But the rule appears to be much more extensive, and any balance which is admitted to be in the executor's hands will be ordered into Court, notwithstanding there are demands on it to which the executor is liable (x). Thus in *Yare v. Harrison* (y), an executor having admitted a large balance of the personal estate to be in his hands, was ordered to pay the whole into Court, although he stated that an action at law was depending against him for a debt to a considerable amount due from the testator; but with liberty, in case the plaintiff in the action should recover, to apply to the Court to have a sufficient sum paid out again. The plaintiff in the action did recover, and the Court ordered the amount to be paid out to the plaintiff in the action, and not to the executor (z).

Admission of

Where the executor admits himself to have been a debtor

ceiver's accounts and to pay the balance: 2 Dan. Ch. Pr. 1709, 6th edit.

(a) *Strange v. Harris*, 3 Bro. C. C. 365. *Blake v. Blake*, 2 Scho. & Lef. 26.

(t) *Ibid.*

(u) *Blake v. Blake*, 2 Scho. & Lef. 26.

(z) Dan. Ch. Pr. 1734, 6th edit. If an executor admits that all the testator's debts, &c. have been paid, the Court will, on motion, order the income of a balance, paid in

by the executor, to be paid to the person entitled to the residue: *Dando v. Dando*, 1 Sim. 510. But see *Abby v. Gilford*, 11 Beav. 28.

(y) 2 Cox, 377.

(z) It having been suggested in this case, that the executor had incurred unnecessary costs, by defending the action, the question whether he should personally answer to the estate for the amount of such costs was reserved to the hearing.

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to the testator at the time of his death, this has always been held a clear admission of assets in his hands to the amount of the debt, and he is compellable to pay it into Court accordingly (a). In this case, the person to pay and the person to receive being the same, the Court assumes that what ought to have been done has been done, and orders the payment, not as of a debt by a debtor, but as of moneys realised in the hands of the executor (b).

assets in
the exe-
cutor's hands.

The Court, in making an order of this kind, adheres strictly to the rule of acting on the executor's admission only: and will refuse to proceed upon its knowledge derived from any other source (c).

The Court will
only act on an
admission.

Money admitted by the executor to be in the hands of his partner is in his own hands for the purpose of being ordered to be paid into Court (d).

Where the executor admits that a certain amount of assets has come to his possession, he may discharge himself from the payment of it into Court, wholly or partially, by taking credit for sums which he shows a right to retain for his own debt, due from the testator (e), or to have allowed him on any just grounds, or which are undisputed (f). Where an executor admits that he has received a certain sum belonging to the testator's estate, but adds that he has made payments, the amount of which he does not specify, the Court will allow him to verify the amount of his payments, by affidavit, and order him, on motion, to pay the balance into Court (g).

How the
executor may
discharge him-
self.

(a) *Mortlock v. Leathes*, 2 Meriv. 491. *Rothwell v. Rothwell*, 2 Sim. & Stu. 218. *Costeker v. Horrox*, 3 Younge & Coll. 530. *Toulmin v. Copland*, *ibid.* 625. *White v. Barton*, 18 Beav. 192.

(b) *Richardson v. Bank of England*, 4 M. & Cr. 174, 175, by Lord Cottenham.

(c) *Richardson v. Bank of England*, *supra*. *Meyer v. Montriou*, 4 Beav. 343. *Scott v. Wheeler*, 12

Beav. 366.

(d) *Johnston v. Aston*, 1 Sim. & Stu. 73. *White v. Barton*, 18 Beav. 192.

(e) *Middleton v. Poole*, 2 Coll. 246.

(f) *Roy v. Gibbon*, 4 Hare, 65. *Nokes v. Seppings*, 2 Phill. 19.

(g) *Anon.* 4 Sim. 359. See also *Proudfoot v. Hume*, 4 Beav. 477, *per* Lord Langdale.

Not by showing
unauthorised
payments.

But when there is a sufficient admission by the executor of assets once come to his hands, he cannot relieve himself from paying them into Court by showing any unauthorised application of them, or any investment or disposition of them which in substance amounts to a breach of his duty as executor (*h*).

Freeman v.
Fairlie.

In *Freeman v. Fairlie* (*i*), it was held that an admission by an executor that the whole amount of the property was near 40,000*l.*, and that the whole was invested in India on public securities, either in his name, or in the name of the house in which he was a partner, but subject to his disposal, unless some part was in the hands of the said house at interest, which he believed might be the case, was not a sufficient admission of money in his hands to order the payment into Court of any part of it; for though an executor dealing with money in his hands is bound to ear-mark it, yet, if he does not, and cannot answer as to the state of it, the Court has no power to act as upon an admission. But in *Roy v. Gibbon* (*k*), it was said by Wigram, V.-C., that the rule was, perhaps, less strict at the present day than it was stated in *Freeman v. Fairlie*; and that the practice was, that where a party charged himself with the receipt of a fund, he was bound by that charge till he had relieved himself from it by showing a proper application of the money; and that it was not enough for him whose duty it was to know the truth and be ready with information, to leave the application in doubt, by merely expressing ignorance with regard to the charges to which the fund was liable (*l*).

A reasonable
time allowed
for payment
into Court.

If there is no danger of the property being lost, from the executor being an insolvent or otherwise, a reasonable time will be allowed for bringing the fund into Court; and a

(*h*) *Wyatt v. Sharratt*, 3 Beav. 498. *Hinde v. Blake*, 4 Beav. 597. *Score v. Ford*, 7 Beav. 333. *Roy v. Gibbon*, 4 Hare, 65. *Ingle v. Partridge*, 32 Beav. 661: or by setting up the adverse title of a

third party: *Lord v. Purchase*, 17 Beav. 171.

(*i*) 3 Meriv. 39.

(*k*) 4 Hare, 65.

(*l*) See also *Hinde v. Blake*, 4 Beav. 597.

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longer time will be allowed when the money is in a foreign country (*m*). And if the assets appear to have been invested on an improper security, time will be allowed (which may, in a proper case, be extended from time to time) to enable the executor to realise the security (*n*). And in fixing the day for payment time will be allowed for the trustee, if he desires it, to show that no reason exists for calling the money into Court (*o*).

The relief will be confined to the payment of money into Court, and the Court will not direct any permanent relief such as the repurchase of stock which had been sold by the executor; for that can be done only at the hearing of the cause (*p*).

Relief granted on interlocutory proceeding.

Though a receiver had been appointed during a litigation in the Probate Court respecting the validity of a Will, the Court of Equity refused, on that account alone, to order the person named as executor to pay into Court money in his hands belonging to the testator's estate received previously to the appointment of the receiver (*q*).

The general rule as to payment of money into Court is, that the plaintiffs must be solely entitled, or have such an interest jointly with others as to entitle them, on behalf of themselves and of those others, to have the fund secured (*r*).

General rule as to payment in.

Applications for the bringing of money or securities into Court before judgment are usually made by summons. If opposed the summons is frequently adjourned into Court (*s*).

Applications for—how made.

(*m*) *Roy v. Gibbon*, 4 Hare, 65.

(*n*) *Score v. Ford*, 7 Beav. 333.

Wyatt v. Sharratt, 3 Beav. 498.

Hinde v. Blake, 4 Beav. 599.

(*o*) *Hill on Trustees*, 571. *Hinde v. Blake*, 4 Beav. 599.

(*p*) *Futter v. Jackson*, 6 Beav. 424. *Hill on Trustees*, 570.

(*q*) *Reed v. Harris*, 7 Sim. 639.

Edwards v. Edwards, 10 Hare,

App. II. lxiii.

(*r*) *Freeman v. Fairlie*, 3 Meriv.

29. Where part of a residuary estate has been invested on an improper security, and the defendant has an interest therein, the Court, on being satisfied that there is no existing claim on the estate, sometimes confines the amount to be paid into Court to the share of the plaintiff: *Score v. Ford*, 7 Beav. 333.

(*s*) *Dan. Ch. Pr.* 1744, 6th edit.

An executor having been ordered to pay money into Court, is not thereby deprived of his right of retainer (t), nor of his lien on the fund for his costs (u).

Applications
for payment
out.

The ordinary method of application for payment or transfer out of a fund in Court is by petition, but in the following cases the application can be by originating summons:

1. Where there has been a judgment or order declaring the rights to the fund (x).

2. Where the title depends only upon proof of the identity, or the birth, marriage, or death of any person (y).

3. Cash money or securities not exceeding 1,000*l.* in amount or nominal value, can be applied for by originating summons—

(a) Where they are standing to the credit of any cause or matter (z).

(b) Where the money has been paid in under the Legacy Duty Act (a).

(c) Where the money has been paid in under the Trustee Relief Acts (b).

4. For payment to any person of the dividend or interest on any securities standing to the credit of any cause or matter, whether to a separate account or otherwise (c).

Petition or
summons.

The application for payment out must be by petition, not by summons, when the application is for payment of a share

(t) *Ante*, p. 887.

(u) *Blenkinsop v. Foster*, 3 Younge & Coll. 207, *coram* Alderson, B.

(x) R. S. C. Ord. LV. r. 2 (1). As to what amounts to an order declaring rights, see *Re Brandram*, 25 Ch. D. 366. *Re Evan Evans*, 54 L. T. 527.

(y) *Ibid.* If the amount is large a petition should be presented: *Re Rhodes*, 31 Ch. D. 499. *Re Broadwood*, 55 L. J. Ch. 646. But *North, J.*, held, in *Bates v. Moore*, 38 Ch. D. 381, that the mere size

of the fund was not alone sufficient ground for a petition, unless there was difficulty in the matter as well.

(z) R. S. C. Ord. LV. r. 2 (2).

(a) See *ante*, 1818. R. S. C. Ord. LV. r. 2 (4).

(b) *Ibid.* r. 2 (5).

(c) R. S. C. Ord. LV. r. 2 (3). As to payment out of Court on an originating summons, see R. S. C. Ord. LV. rr. 2 (1) to (9). *Ann. Pr.* 1893, pp. 911—914. See also *Supreme Court Funds Rules*, 1886.

less than 1,000*l.* of a fund in Court exceeding 1,000*l.* in amount (*d*), or where the fund in Court consists of cash less than 1,000*l.* and securities of a less nominal amount than 1,000*l.* but both together exceeding that amount (*e*), and the costs of a petition were allowed where the fund was brought over 1,000*l.* by accrued interest (*f*).

The general rule as to papers and writings is, that an executor representing an estate should deposit them, for the benefit of the parties interested, in the Central Office (*g*), unless there are other purposes which require that he should retain them in his own hands (*h*). But where the production of documents is required, the application for it must in all cases be made by summons at Chambers, and the party required to produce will then be ordered to file an affidavit, stating what documents he has, or has had, in his possession or power relating to the matters in question, and to produce them (excepting such as he may by his affidavit object to produce) to the party requiring production (*i*).

By stat. 13 & 14 Vict. c. 60 (the Trustee Act), repealing stat. 11 Geo. IV. and 1 Will. IV. c. 60, the Lord Chancellor (*s. 3*) is empowered to make orders for the vesting of the lands of lunatic trustees and mortgagees in such person or persons, and in such manner and for such estate, as he shall

Production of papers, &c.

13 & 14 Vict. c. 60, The Trustee Act. The Lord Chancellor may make vesting and

(*d*) *May v. Dowse*, W. N. 1884, p. 122. *Re Evan Evans*, 54 L. T. 527.

(*e*) *Re Haworth*, W. N. 1885, p. 48.

(*f*) *Ex parte Trustees of Finsbury, &c. Savings Bank*, W. N. 1886, p. 150.

(*g*) R. S. C. Ord. LXI. r. 31. The place for deposit is the General Filing Office, Room 83, Royal Courts of Justice.

(*h*) *Freeman v. Fairlie*, 3 Meriv. 30.

(*i*) See Ord. XXXI. r. 14. *Prima facie* evidence in support of a claim will entitle a creditor in

an administration suit to an order directing the executors to file an affidavit as to their possession of documents relating to the claim, or to any item in it: *Re McVeagh*, 1 De Gex, J. & S. 399. The old practice was for the party producing the documents to leave them at the Record and Writ Clerk's Office (now the Central Office). It is now the ordinary practice to produce them at his solicitors' office, but this is only a matter of indulgence and convenience: *Prestney v. Mayor of Colchester*, 24 Ch. D. 379.

other orders
respecting
lands or stock
of lunatic
trustees, &c.

direct; (s. 4) and to make orders releasing or disposing of contingent rights in lands to which such lunatic trustees or mortgagees shall be entitled. He is also empowered (s. 5) to make orders vesting the right to transfer stock or to sue for and recover any chose in action to which a lunatic trustee or mortgagee may be solely or jointly entitled (k); (s. 6) or to transfer stock standing in the name of a deceased person, *whose personal representative is a lunatic or person of unsound mind*, or to sue for and recover a chose in action vested in any such lunatic as the personal representative of a deceased person (l).

Court of
Chancery may
make orders
in respect of
the estates of
infant trust-
tees, &c., and
in various
other cases.

And the same Act (the provisions of which are extended by stat. 15 & 16 Vict. c. 55), enables the Court of Chancery (ss. 7, 8, 9, 10, 11, 12) to make orders vesting the estates, and releasing or disposing of the contingent rights of infant trustees and mortgagees, or of trustees out of the jurisdiction of the Court. It further empowers the Court (s. 13) to make orders for the vesting of lands when it is uncertain which of several trustees was the survivor, or (s. 14) whether the last trustee be living or dead; and (s. 15) in cases where the trustee has died without an heir, and (s. 16) to release lands from the contingent rights of unborn trustees or vest them; and (15 & 16 Vict. c. 55, s. 2, repealing 17th and 18th sections of the Trustee Act) in case of the refusal or neglect of a trustee to convey or release, to make an order for vesting the estate; whilst by sect. 20 of the Trustee Act it is provided, that in every case where the Lord Chancellor or the Court of Chancery shall be enabled to make an order having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also

(k) Where one of three executors of the surviving executor of a testator was of unsound mind, an order was made under this section giving the right to transfer a sum of stock belonging to the estate of

the original testator, although the stock still remained standing in the name of the original testator: *Re Wachter*, 22 Ch. D. 335.

(l) *Re White*, L. R. 5 Ch. 698.

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be lawful for the Lord Chancellor or the Court of Chancery, as the case may be, should it be deemed more convenient, to make an order appointing a person to convey or assign such lands, or release or dispose of such contingent right.

Similar powers of making orders vesting a right to transfer or recover are by these Acts given to the Court of Chancery (13 & 14 Vict. c. 60, s. 22) in cases where the trustees of any stock or chose in action are out of the jurisdiction of the Court, or cannot be found, or concerning whom it is uncertain whether they be living or dead, or (15 & 16 Vict. c. 55, s. 8) in the case of an infant solely or jointly entitled to any stock upon any trust; whilst (15 & 16 Vict. c. 55, s. 4, altering sects. 23 and 24 of Trustee Act) if any person shall neglect or refuse to transfer any stock or to receive the dividends or income thereof, or to sue for or recover any chose in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer or recover in such person as the Court shall appoint; and on like refusal or neglect of an executor in respect of the transfer of stock standing in the sole name of a deceased person, a similar order may be made.

Orders vesting a right to transfer stock.

By the 6th and 7th sections of 15 & 16 Vict. c. 55 (extending the provisions of the 26th section of the Trustee Act), the Bank of England, and all companies and associations whatever, are ordered to obey such orders: and every order so made is declared to be an indemnity to the Bank and to all companies so obeying (*m*).

Bank of England, &c., must obey orders, and will be indemnified.

By the interpretation clause of the Trustee Act, "The word 'trust' shall not mean the duties incident to an estate conveyed by way of mortgage; but, with this exception, the

Interpretation clause.

(*m*) The Bank of England at first refused to act on vesting orders made in chambers under Ord. LV. r. 13a, but it now acts on them: Ann. Pr. 1893, p. 928.

word 'trust' and 'trustee' shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of personal representative of a deceased person."

Summons for the appointment of new trustee and for a vesting order.

Prior to 1889 the application to the Court to appoint new trustees and for a vesting order was by petition, but now, by Ord. LV. r. 18a, "In all cases in which the Court has jurisdiction to appoint new trustees upon petition, an application may be made to a judge in chambers by summons, and thereupon new trustees may be appointed; and, by the same or by any subsequent orders to be made on the same or any other summons for the purpose, such vesting and other consequential orders may be made as the Court has jurisdiction to make on petition for the appointment of new trustees. Every such summons shall be intituled in the same manner as the petition seeking the like relief ought to have been, and shall be served upon the same persons upon whom the petition ought to have been served."

Duty of executor to keep clear accounts.

It is the bounden duty of an executor to keep clear and distinct accounts of the property which he is bound to administer: If, therefore, he chooses to mix the accounts with those of his own trading concerns, he cannot thereby protect himself from producing the original books, in which any part of those accounts may be inserted: It is a more difficult question, as between an executor, bound to produce, and his partner in trade: but if the partners have permitted him to mix the accounts, it seems they cannot afterwards object to the production: clearly they cannot do so, in a case where the executor has admitted having lent to his firm part of the trust property, and that the firm has been dealing with it (n).

(n) *Freeman v. Fairlie*, 3 Meriv. 43, 44. The Court, however, will not order a defendant, who has a joint possession of a document

with some one else not before the Court, to produce the document itself: *Taylor v. Rundell*, Cr. & Ph. 111.

For instance, in *Freeman v. Fairlie* (o), an executor in India, coming to England, and after twenty-one years, being called upon to account, alleging that he had left his books, &c., behind him in India, was ordered to produce copies of all entries in such books, &c., within six months, though it was impossible he could do so, in order that the Court might have an opportunity from time to time of seeing that he had used proper diligence.

Trustees can, where they are required to furnish accounts in respect of their trust estate, demand to be paid or to be guaranteed the costs of doing so, before complying: it makes no difference that one of the trustees is a solicitor (p).

Costs of
furnishing
accounts.

Under the usual administration decree obtained on a writ or originating summons, an executor or administrator can only be charged for actual receipt by himself, or his agent, not for a default of his co-trustee (q). The practice is to make executors and administrators only account for the money they themselves have received, not for what they might have received, but for their own default; to make them account, on the latter footing, a special case must be made (r), and the plaintiff must aver and prove at least one act of wilful default (s), and if what is averred is admitted, the practice is only to make the common decree, adding a submission by the executor to account with respect to the matters so admitted (t).

What an
executor is
liable to
account for
under the new
administration
decree.

Wilful
default.

An order charging wilful default can be made at any time during the action (u) on a proper case being shown (x).

Order on
footing of
wilful default
can be made
at any stage
of action.

(o) 3 Meriv. 44.

(p) *Re Bosworth*, 58 L. J. Ch. 432.

(q) *Re Fryer*, 3 K. & J. 317. *Blakeley v. Blakeley*, 1 Jur. N. S. 368.

(r) *Shepherd v. Towgood*, T. & R. 379, 388. *Pybus v. Smith*, 1 Ves. 193. *Barber v. Mackrell*, 12 Ch. D. 538. But see *Bulstrode v. Bradley*, 3 Atk. 582.

(s) *Sleight v. Lawson*, 3 K. & J. 292. *Re Youngs*, 30 Ch. D. 431.

(t) *Wildes v. Dudlow*, W. N. 1870, p. 231.

(u) This is the modern practice; the old practice did not allow this to be done; see *Seton*, 4th edit. p. 477.

(x) *Job v. Job*, 6 Ch. D. 562. *Mayer v. Murray*, 8 Ch. D. 424. *Barber v. Mackrell*, 12 Ch. D. 534.

After common
decree leave
necessary.

Where a common administration order has been obtained against a defendant, the leave of the Court must be obtained, in order to continue the action against him on the footing of wilful default (*y*).

How raised
where no
pleadings.

In actions in which there are no pleadings a charge of wilful default can be raised by affidavit (*z*).

Not asked for
at judgment.

If the statement of claim alleges wilful default, but the judgment at the trial gives no relief on that footing, but does not dismiss the claim for that relief, the Court can, at any subsequent stage of the proceedings, upon evidence of wilful default, direct further accounts and inquiries on that footing (*a*).

Allegations of
wilful default
must be proved
at hearing ;

Where the plaintiff by his statement of claim alleges wilful default, he must be prepared to support his allegations at the hearing ; he has no right to insist on the question of wilful default being left to be decided at some subsequent stage of the action (*b*).

burden of
proof of wilful
default :

The burden of proof is on the party alleging wilful default, and he must show not only a loss, but a loss under such circumstances as to show default on the part of the executor or administrator (*c*).

particulars of :

Particulars of the allegations of wilful default should be given in the pleading (*d*).

Accounts on the footing of wilful default cannot be obtained under Ord. XV. (*e*).

When the
Court will
decree pay-
ment of the
plaintiff's
demand with-
out first
decreeing an
account :

If the plaintiff's demand be uncontested or proved, and the executor admits assets, the plaintiff is entitled at the hearing to an immediate order for payment without taking the accounts (*f*). The same doctrine prevails though the exe-

(*y*) *Laming v. Gee*, 10 Ch. D. 1104. See also R. S. C., Ord. XIX. r. 6, and Forms, App. "C."

(*z*) *Barber v. Mackrell*, 12 C. D. s. 2, Nos. 2 and 9.

(*a*) *Re Bowen*, 20 Ch. D. 538.

(*b*) *Re Symons*, 21 Ch. D. 757.

(*c*) *Re Brier*, 36 Ch. D. 238.

(*d*) *Re Smith v. Armitage*, 24 Ch. D. 727.

(*e*) *Re Anastier*, 54 L. J. Ch. 1104. See also R. S. C., Ord. XIX. r. 6, and Forms, App. "C."

(*f*) *Woodgate v. Field*, 2 Hare, 211. Where the answer admitted assets, but insisted that, under the circumstances stated, the legacy sought to be recovered had been

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Where

executor denies assets in hand at the time of filing his answer, if he also discloses that he had at one time sufficient assets, but that he has since misapplied them (*g*). An admission of assets for the payment of a legacy is an admission of assets for the purposes of the suit, and extends to costs, if the Court think fit to give them (*h*).

Again, if it is charged that the executor has rendered himself personally liable to pay the plaintiff's debt or legacy by an admission of assets made before suit, or by any other means, and the plaintiff can sustain this allegation, he will entitle himself to a decree for payment at once (*i*). And the general rule is, that an admission of assets by an executor or administrator can never be retracted in a Court of Equity, unless a case of mistake be most clearly established (*k*). If, however, a strong case be made out, this may enable the Court to relieve him from the admission (*l*): as if the money were in a banker's hands, who fails: But the executor or administrator must clearly prove the mistake, and show that the circumstance, on which he built his admission, failed (*m*).

where the executor has made himself personally liable by admitting assets, &c.:

paid, it was held that the plaintiff had a right to read the passage admitting the assets, without reading that as to the payment of the legacy; *Connop v. Hayward*, 1 Y. & Coll. Ch. C. 33. An admission of assets by the executor's answer is waived by the plaintiff's going on to an account of assets, and procuring a receiver to be appointed: *Wall v. Bushby*, 1 Bro. C. C. 484.

(*g*) *Rogers v. Soutten*, 2 Keen, 598.

(*h*) *Philanthropic Society v. Hobson*, 2 M. & K. 357. If there are several executors and some admit assets, yet an account may be decreed against the rest: *Norton v. Turvill*, 2 P. Wms. 145. Where in an examination put in

by two executors, it was stated that their receipts had been joint, but it appeared by affidavit, that that statement was made through mistake and inadvertence, and that one of the executors had, in fact, received nothing, liberty was given to him to put in a supplemental affidavit, to correct the mistake: *Hewes v. Hewes*, 4 Sim. 1.

(*i*) *Barnard v. Pumfrett*, 5 M. & Cr. 63. *Dimsdale v. Dudding*, 1 Y. & Coll. Ch. C. 265.

(*k*) *Drewry v. Thacker*, 3 Swanst. 548. *Roberts v. Roberts*, cited 1 Bro. C. C. 487.

(*l*) See *Foster v. Foster*, 2 Bro. C. C. 619. *Young v. Walter*, 9 Ves. 365.

(*m*) *Horsley v. Chaloner*, 2 Ves. Sen. 85, *post*, p. 1898.

The admission of assets by an executor will not preclude creditors from coming on a fund specifically appropriated for their benefit, although that fund may have been disposed of to a purchaser (*n*).

what is an
admission of
assets.

With respect to what amounts to an admission of assets, it was held in a case (*o*), where the deceased gave money upon mortgage to a charity in Ireland, that his executrix by her own Will attempting to provide other means for payment of that legacy, and stating as a reason that his personal estate was out on mortgage, thereby admitted assets of her testator (*p*). Payment of interest for a legacy by the executor, from time to time, will be evidence of assets, though a single instance of payment of interest will not (*q*). So where executors from time to time, had made some payments on account of principal and interest on a legacy, and, about nine years after the testator's death, passed their accounts at the Legacy Duty office, showing a considerable residue; Lord Langdale held, that the legatee was entitled to an immediate decree for payment of the legacy, without first taking an account of the testator's estate (*r*).

(*n*) *Curtis v. Blow*, 2 Barn. & Adol. 426.

(*o*) *Campbell v. Lord Radnor*, 1 Bro. C. C. 271. *Barnard v. Pumfrett*, 5 M. & Cr. 70.

(*p*) See also *Elliott v. Holwell*, 1 Cas. temp. Lee, 574.

(*q*) *Corporation of Clergymen's Sons v. Swainson*, 1 Ves. Sen. 75. *Barnard v. Pumfrett*, 5 M. & Cr. 63, 70, by Lord Cottenham. *Atty.-Gen. v. Chapman*, 3 Beav. 255. *Atty.-Gen. v. Higham*, 2 Y. & Coll. Ch. C. 634. But payment of the interest of a specific or demonstrative legacy, when that payment is clearly not made out of the general assets, nor a payment referable to the general assets, is not an admission of general assets: *Severs v. Severs*, 1 Sm.

& G. 400. Executors having invested an infant's legacy in their partnership concern, it was held that the entry by them in the partnership books of the amount of the legacy to the credit of the legatee was a sufficient admission of assets, there being no evidence that the entries were mistaken, and the course of conduct observed being consistent with them: *Townend v. Townend*, 1 Giff. 201. For an instance in which a similar entry was held not to amount to an admission of assets, see *Hutton v. Rossiter*, 7 De Gex, M. & G. 9.

(*r*) *Whittle v. Henning*, 2 Beav. 396. See further, as to admission of assets by having given a legatee the legacy office receipt for duty on the legacy, *Lazonby v. Rawson*,

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But in *Postlethwaite v. Mounsey* (s), it was held by Wigram, V.-C., that payment by the executor of the interest of a legacy to the tenant for life under the Will was not conclusive as an admission of assets by the executor; but that such payment might be explained as having been made by mistake, or for other reasons or causes; and that in that case the usual account of assets might be directed: And his Honor observed, that it would be difficult to hold that the payment of one legacy would, of itself, bind the executor to pay all the legacies given by the Will: Suppose a case in which small legacies were given to servants, and the executor chose, on his own responsibility, to pay those legacies at once, without reference to the state of the assets, it would be hard to say that he had thereby conclusively bound himself to pay all the legacies given by the Will. In the subsequent case of *Savage v. Lane* (t), the same learned Judge held, that, at all events, where the bill in a creditor's suit does not specifically charge the executor with having made himself personally liable, but prays that an account may be taken and the estate administered, the executor's admission in his answer that he has paid certain legacies is not such an admission of assets as to entitle the plaintiff to a decree without taking the account.

The payment of interest on a legacy, or payment of a legacy not conclusive.

The general rule, however, is that an admission of assets by the executor to one claimant on them is an admission to all (u). General rule.

In *Holland v. Clark* (x), Sarah Clark bequeathed a legacy of 150*l.* to Susannah C., when she should attain 21: The testatrix died in 1811, and the legatee did not attain 21 till several years afterwards, and she then married: In 1825 the executors signed and gave to her husband this memo-

2 Sm. & G. 267. 4 De Gex, M. & G. 556, S. C.

(s) 6 Hare, 33, note (a). See also *Cadbury v. Smith*, L. R. 9 Eq. 37.

(t) 6 Hare, 32. See also *Cadbury v. Smith*, L. R. 9 Eq. 41.

Billing v. Brogden, 38 Ch. D. 546.

(u) *Cook v. Martyn*, 2 Atk. 2. *Barnard v. Pumfrett*, 5 M. & Cr. 70, by Lord Cottenham.

(x) 2 Y. & Coll. Ch. C. 319, conf. *Stephens v. Venables*, 31 Beav. 124.

random: "We separately and jointly acknowledge to owe to George Holland the sum of 150*l.*, being a legacy left to his wife by the late Sarah Clark, and 50*l.* interest thereon:" And it was held by Knight-Bruce, V.-C., that, under the circumstances, this memorandum amounted to an admission of assets by the executors.

The authorities as to the probate stamp being admissible, and its effect in evidence as to the amount of assets, have already been examined (y).

It only remains to be noticed that an admission is always susceptible of explanation. Thus, in *Payne v. Little* (z), Romilly, M. R., observed, that every admission of assets made by an executor, whether it be made by his acts or by an express admission in words, must have reference to the circumstances which he was then acquainted with, and if "the circumstances on which he built his admission fail him" (an expression used by Sir John Strange in *Horsley v. Chaloner* (a)), then the admission fails also, and he cannot be bound by an admission made under circumstances with which he was not acquainted.

Remedy for
devastavit.

If an executor changes the nature of the testator's estate, the general rule is, that this is a conversion; and as money has no ear-mark, it cannot be followed (aa); but the executor by such transactions has made himself liable to a *devastavit* (b), for which the party injured must seek satisfaction out of the executor's own effects (c). If an executor purchases estates with the assets, and takes the conveyance in his own name, without the trust appearing on the face of the deeds, the estate will not be liable to the trusts, although he die

(y) See *ante*, p. 1855.

(z) 22 Beav. 69. See also *Cadbury v. Smith*, L. R. 9 Eq. 41.

(a) 2 Ves. Sen. 83.

(aa) That is, it cannot be followed in the hands of a stranger to the trust, although it can be followed in the hands of the trustees and those claiming under him. See *Re Hallett's Estate*,

13 C. D. 696.

(b) *Waite v. Whorwood*, 2 Atk. 159. A married woman executrix was, after the death of her husband, held liable for a *devastavit* committed by him during their joint lives: *Soady v. Turnbull*, L. R. 1 Ch. 494.

(c) *Charlton v. Low*, 3 P. Wms. 330.

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insolvent, unless the application of the purchase money can be clearly proved (*d*).

But if an executor, for the benefit of the testator's estate, should invest part of it in the funds, or transfer money from one stock to another, this is not a conversion, but it may still be followed, as much as if it had continued in the same condition as at the testator's death (*e*).

The general question, as to the right of creditors and legatees to follow the assets into the hands of the person to whom the executor has aliened them, has been investigated in a former part of this Work (*f*).

In *Skinner v. Sweet* (*g*), it appeared that an executrix, in respect of her receipt as such, was considerably indebted to the estate, and that she had an annuity of 250*l.* given to her by the Will: Sir John Leach, V.-C., directed, that her annuity, as it became due, should be applied in payment of the debt due to the estate, with liberty to apply to the Court when the debt due to the estate should be discharged. So where an executor assigns his reversionary legacy, the assignee takes it subject to the equities which attached to the executor; and therefore if the executor, though subsequently to the assignment, wastes the testator's assets, the assignee cannot receive the legacy till satisfaction has been made for the breach of trust (*h*).

The party injured by a *devastavit* is but a simple contract creditor of the executor (*i*), and the claim is consequently barred after the lapse of six years by the Statute of Limitations (*k*), but this does not, or did not, before the Trustee

Following assets.

Party injured, a simple contract creditor only.

(*d*) 2 Sugd. Vend. & Purch. 143 9th edit. See *Kendar v. Milward*, 2 Vern. 440. *Kirk v. Webb*, Prec. Chanc. 84. *Deg v. Deg*, 2 P. Wms. 414, 415. *Ryall v. Ryall*, 1 Atk. 59. *Wilkins v. Stevens*, 1 Y. & Coll. 431.

(*e*) 2 Atk. 159.
(*f*) *Ante*, pp. 801, 802. See also *Downes v. Power*, 2 Ball & B. 491. *Silver v. Stein*, 1 Drewr.

295. *Collinson v. Lister*, 20 Beav. 356.

(*g*) 3 Madd. 244.

(*h*) *Morris v. Livie*, 1 Y. & Coll. Ch. C. 380. *Ante*, p. 1261. See also *Barnett v. Sheffield*, 1 De Gex, M. & G. 371.

(*i*) *Charlton v. Low*, 3 P. Wms. 331.

(*k*) *Thorne v. Kerr*, 2 Kay & J. 54.

Act, 1888, apply to an action by a beneficiary against the executor (or his estate) who had committed the *devastavit*, as the debt arose from a breach of trust on his part, and from this the Statute of Limitations did not protect him (l).

Bankrupt or insolvent executor.

In *Geary v. Beaumont* (m), a specific legacy was given to an executor, who afterwards became bankrupt, and committed a *devastavit*: The subject of the specific bequest was sold by his assignees: and Sir W. Grant held that the produce in their hands was not specifically liable to make good the *devastavit*, in favour of the parties beneficially entitled under the Will, but that such parties were only entitled to prove to the amount of the *devastavit*.

If an executor becomes bankrupt, having wasted the assets, a proof for the *devastavit* can be taken in under the bankruptcy (n). An executor and trustee having committed a *devastavit*, cannot prove under his own bankruptcy without obtaining an order from the Court (o). Generally speaking, such order will be made on the application of a bankrupt who is sole executor (oo), but, if leave to prove be given, the dividends should be secured and not allowed to come into the bankrupt's hands (p).

Debt due under a *devastavit*, due from what time.

In the case of an executor committing a *devastavit*, and a decree for payment of the amount, the debt is considered as due from the time of the *devastavit*, and not from the date of the decree; and therefore, where a person was committed under an attachment for breach of a writ of execution of a decree for payment of money on account of a *devastavit*, it was held that as he had, between the time of the *devastavit*

(l) *Re Marsden*, 26 Ch. D. 783. As to the effect of the Trustee Act, 1888, see *post*, p. 1928.

(m) 3 Meriv. 431.

(n) Toller, 420.

(o) See *Ex parte Colman*, 2 Dea. & Ch. 584. Where the bankrupt is one of several executors, and has before his bankruptcy received a part of the assets, the other executors may prove the amount

against his estate: *Ex parte Brown*, 1 Dea. & Ch. 118. *Ex parte Phillips*, 2 Dea. 334.

(oo) *Ex parte Shaw*, 1 Glyn & Jam. 127. *Ex parte Wyatt*, 2 Dea. & Ch. 211.

(p) *Ex parte Leeke*, 2 Bro. C. C. 597. *Ex parte Shaw*, 1 Glyn & Jam. 127. *Ex parte Colman*, 2 Dea. & Ch. 584. *Ex parte Moody*, 2 Rose, 413.

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(g) *Whele*
Vea. 376.
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(r) *Cobha*
Ch. 655. N
1876, p. 2
1882, p. 46.

(s) *Re Ma*
(t) R. S. C
(u) *Temp*

and the date of the decree, taken the benefit of the Insolvent Debtors Act, and had been ordered to be discharged by the Court of Quarter Sessions, he might be brought up on a *habeas corpus* before the Chancellor, and discharged (*q*).

A defaulting executor or administrator who becomes bankrupt is protected from attachment by sec. 10 of the Bankruptcy Act, 1883 (*r*), and if he becomes bankrupt after he has been attached he may be released; he is protected from arrest by the order in bankruptcy (*s*).

The issue of a summons under rule 3 of order L.V. does not interfere with or control any power or discretion vested in any executor, administrator, or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought (*t*).

Even a judgment for administration does not deprive executors or trustees of the right to exercise a discretionary power vested in them (*u*), except so far as the exercise conflicts with the order (*x*); for instance, they can exercise a power of appointing new trustees (*y*): but the Court will see that improper persons are not appointed, and if a person of whom the Court does not approve is appointed, it will call on the trustees to make a fresh appointment (*z*). The fact that the decree directs the appointment of new trustees does not take from the trustees their right of appointment (*a*). An administration decree does not prevent trustees from exercising a power of sale (*b*).

Where a testator has given a pure discretion to trustees as to the exercise of a power, the Court will not enforce the exercise of the power against the wish of the trustees, but it

Interference with the discretion of executors, &c.

Effect of a judgment for administration.

Discretionary power given to trustees.

(*q*) *Wheldale v. Wheldale*, 16 Ves. 376. 3 Madd. Pract. 458, 2nd edit.

(*r*) *Cobham v. Dalton*, L. R. 10 Ch. 655. *Nowell v. Nowell*, W. N. 1876, p. 248. *Re Neil*, W. N. 1882, p. 46.

(*s*) *Re Manning*, 30 Ch. D. 480.

(*t*) R. S. C. Ord. L.V. r. 12.

(*u*) *Tempest v. Lord Camoys*, 21

Ch. D. 571, 576, note. *Re Gadd*, 23 Ch. D. 134. *Re Burrage*, 62 L. T. 752.

(*x*) *Re Hall*, 33 W. R. 508.

(*y*) *Tempest v. Lord Camoys*, *supra*. *Re Gadd*, *supra*.

(*z*) *Re Gadd*, *supra*.

(*a*) *Re Gadd*, *supra*.

(*b*) *Re Mansel*, 33 W. R. 727.

will prevent them from exercising it improperly (c); and even where the power is coupled with a trust or duty, the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bonâ fide* exercise of it (d).

Remedy of a creditor of the business.

The remedy of a creditor of the business for a debt incurred since the death of the testator or intestate, is against the executor or administrator personally, and not against the estate of the deceased (e); and the creditor's remedy is by action at law against the executor or administrator, and he has no right to have the estate of the deceased administered (f). But a creditor of the business whose debt has been incurred since the decease, can make the executor render to him an account of the assets of the deceased which have been employed in the business since the death (g).

A creditor's right to an account of the assets employed in a business.

Remedy of a creditor where the business is properly carried on.

As has been pointed out in the chapter on Remedies for an Executor in Equity, where the executor or administrator properly carries on the business of the deceased, he is entitled to be indemnified out of the assets, which are authorized to be, or can be, otherwise properly applied (h) for the purposes of the business. In such case, creditors whose debts have been incurred since the death of the deceased, are entitled to stand in the place of the executor or administrator, and to claim that the fund, out of which he is entitled to indemnity, shall be applied in payment of their debts (i).

Where executor in default.

Where the executor is in default to the specific trust estate he is authorized to employ in the trade, the creditors of the trade are in no better position than the executor himself, and

(c) *Tempest v. Lord Camoys*, *supra*.

(d) *Re Burrage*, 62 L. T. N. S. 752.

(e) *Farhall v. Farhall*, L. R. 7 Ch. 123.

(f) *Owen v. Delamere*, L. R. 15 Eq. 134. *Strickland v. Symons*, 26 Ch. D. 245.

(g) *Thompson v. Dunn*, L. R. 5 Ch. 573.

(h) *E.g.*, where the business is only carried on for the purpose of being realized.

(i) *Ex parte Garland*, 10 Ves. 120. *Ex parte Edmonds*, 4 D. F. & J. 488.

as he is only entitled to be indemnified against the debt he has incurred in carrying on the trade upon the terms of making good his default, the creditors are only entitled to have their debts paid out of the specific assets when the default is made good (*k*).

Where neither the whole nor any specific part of the estate is properly applicable to carrying on the trade, creditors of the business have no right to recover their debt out of the trust funds (*l*), but they are entitled to any interest the executor may have in such trade as against the trust estate, *e.g.* the right to be repaid moneys he has advanced or become liable to pay in respect of the business (*m*).

The executor is, as against the beneficiaries, entitled to be indemnified by the trust estate against the debts incurred by him in carrying on the trade out of the specific part of the testator's estate, which he is authorized by the Will to employ in the trade, but this right to indemnity does not apply as against the creditors of the testator unless such creditors had knowledge that the testator's business was being carried on by the executor, and have acquiesced in such trading (*n*).

Where the executor of a deceased trader had carried on his business for three years after his death, in accordance with the provisions of his Will and with the assent of the testator's creditors, the Court of Appeal held that the executors had a right to be indemnified against all liabilities incurred by them in carrying on the trade out of the assets acquired subsequently to the testator's death, and that their right to indemnity was confined to such assets, and it also held that the trade creditors of the executors were entitled to stand in the place of the executors in enforcing their claim (*o*). The House of Lords, on appeal, held that, as the creditors of the testator had acquiesced in the business being carried on by

Where no specific part of estate can be employed in carrying on the business :

right of indemnity as against creditors of the testator.

Dowse v. Gorton.

(*k*) *Re Johnson*, 15 Ch. D. 548.

(*l*) *Strickland v. Symons*, 22 Ch. D. 666.

(*m*) *Re Evans*, 34 Ch. D. 597.

(*n*) *Dowse v. Gorton*, [1891]

A. C. 190.

(*o*) *Re Gorton*, 40 Ch. D. 536.

the executors, the executors were entitled to be indemnified out of the testator's estate against the liabilities which they had properly incurred in carrying on the business, and that their right to indemnity was not limited to the assets acquired subsequently to the testator's death, and that the executors were entitled to indemnity, not only as against the beneficiaries, but also as against the testator's creditors (p).

Priority of
creditors of the
executors.

The effect of giving the executors so wide a right of indemnity is to give the creditors of the business, subsequent to the testator's death, a priority over the creditors of the testator in cases where they acquiesced in the trading. This makes it exceedingly important for the creditors of a deceased trader to protect themselves against the risk of the executors carrying on the business at a loss by requiring the estate to be administered without delay.

Conduct of
proceedings.

In cases like *Dowse v. Gorton*, where the business has been carried on after the testator's death, and the estate is insolvent, the rights of the creditors of the testator, and the creditors of the executors, will conflict, and the question whether a creditor of the one class or the other is to have the conduct of the administration proceedings will probably be governed by the extent to which the estate is deficient. If, for example, the estate is likely to be sufficient only to pay the creditors of the executors, it may be that the conduct of the proceedings will be given to one of them, but if there is likely to be a surplus after satisfying the claims of the creditors of the executors, the conduct of the proceedings should be given to a creditor of the testator as having the greater interest in the administration.

Uncorrobo-
rated claim.

In claims by creditors against the estate of a dead man the Court looks with suspicion upon a claim which is supported only by the uncorroborated evidence of the claimant (q), but there is no rule of law which precludes a claimant from recovering against the estate of a deceased person on his own

(p) *Dowse v. Gorton*, [1891] A. C. 190.

(q) *Hill v. Wilson*, L. R. 8 Ch. 888.

testimony without corroboration, although the Court will in general require such corroboration (r).

It has been shown, in a previous part of this work (s), Set-off. under what circumstances an executor may retain a legacy, by way of set-off against a debt due from the legatee to the testator (t). But the executor cannot set off, against a demand upon him as executor, a debt due to him individually (u).

The usual form of relief now given by the Chancery Division against an executor or administrator is to compel him to properly account for the assets of his testator or intestate, and to see that these assets are properly distributed amongst the persons entitled to them, namely, first, the creditors of the deceased, and, secondly, the beneficiaries under the Will or the persons entitled under the intestacy.

An administration action, like other actions, can usually be commenced by the issue of a writ of summons, but the Rules of the Supreme Court, 1883, provide that, in some cases, creditors or beneficiaries can commence proceedings against executors or administrators by originating summons, and in such proceedings obtain full or partial administration of the dead man's estate.

Meaning of
"administration
action :"

how
commenced :

Rules 3 and 4 of Ord. LV. of the Rules of the Supreme

originating
summons.

(r) *Re Hodgson*, 31 Ch. D. 177. See also *Re Farman*, 57 L. J. Ch. 637, 639. See *ante*, pp. 1658, 1659. (s) *Ante*, p. 1171 *et seq.* See also *Richards v. Richards*, 9 Price, 219.

(t) In *Re Knapman*, 18 Ch. D. 300, legatees brought an action against the executor, seeking revocation of probate. While this action was pending they mortgaged their shares. They failed in the action, and were ordered to pay costs. Subsequently they brought an action for the administration of the estate. The executor was held entitled to set-off the costs in the

probate action against the legacies, notwithstanding the incumbrances. But see *Re Harrauld*, 52 L. J. Ch. 436.

(u) *Whitaker v. Rush*, Ambl. 407. *Medlicot v. Bowes*, 1 Ves. Sen. 208. *Gale v. Luttrell*, 1 Younge & Jerv. 180. *Ante*, pp. 1781, 1846. But in — *v. Wood*, 2 P. Wms. 131, money lent and goods delivered by the executor to the legatee were held to be in part payment, and the Court said that the executor, if sued in equity for the legacy, might have insisted that the legatee had received so much of it by money and goods.

Court, 1883, dealing with originating summonses, will be found set out in the chapter on remedies for an executor in equity (*v*).

When a creditor can commence proceedings by summons.

A creditor is entitled to obtain an order for administration upon an originating summons, where the dispute as to his debt depends on a question of law, but not where his debt depends on disputed facts (*x*); in the latter case, he should commence proceedings by writ of summons.

Proceedings before probate or letters of administration granted must be by writ:

Ord. L.V. r. 4, only authorizes an administration summons to be taken out by a creditor against executors, administrators, and trustees, and an originating summons taken out by a creditor against an executor before administration is entirely bad (*y*).

by annuitant.

An annuitant whose annuity is not in arrear, is not a creditor, and cannot apply for administration of the estate of the deceased, even although the estate of the deceased is not sufficient to pay the estimated value of the annuity as well as the other debts and liabilities (*z*).

Matters which can be decided on an originating summons.

There is only jurisdiction on an originating summons to decide such matters as could have been decided in an administration suit, as, for instance, points relating to the administration of the estate and questions between executors and legatees, there is no jurisdiction on such a summons to decide questions as against persons claiming adversely to the estate (*a*), or questions as to legal devises or between legal devisees (*b*).

When the objection to the jurisdiction must be taken.

Unless the objection to the want of jurisdiction is taken in the Court below, it appears that the Court of Appeal will not entertain the objection (*c*), and the objection must be taken in chambers or the defendant will not be allowed his costs of the adjournment into Court (*d*).

(*v*) See *ante*, pp. 1806, 1808.

(*x*) *Re Powers*, 30 Ch. D. 291.

(*y*) *Re Leask*, W. N. 1891, p. 159.

(*z*) *Re Hargreaves*, 44 Ch. D. 236.

(*a*) *Re Royle*, 43 Ch. D. 18. *Re*

Bridge, 56 L. J. Ch. 779. *Re Gladstone*, W. N. 1888, p. 185.

(*b*) *Re Carlyon*, 56 L. J. Ch. 219. *Re Davies*, 38 Ch. D. 210.

(*c*) *Re Turcan*, 58 L. J. Ch. 101.

(*d*) *Re Davies*, *supra*.

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(e) K 37 W. N. 1893, p. 43 Ch. D.

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It is questionable whether an originating summons is a proper proceeding on which to raise a question of breach of trust against trustees (e).

An originating summons should not be taken out to obtain payment of a disputed debt where the dispute turns on a matter of fact, but when the question depends merely on a question of law, it will be decided on an application by originating summons without putting the parties to another proceeding (f).

Determining a disputed debt on originating summons.

Notice should be given of intention to raise, on the hearing of the summons, any question arising under the Statute of Frauds (g). The notice should be given by letter or affidavit.

Notice of intention to raise Statute of Frauds.

In order to prevent inconvenient preference in the administration of the assets, as well as to avoid the burden which several suits by several creditors could not fail to bring on the fund to be administered, a Court of Equity always allowed a creditor to sue on behalf of himself and the other creditors of the deceased, and has thereupon directed a general account of the estate and debts to be taken against the executor or administrator (h), or, if assets were admitted, and the debt admitted or proved, has made an immediate decree for payment (i).

Practice in an administration action.

A creditor's action.

Upon the same principle a legatee has always been permitted to sue on behalf of himself and other legatees: and, even under the old practice, a bill has been admitted by a

A legatee's action.

(e) Kekewich, J., in *Re Weall*, 37 W. R. 779. But see Ann. Pr. 1893, p. 919. See also *Re Giles*, 43 Ch. D. 391.

(f) *Re Powers*, 30 Ch. D. 291. See Ord. LV. r. 3, set out in the chapter on Remedies for an Executor in Equity, p. 1806.

(g) *Re Shearman*, 2 Times Rep. 236.

(h) Mitf. Pl. 193, 5th edit. A creditor having *debitum in presenti solvendum in futuro* may maintain

such a suit: *Whitmore v. Oxborow*, 2 Y. & Coll. Ch. C. 13: And so may a claimant under a voluntary covenant: *Watson v. Parker*, 6 Beav. 283, note (n). After a decree in the suit, the executor cannot do any act to affect the relative rights of creditors: By Sir John Leach, M. R., in *Shewen v. Vandenhorst*, 2 Russ. & M. 75. 1 Russ. & M. 347, S. C.

(i) *Woodgate v. Field*, 2 Hare, 211.

person claiming under a general description on behalf of himself and the other persons equally entitled under the same description (k).

Remedy in
the County
Court.

Creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs at law or next of kin, can bring actions against executors or administrators in the County Court for an account or administration.

Limit of jurisdiction in the
County Court.

The jurisdiction of the County Court is, for this purpose, limited to cases, in which the personal or real, or personal and real estate, against or for an account or administration of which the demand may be made does not exceed in amount or value the sum of 500*l.* (l).

Execution of
trusts.

The County Court has also jurisdiction in claims for the execution of trusts, in which the trust estate or fund does not exceed in amount or value 500*l.* (m).

Transfer from
the Ch. Div.
to the County
Court.

The Chancery Division has concurrent jurisdiction in the above matters with the County Court. Where an action is commenced in the Chancery Division which might have been commenced in the County Court, any of the parties can apply for its transfer to the County Court, and the Judge has power on such an application, or without such an application, to make an order transferring the action to the County Court, and thereupon the action proceeds in the County Court as if originally brought there (n). It has not been the practice to make such an order of transfer without special reason (o).

Creditor suing
on behalf of
himself and
all the other
creditors.

Where administration of personal estate only is sought, a creditor suing need not state himself as suing on behalf of

(k) Mitf. Plead. 169, 4th edit. The legatee of an annuity charged upon residue is entitled to administer: *Wollaston v. Wollaston*, 7 Ch. D. 58.

(l) 51 & 52 Vict. c. 43, s. 67, sub-s. 1.

(m) 51 & 52 Vict. c. 43, s. 67, sub-s. 2. In general the action must be commenced in the Court within the district of which any of the defendants dwell or carry on

business, or live in, or in the Court of the district in which the defendants or one of them dwell or carried on business at any time within six calendar months next before the commencement of the action: 51 & 52 Vict. c. 43, s. 74, and Ann. County Courts Practice, 1893, pp. 68, 538.

(n) 51 & 52 Vict. c. 43, s. 69.

(o) *Picard v. Hine*, 18 L. T. 704.

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himself and all the other creditors of the deceased (p), and the late Master of the Rolls said it was no longer the practice to sue in such form (q); but there is nothing in the Rules of the Supreme Court to prevent such a form of action from being adopted, and in practice the plaintiff very often sues in that form. A creditor who sues *on behalf of himself and all other the creditors* is entitled, where the estate proves insufficient for payment of debts, to costs, as between solicitor and client (r), and until it is decided that the use of the words is immaterial, it will be wise where a creditor is suing to use this particular form of words.

"If a creditor files a bill on behalf of himself and all the other creditors, and it turns out that the estate applicable to the payment of debts is insufficient, the estate belongs to the creditors exclusively; and, therefore, if a creditor has, for the benefit of all the other creditors, instituted a suit, in which he has recovered a fund, it is extremely unreasonable that the fund which would be divisible among the creditors *pro rata*, should be applied in payment of debts without recouping that creditor what he has properly expended in recovering the fund, and he is clearly entitled to his costs as between solicitor and client, and not as between party and party only" (s).

It is sufficient, if it appears from the statement of claim, that the creditor sues on behalf of all other creditors, although it does not appear on the writ, and the writ need not be amended (t).

The rule applies equally to the case of a creditor who obtains the conduct of an action originally commenced by a legatee or next of kin (u).

Right of
creditor suing
on behalf of
himself and
other creditors
to costs :

or where he
obtains conduct
of action.

(p) *Bray v. Toffield*, 18 Ch. D.

534. *Re Blount*, 27 W. R. 865.

(q) In *Bray v. Toffield*, *supra*.

(r) *Re Richardson*, 14 Ch. D.

611. *Re McRea*, 32 Ch. D.

613.

(s) *Kindersley, V.-C.*, in *Thomas*

v. Jones, 1 Dr. & Sm. 134, 136.

Cited and approved of by Kay, J.,
in *Re McRea*, 32 Ch. D. 613, 615.

(t) *Eyre v. Cox*, 24 W. R. 137.

(u) *Re Richardson*, 14 Ch. D.

611.

Creditor must
so claim where
there is un-
divided real
estate.

Where a creditor sues for administration of the real and personal estate of a testator or intestate, and there is no devise of the real estate to trustees with power to sell and give receipts, it appears that the writ must be indorsed with a claim by the plaintiff "on behalf of himself and all other creditors" (x).

Staying pro-
ceedings in
another action.

There is nothing to prevent other creditors or legatees from instituting a second action for administration; and as it is possible that, before the order, the litigating creditor may stop his action, the Court permits the actions to go on together until a decree in one of them is obtained (y). So, also, in the case of several persons claiming under the same general description. And when the usual order has been obtained in one of such actions, if another action is instituted, praying no further relief than might be had in the former action, the parties to such former action ought to apply to have the proceedings in the latter action transferred to the Judge in whose Court the proceedings under the decree are pending, and to have the second action stayed by him (z); otherwise the costs of it may be dealt with as costs in their action (a).

Question on
applications to
stay.

On the application to stay the proceedings, the question is, whether the action which is sought to be stayed asks something more than could be obtained under the existing order (aa).

(x) *Re Royle*, 5 Ch. D. 540. See also *Re Vincent*, 26 W. R. 94.

(y) *Woodgate v. Field*, 2 Hare, 211, 214. As to staying proceedings in the other suits, see *Hawkes v. Barrett*, 5 Madd. 17. *Turner v. Dorgan*, 12 Sim. 504. *Reid v. Territt*, 1 Coll. 1. *Dryden v. Foster*, 6 Beav. 146. *Frowd v. Baker*, 4 Beav. 76. *Portarlington v. Danner*, 2 Phill. Ch. C. 262. *Duffort v. Arrowsmith*, 7 De G. M. & G. 434. *Harris v. Gandy*, 1 De C. F. & J. 13.

(z) As to applications to stay where one of the actions is in the

Palatine Court, see *Re Williams*, W. N. 1882, p. 6. *Townsend v. Townsend*, 23 Ch. D. 100. *Wynne v. Hughes*, 26 Beav. 377. *Re Longdendale Cotton Co.*, 8 Ch. D. 150.

(a) *Therry v. Henderson*, 1 Y. & C. Ch. C. 481.

(aa) *Rigby v. Strangways*, 2 Phill. Ch. C. 175. *Rump v. Greenhill*, 20 Beav. 512. *Plunkett v. Lewis*, 11 Sim. 379. See also *Suisse v. Lowther*, 2 Hare, 424. *Gwyer v. Peterson*, 26 Beav. 83. *Hoskins v. Campbell*, 2 Hemm. & Miller, 42. *Belcher v. Belcher* 2 Dr. & Sm. 444.

As, for instance, where more complete and beneficial relief is sought or can be obtained in the second suit (*b*), or further questions raised, such as wilful default or breaches of trust (*c*). Even where the second suit goes further than the first, proceedings in the second action have been stayed on the executor or administrator undertaking not to object to any additions to the decree in the first action which the Judge may think fit to add in chambers (*d*).

The ordinary practice is to allow the action in which a decree has first been obtained to proceed and to stay the other action (*e*). General practice.

If the decree has been "snapped," or unfairly obtained (*f*), or the action in which it was obtained improperly instituted (*g*), the Court will either not stay the other action or will give the conduct of the action in which the decree has been made, to the plaintiff in the other action (*h*). Where the decree has been wrongly obtained.

Where the first action is stayed because a decree has been made in a later action, the conduct of the second action will usually be given to the plaintiff in the first action (*i*); it makes no difference in this respect, that one of the actions is in the Palatine Court (*k*). The Court will, of course, depart from this rule, on the ground of the special circumstances of the case; for instance, where the Court comes to the conclusion that the object of the plaintiff in the first action is not the *bond fide* administration of the estate (*l*). Conduct of the proceedings.

(*b*) *Re McRae*, 25 Ch. D. 16. J. 13.

Bulgen v. Sage, 3 M. & Cr. 683.

Taylor v. Southgate, 4 M. & Cr.

203. *Underwood v. Jee*, 1 Mac. &

G. 276. *Pickford v. Hunter*, 5 Sim.

122.

(*c*) *Zambaco v. Cassavelli*, L. R.

11 Eq. 439.

(*d*) *Gwyer v. Peterson*, 26 Beav.

83. *Matthews v. Palmer*, 11 W. R.

610. *Van Bunan v. Piffard*, 13

W. R. 425.

(*e*) *Saton*, 5th edit. 705.

(*f*) *Harris v. Gandy*, 1 D. F. &

(*g*) *Frost v. Ward*, 2 D. J. & S.

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(*h*) *Rhodes v. Barret*, L. R. 12

Eq. 479.

(*i*) *Zambaco v. Cassavelli*, L. R.

11 Eq. 439. *Kenyon v. Kenyon*, 35

Beav. 300. *Belcher v. Belcher*, 2

Dr. & Sm. 444. *Frost v. Frost*, 2

D. J. & S. 70.

(*k*) *Re Swire*, 21 Ch. D. 647.

Townsend v. Townsend, 23 Ch. D.

100.

(*l*) *Re Swire*, *supra*.

Partial stay.

In some cases the first action will be partially stayed, and liberty given to the plaintiff in the first action to prove in the second action for what he may eventually establish in the first (*m*).

Transfer of actions against executors or administrators where an administration order has been made.

Where an order has been made by any Judge of the Chancery Division, for the administration of the assets of any testator or intestate, the Judge in whose Court such administration is pending has power, without any farther consent, to transfer to himself any cause or matter pending in any other Court or Division, brought or continued by or against the executors or administrators of the testator or intestate (*n*). In dealing with a creditor's action, when transferred to him, he will be governed by the same principles as formerly governed the Court in staying proceedings in such actions.

The application, how made.

The application for transfer of an action brought or continued against an executor or administrator, after an administration order, can be made *ex parte* by any party to either action (*o*). It must be made to the Judge who made the administration order (*p*).

This power of transfer takes the place of the old practice, which was, after a decree for administration had been made, for the Judge of the Court of Chancery making the administration decree, to restrain proceedings against the executor or administrator by creditors by granting injunctions against such other creditors.

The action to be transferred must be one brought against the executor *quâ* executor, and not one for which the executor is personally liable (*q*).

Right of creditor bringing second action to costs.

The old practice was that a plaintiff at law was entitled, unless his claim proved unfounded (*r*), upon the injunction

(*m*) Dryden v. Foster, 6 Beav.

146. *Re* Smith's Estate, 33 L. T.

N. S. 804. *Crowe v. Russell*, 4 C.

P. D. 186.

(*n*) R. S. C. 1883, Ord. XLIX.

r. 5. For transfer in other cases, see Ord. XLIX.

(*o*) Ann. Pr. 1893, p. 834.

(*p*) R. S. C. 1883, Ord. XLIX.

r. 5.

(*q*) *Chapman v. Mason*, 40 L. T.

N. S. 678. See also *Re Timms*, 26

W. R. 692.

(*r*) *King v. King*, 34 Beav. 10.

being granted, to his costs of the action up to the time when he had notice of the decree (*s*). And if the creditor commenced his action at law before bill filed, and then discontinued it, and came in under the decree, he would be entitled to prove his costs at law, in addition to his debt (*t*). He was also entitled to the costs of the motion to restrain him from suing at law (*u*). But he was not allowed the costs of further proceedings at law after actual notice of the decree (*x*), nor in such case his costs of the motion to restrain his proceedings (*y*). If, however, the executor took any steps in the action after the plaintiff at law had notice of the decree, the latter would be allowed all his costs at law and also those of the motion for the injunction (*z*). The practice is now substantially the same as before the Judicature Acts (*a*).

With respect to the time within which the injunction should be applied for, it was observed by Lord Lyndhurst (*b*), that any delay in the application before judgment

time for
application.

(*s*) *Dyer v. Kearsley*, 2 Meriv. 483, note to *Terwest v. Featherby*. *Paxton v. Douglas*, 8 Ves. 520. *Ratcliffe v. Winch*, 16 Beav. 576. In *Drewry v. Thacker*, 3 Swanst. 541, Lord Eldon said that the usual form in which the order for the injunction was drawn (*i.e.*, "on payment of costs") was improper; inasmuch as the parties entitled to the injunction, if they were required to pay costs as a preliminary, might, from the situation of the assets, be unable to obtain it in time.

(*t*) *Goate v. Fryer*, 3 Bro. Chanc. Cas. 23.

(*u*) *Jones v. Jones*, 5 Sim. 678. But see *Anon.* 2 Sim. & Stu. 424.

(*x*) *Paxton v. Douglas*, 8 Ves. 521. *Curre v. Bowyer*, 3 Madd. 456. *Jones v. Brain*, 2 Y. & Coll. Ch. C. 170.

(*y*) *Curre v. Bowyer*, 3 Madd.

456. *Jones v. Brain*, 2 Y. & Coll. Ch. C. 170. See *Hayward v. Constable*, 2 Younge & Coll. 43. *Moore v. Prior*, *ibid.* 375. He may be ordered to pay these costs, if, after bringing in his claim under the decree, he proceeds with his own suit: *Beauchamp v. Lord Huntley*, Jacob, 546. *Gardner v. Garrett*, 20 Beav. 469: notwithstanding the suit be in a foreign Court: *Graham v. Maxwell*, 1 Mac. & G. 71. He may set off such costs against his costs incurred before notice of the decree: 20 Beav. 469.

(*z*) *Turner v. Connor*, 15 Sim. 630.

(*a*) See R. S. C. Ord. XLIX. r. 5. *Morgan & Wurtzburg on Costs*, 2nd edit. p. 192. *Dan. Ch. Pr.* 6th edit. p. 1947.

(*b*) *Rouse v. Jones*, 1 Phill. Ch. C. 464.

would, in most cases, properly resolve itself into a mere question of costs.

Transfer to
bankruptcy.

By sec. 125, sub-s. 4, of the Bankruptcy Act, 1883, where proceedings have been commenced in any Court for the administration of the estate of a deceased debtor, such Court can, on proof that the estate is insolvent, transfer the proceedings to the Court of Bankruptcy.

The transfer can be made either on the application of a creditor (*c*), or without any such application (*d*).

A creditor before applying for the transfer of an insolvent estate into bankruptcy must have proved his debt (*e*).

The transfer can be ordered after a judgment for administration has been made (*f*).

Transfer discretionary.

The exercise of this power of transfer is discretionary (*g*), and the mere fact that the executor has a right of retainer and a liberty not to plead the Statute of Limitations to a debt, which rights would be recognized in the Chancery Division, but might be taken away by a transfer to the Court of Bankruptcy, is not a ground for the transfer (*h*).

An order for
administration
cannot be
made in the
absence of a
personal representative
of
the deceased.

An estate cannot be administered in a Court of Equity in the absence of a personal representative (*i*). And, consequently, if it appear that the Court cannot give the plaintiff the relief which he asks without an administration of the estate, there must be a personal representative of it before the Court (*k*). Accordingly, on a demurrer to a bill seeking payment of a legacy out of assets come to the hands of the

(*c*) 46 & 47 Vict. c. 52, s. 125, sub-s. 4.

(*d*) 53 & 54 Vict. c. 71, s. 21, sub-s. 2 (Bankruptcy Act, 1890).

(*e*) *Re Weaver*, 29 Ch. D. 236.

(*f*) *Re York*, 36 Ch. D. 233. *Senhouse v. Mawson*, 52 L. T. N. S. 745. *Re Briggs*, 7 Times Rep. 572.

(*g*) *Re Baker*, 44 Ch. D. 262. *Re Weaver*, 29 Ch. D. 236.

(*h*) *Re Baker*, *supra*. But see

Re York, 36 Ch. D. 233.

(*i*) *Lowry v. Fulton*, 9 Sim. 104. *Dowdeswell v. Dowdeswell*, 9 Ch. D. 294.

(*k*) *Penny v. Watts*, 2 Phill. Ch. C. 153. *Cary v. Hills*, L. R. 15 Eq. 79. *Rowell v. Morris*, L. R. 17 Eq. 20. But see *contra*, *Rayner v. Koehler*, L. R. 14 Eq. 262. *Cooté v. Whittington*, L. R. 16 Eq. 536. *Re Lovett*, 3 C. D. 193.

defendant, who was the husband of the sole executrix deceased, it was held by Lord Cottenham, C., that an allegation that all the testator's debts and the other legacies bequeathed by his Will had been paid, and that there were assets *ultra* in the hands of the defendant to satisfy the plaintiff's demand, was not sufficient to dispense with the presence of a personal representative of the testator, the allegation being one which, even if admitted by the defendant, the Court would not take his word for (l).

In *Glass v. Oxenham* (m), it was held that if a bill were brought against an executor, during whose infancy the Will appointed an executor *durante minore ætate*, the latter must be made a party, unless the former had received all the testator's personal estate from the hands of the temporary executor, upon an account between them.

It seems to be established, that in an action for a general account of the assets of a deceased person, the personal representative of his former representative is properly joined as a co-defendant with his continuing or present personal representative. In *Holland v. Prior* (n), it was held, by Lord Brougham, overruling the decision of Sir L. Shadwell, V.-C., that the executor of an administratrix, who had received assets of her intestate, might and ought to be made a defendant in a suit instituted by a creditor of the intestate. And in *Hall v. Austin* (o), Knight Bruce, V.-C., appears to have acceded to the proposition that, as a general rule, where there are several executors who have acted and one of them dies before any suit is instituted, a person interested in the administration of the estate cannot file a bill for the general administration of the estate, making the surviving executors alone parties.

It is necessary to join the representative of a deceased exe-

Where the executor of a deceased personal representative is a necessary party.

The representative of a

(l) *Penny v. Watts*, 2 Phill. Ch. C. 149.

(m) 2 Atk. 121.

(n) 1 Mylne & K. 237. See also *Hall v. Austin*, 2 Coll. 570.

(o) 2 Coll. 570. See also *Cop-
pard v. Allen*, 2 D. J. & S. 173.
But see *Masters v. Barnes*, 2 Y. &

C. Ch. C. 616.

deceased executor must be joined where wilful default alleged.

executor if a general account of the trust estate, on the footing of wilful neglect and default, is required (*p*).

The representative of a deceased executor need not be joined in an administration action, if it is not sought to charge the estate of the deceased executor (*q*), or if an account is waived as against his estate (*r*). The old form of pleading, where the representatives of a deceased executor were not joined, was to allege that the deceased executor, or his representative, had duly accounted to the surviving executors (*s*); but such an allegation appears to have been unnecessary (*t*), and under the present procedure, as the bulk of administrations are without pleadings, there would be no opportunity of making such an allegation.

Administrator of deceased executor and executor *de son tort* not sufficient.

The administrator of a deceased executor does not sufficiently represent the estate of which his intestate was executor for the purpose of making an administration decree (*u*), and the better opinion seems to be that an executor *de son tort* alone is not sufficient (*x*).

Where fund converted or specially appropriated.

If, indeed, an executor or administrator has so dealt with a fund, that by reason of such dealing it has ceased to bear the character of a legacy or share of residue, and has assumed the character of a trust-fund, in a sense different from that in which the executor or administrator held it,—if it has been taken out of the estate of the testator, and appropriated to, or made the property of, the *cestui que trust*,—it may not be necessary that the *cestui que trust* should bring before the Court the personal representative of the testator in a suit to recover that part of the estate (*y*).

(*p*) *Coppard v. Allen*, 2 D. J. & S. 173.

(*q*) For form of such a decree, see *Seton*, 4th edit. p. 881.

(*r*) *Masters v. Barnes*, 2 Y. & C. Ch. C. 616.

(*s*) *Adams v. Barry*, 2 Y. & C. Ch. C. 167.

(*t*) *Wilson v. Todd*, 1 My. & Cr. 42.

(*u*) *Barber v. Walker*, 15 W. R. 728.

(*x*) *Rowse v. Morris*, L. R. 17 Eq. 20. But see *contra*, *Re Lovett*, 3 Ch. D. 198. *Rayner v. Koehler*, L. R. 14 Eq. 262. *Coote v. Whittington*, L. R. 16 Eq. 534. *Blewitt v. Blewitt*, 10 Ch. 541.

(*y*) *Bond v. Graham*, 1 Hare, 482, 484. See also *Arthur v.*

There has already been occasion to point out that in cases where the executor or administrator is required to be made a party, it is not sufficient that he is such by the appointment and authority of a foreign government; but he must obtain his right to represent the estate from the Probate Court in this country (z).

Foreign
executor, &c.

Where there is no general personal representative, but a special representative limited to the subject of the suit has been appointed by the Probate Court, the limited administrator does not sufficiently represent the estate of the deceased where a general administration is required (a).

Administrator
ad litem not
sufficient.

After the usual administration judgment or order, every creditor has an interest in the suit (b), and is in a sense, deemed to be before the Court; yet, until such order, the plaintiff is *dominus litis*, so that he may deal with the action as he pleases; and he may settle the matter with the execu-

Until decree
the plaintiff is
dominus litis.

Hughes, 4 Beav. 506. and Lord Cottenham's judgment in *Penny v. Watts*, 2 Phill. Ch. C. 153, 154. But see *Rayner v. Koehler*, L. R. 14 Eq. 262. *Coote v. Whittington*, L. R. 16 Eq. 534.

(z) *Ante*, p. 296 *et seq.* In *Anderson v. Caunter*, 2 M. & K. 763, A., one of the executors of the Will of B., who died in India, proved the Will, and possessed the testator's assets in India. The widow and executrix of A. proved her husband's Will, and possessed his assets in India, and having afterwards come to England, she was made a party to a suit for the administration of B.'s estate: And Sir J. Leach, M. R., held, that it was not necessary that an administrator of A.'s estate in England should be also a party to this suit. But see the observations of Lord Cottenham on this decision in *Tyler v. Bell*, 2 Mylne & Cr. 69, 110. See also

Story's Conf. of Laws, ch. xiii. s. 513, note (1), where it is said that *Anderson v. Caunter* seems not a sound authority. *Maclean v. Dawson*, 27 Beav. 21. *Flood v. Patterson*, 29 Beav. 295.

(a) See *ante*, p. 448, note (g). *Dowdeswell v. Dowdeswell*, 9 Ch. D. 294.

(b) See *Sterndale v. Hankinson*, 1 Sim. 399, 400. *Cook v. Bolton*, 5 Russ. 283. *Brown v. Lake*, 2 Coll. 620. *Smith v. Guy*, 2 Phill. Ch. C. 159. But see *Re Greaves*, 18 Ch. D. 551. It would appear that under the old practice only creditors whose debts were due at the death of the testator were in strictness permitted to come in under the decree; the present practice is to admit all creditors to come in whose debts have become due before the date of the report: *Thomas v. Griffith*, 2 De G. F. & J. 555, *per* Turner, L. J.

tor, by the latter paying the debt and costs of the action, and compromise the action and relinquish proceedings (c). And indeed the Court will compel the creditor to accept payment of his debt, when the executor offers to pay it with the costs of the action (d).

Who may be made co-defendants with executors, &c.

The general rule is, that, inasmuch as the executor or administrator is the trustee and proper representative of all persons interested in the personal estate, and has the duty cast on him of protecting it against improper demands, it is not necessary or proper to join either a pecuniary or a residuary legatee, or the next of kin, as a party to an action against the executor or administrator for an account of the personal estate, however interested such persons may be to contest the demand which has occasioned the suit (e). Special circumstances, however, have been permitted to justify the relaxation of this rule (f).

Persons wrongfully taking the dead man's property.

Against the established rule is, that in ordinary cases, persons who have possessed themselves of the property of the deceased, or debtors to the estate generally, cannot be made parties to an action against the executor: For regularly there can be no action against the debtor but by the executor, who has the right both in law and in equity: If the executor be solvent he may even release a debtor, and neither a creditor nor a residuary legatee can bring any action against that debtor: There must be collusion or insolvency, or some special case: The Court will interfere, if there is such special case: as collusion or insolvency; and then the action may be brought against both the debtor and the executor (g). And the general principle on which a debtor

(c) *Woodgate v. Field*, 2 Hare, 213. *Wood v. Westall*, 1 Younge, 305.

(d) *Woodgate v. Field*, 2 Hare, 213. *Pemberton v. Topham*, 1 Beav. 316. *Holden v. Kynaston*, 2 Beav. 204.

(e) *Brown v. Dowthwaite*, 1 Madd. 446.

(f) *Lord Hertford v. Zichi*, 9 Beav. 11.

(g) *Newland v. Champion*, 1 Ves. Sen. 105. *Utterson v. Mair*, 2 Ves. 95. *Doran v. Simpson*, 4 Ves. 651. *Troughton v. Binkes*, 6 Ves. 573. *Alsager v. Rowley*, 6 Ves. 748. *Beckley v. Dorrington*, cited by Lord Eldon, *ibid.*

to the estate cannot be made a defendant to an action by a creditor or residuary legatee against the executor, unless collusion, insolvency, or some special case be shown, has been held to apply equally to the case of a creditor overpaid by the executor: that is, if there is no collusion or special case, if the executor is not insolvent, he stands the middle man, responsible for the property misapplied by paying a man as a creditor who was not a creditor, as in the other case for the property outstanding in a debtor (*h*).

But this rule has been relaxed in the case of surviving partners of the deceased: whom it is allowable to make parties with the executor: in order, it is said, that the plaintiff may have an account of the personal estate entire (*i*). Accordingly, in *Bowsher v. Watkins* (*k*), it was held by Sir John Leach, M. R., that residuary legatees might maintain a bill for an account against the executor and the surviving partner of the testator, although collusion between the executor and the surviving partner was neither charged nor proved (*l*). But upon the examination of the autho-

Surviving
partners of
deceased.

749. *Benfield v. Solomons*, 9 Ves. 86. *Burroughs v. Elton*, 11 Ves. 29. *Consett v. Bell*, 1 Y. & Coll. Ch. C. 569. *Lancaster v. Evans*, 4 Beav. 158. *Baddeley v. Curwen*, 2 Coll. 151. *Barker v. Birch*, 1 De Gex & Sm. 376. As to whether a refusal by the executor to sue the debtor is sufficient, see the case last cited. The special circumstances which will authorize making the debtor a party are not confined to collusion or insolvency: *Meldrum v. Scorer*, 56 L. T. 471. *Consett v. Bell*, 1 Y. & Coll. Ch. C. 569. 1 De Gex & Sm. 376. *Stainton v. Carron Company*, 11 Beav. 146. *Saunders v. Druce*, 3 Drewr. 140.

(*h*) *Alsager v. Rowley*, 6 Ves. 748.

(*i*) *Newland v. Champion*, 1

Ves. Sen. 106, by Lord Hardwicke.

(*k*) 1 Russ. & M. 277.

(*l*) His Honor, in the previous case of *Gedge v. Traill*, 1 Russ. & M. 281, note, overruled a demurrer to a creditor's bill, which had made the co-partners of the deceased testator co-defendants with his executor, upon the ground that the retaining of assets by a stranger with consent of the executor, amounted to collusion. In *Davies v. Davies*, 2 Keen, 534, Lord Langdale, M. R., said, that the decision of *Bowsher v. Watkins* is far from establishing the general proposition, that in every case a bill may be filed against an executor and a surviving partner of the testator, without charging and proving fraud or collusion. See



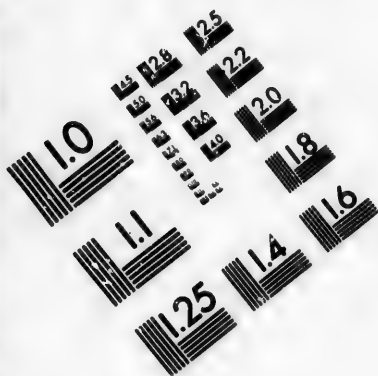
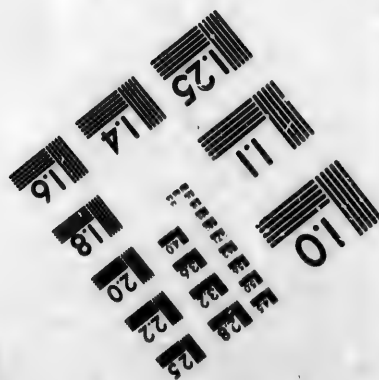
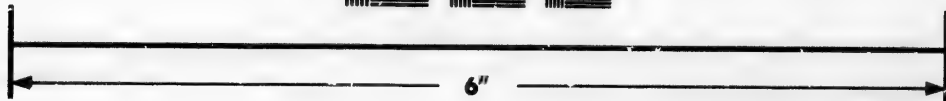
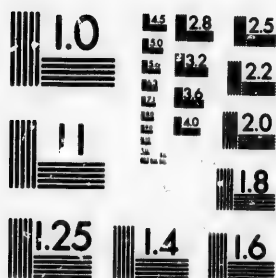


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rities (*m*), it will be found that there is no instance of such a suit being maintained in the absence of special circumstances, and that collusion is clearly not the only ground on which such a bill can be supported. The cases seem to go to this extent,—that such an action may be supported in all cases where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution of the rights of the parties interested in the estate against the surviving partners (*n*).

Refusal of personal representative to sue.

The mere refusal of a legal personal representative to sue for the recovery of outstanding assets, is not, in the absence of special circumstances, sufficient to justify a residuary legatee or next of kin, in suing the legal personal representative and the alleged debtor to the estate (*o*).

Following assets.

Where an executor has administered assets and paid over the residue of an estate, a creditor of the testator is entitled to follow the residue and to compel payment from the residuary legatee of his debt, so far as the residue will extend, and the executor need not be a defendant to the action (*p*).

Death of one of several co-plaintiffs in a creditor's action.

The death of one of several co-plaintiffs in a creditor's suit did not under the old practice cause the suit to abate (*q*), but his personal representatives could obtain an order of revivor if the dead creditor represented a different class of creditors to his co-plaintiff, at any rate if the dead plaintiff died after

also *Law v. Law*, 2 Coll. 41. *Cropper v. Knapman*, 2 Younge & Coll. 338.

(*m*) *Bowsher v. Watkins*, 1 Russ. & M. 277. *Gedge v. Traill*, 1 Russ. & M. 281. *Davies v. Davies*, 2 Keen. 534. *Law v. Law*, 2 Coll. 41. *Cropper v. Knapman*, 2 Younge & Coll. 338. Commented on in *Yeatman v. Yeatman*, 7 C. D. 210. *Beningfield v. Baxter*, 12 App. Cas. 167.

(*n*) *Travis v. Milne*, 9 Hare, 141, 150, by Turner, V.-C. In *Stainton v. Carron Company*, 18 Beav. 146

Romilly, M. R., approved of this statement of the general principle, and held, that it did not apply to such a partnership as a Joint Stock Company. See also *Yeatman v. Yeatman*, 7 C. D. 210.

(*o*) *Yeatman v. Yeatman*, 7 C. D. 210.

(*p*) *Hunter v. Young*, 4 Ex. D. 256. See also *Clegg v. Rowland*, L. R. 3 Eq. 368.

(*q*) *Body v. Kent*, 1 Mer. 364. *Burney v. Morgan*, 1 Sim. & Stu. 358.

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decree (r). So now under the Judicature Act the action will not abate by reason of Ord. XVII. r. 1, and any necessary parties may be added under r. 4 of the same order.

Although it has been the practice of the Court in administration actions to entertain actions by creditors, legatees, and parties entitled in distribution on behalf of themselves and all others, and to exonerate the executor or administrator for payment of assets pursuant to its order, yet such a decree is not absolutely binding upon the absent creditors, legatees, or distributees, who have had no opportunity of proving and presenting their claims (s), and have been guilty of no laches (t). Although such creditors have no remedy against the executor or administrator, yet they have a right to assert their claim against the creditors, legatees or distributees who have received it (u).

Binding absent persons.

It is important to understand how the interests of persons affected by an account or inquiry decided in an administration action may be bound when they are not actually parties to the action.

When the interests of persons not parties to the action are bound by it.

There seem to be four ways in which such interests will be bound :—

1. The Court can under Ord. XVI. r. 40, direct that such persons shall be served with notice of the judgment or order.

After such notice the persons served are bound by the proceedings, in the same manner as if they had originally been parties, and are at liberty to attend the proceedings (x) upon entering an appearance in the Central Office in the same manner as a defendant entering an appearance (y). Any person so served may, within one month after such service,

(r) *Burney v. Morgan*, *supra*.

(s) *David v. Frowd*, 1 Mylne & K. 200. See *Anon.* 9 Price, 210.

(t) *Sawyer v. Birchmore*, 1 Keen, 391. S. C. 2 M. & Cr. 611. See also *Cattall v. Simons*, 8 Beav. 143.

(u) Story on Equity Plead. Ch.

iv. s. 106. An executor suing on behalf of himself and all other creditors can none the less retain his own debt: *Ex parte Campbell*, 16 Ch. D. 198.

(x) Ord. XVI. r. 40.

(y) Ord. XVI. r. 41.

apply to the Court or a Judge to discharge, vary or add to the judgment or order (2).

Numerous persons having the same interest.

2. "Where there are numerous parties having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a Judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested" (a). If an order made in such an action is intended to bind absent parties the Court will make a "representation order" in the form "it appearing that the residuary legatees (or whatever the class may be) are numerous, and that A. is one of such class, order that A. do defend in the cause (or matter) on behalf or for the benefit of all persons so interested" (b).

Claim for a representation order:

Where a representation order is required the writ must be indorsed in accordance with Ord. III. r. 4, and show that the plaintiff sues or the defendant is sued in a representative capacity (c).

"If either party wishes to deny the right of any other party to claim as executor, or as trustee, whether in bankruptcy or otherwise, or in any representative or other alleged capacity . . . he shall deny the same specifically" (d).

representative of a class.

3. "In any case in which the right of an heir-at-law or the next of kin or a class shall depend upon the construction which the Court or a Judge may put upon an instrument, and it shall not be known or shall be difficult to ascertain who is or are such heir-at-law or next of kin or class, and the Court or Judge shall consider that in order to save expense, or for some other reason, it will be convenient to have the questions of construction determined before such heir-at-law, next of

(2) Ord. XVI. r. 40.

(a) R. S. C. Ord. XVI. r. 9.

(b) See judgment of Kay, J., in *May v. Newton*, 34 Ch. D. 345, 348, where the whole subject is very fully discussed.

(c) "If the plaintiff sues, or the defendant or any of the defendants

is sued, in a representative capacity, the indorsement shall show . . . in what capacity the plaintiff or defendant sues or is sued": R. S. C. Ord. III. r. 4. See forms in Appendix A. Part III. Sect. VII. to R. S. C.

(d) R. S. C. Ord. XXI. r. 5.

kin or class, or otherwise, more persons, class, and of such persons, kin or class.

4. "Trustees and be sued in estate of will, joining any or estate, persons; but proceeding either in parties" (c).

It is obvious or administrator is one of estate to be

In the case had power persons not there by v. r. 32.

A residuary

A next of kin

A legatee

A person to be sold

A residuary if entitled deceased, administrative subject to

(e) R. S. C.

(f) R. S. C.

(g) See Kay

W.E.—VO

kin or class, shall have been ascertained by means of inquiry, or otherwise, the Court or a Judge may appoint some one or more persons to represent such heir-at-law, next of kin or class, and the judgment of the Court or Judge in the presence of such persons shall be binding upon the heir-at-law, next of kin or class, so represented (e).

4. "Trustees, executors, and administrators, may sue and be sued on behalf of, or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may, at any stage of the proceedings, order any of such persons to be made parties, either in addition to or in lieu of the previously existing parties" (f).

Trustees, executors, &c., may sue and be sued as representing estate.

It is obvious, however, that where the trustees, executors, or administrators, are the accounting parties, and the question is one of accounts, they do not sufficiently represent the estate to bind absent parties (g).

In the case of *Re Davies* (h), Kekewich, J., held that he had power to give costs, as between solicitor and client, to persons not actually parties to the proceedings, but only there by virtue of a representation order under Ord. XVI. r. 32.

Costs of persons appearing under a representation order.

A residuary legatee;

A next of kin;

A legatee interested in a legacy charged upon real estate;

A person interested in the proceeds of real estate directed to be sold;

A residuary devisee, or heir;

if entitled to an order for administration of the estate of a deceased, can obtain such order against the executor or administrator without serving the other persons interested (i), subject to the right of the Court to require any other to be

(e) R. S. C. Ord. XVI. r. 32.

ton, 34 Ch. D. 349.

(f) R. S. C. Ord. XVI. r. 8.

(h) W. N. 1891, p. 104.

(g) See Kay, J., in *May v. New-*

(i) Ord. XVI. rr. 33—35.

made a party (*k*); but it appears an order made in such case will not be binding on other beneficiaries unless they are served with it under Ord. XVI. r. 40, or a representation order is made under Ord. XVI. rr. 9 or 32 (2) (*l*).

Defence :
Statute of
Limitations.

Although suits in equity are not within the words of the Statute of Limitations, 21 Jac. I. c. 16, yet they are within the spirit and meaning of it; and, therefore, upon all legal demands, the Courts of Equity are bound to yield obedience to its provisions (*m*); and as Courts of Equity will not entertain stale demands, they have thought proper to adopt the limit of six years by analogy to that statute (*n*).

Effect of a trust
for creditors or
beneficiaries.

Subject to the provisions of the Trustee Act, 1888, the Statute of Limitations (21 Jac. I. c. 16) does not run against a trust (*o*). Accordingly, a trust created by Will upon the real estate for the payment of debts, prevents the statute

(*k*) Ord. XVI. r. 39.

(*l*) See *May v. Newton, supra*.

(*m*) *Hovenden v. Annesley*, 2 Scho. & Lef. 630, 631. *Foley v. Hill*, 1 Phill. Ch. C. 399. *Burdick v. Garrick*, L. R. 5 Ch. 234, 240. *Re Greaves*, 18 Ch. D. 551, 554. *Re Sharpe*, [1892], 1 Ch. 154. *Re Bennett, ibid*.

(*n*) *Re Greaves, supra*. In *Tatam v. Williams*, 3 Hare, 347, a bill by surviving partners against the executors of a partner, who died thirteen years before the institution of the suit, for an account of his partnership dealings and transactions, charging that the deceased partner was indebted to the firm at the time of his death, was dismissed by Wigram, V.-C., with costs, on the ground of lapse of time. Again, in *Baker v. Read*, 18 Beav. 398, where a bill had been filed after seventeen years to set aside a purchase of the testator's estate by his executor at an undervalue,

Romilly, M. R., refused relief, although his Honor added that if the transaction had been fresh, he should have set it aside without a moment's hesitation. See further as to *laches* and lapse of time being a bar in equity, *Portlock v. Gardner*, 1 Hare, 594. *Browne v. Cross*, 14 Beav. 105. *Sibbering v. Balcarras*, 3 De G. & Sm. 735. *Wright v. Vanderplank*, 2 Kay & J. 1. *Aspland v. Watte*, 20 Beav. 474. *Mills v. Drewitt*, 20 Beav. 632. *Hartwell v. Colvin*, 16 Beav. 140. *Bullock v. Downes*, 9 H. L. C. 1.

(*o*) *Hollis's case*, 2 Ventr. 345. *Hargreaves v. Michell*, 6 Madd. 326. *Barker v. Martin*, 5 Sim. 380. *Wedderburn v. Wedderburn*, 2 Keen, 722. *Dickenson v. Lord Holland*, 2 Beav. 310. *Obce v. Bishop*, 1 De Gex, F. & J. 137. *Brittlebank v. Goodwin*, L. R. 5 Eq. 545. *Woodhouse v. Woodhouse*, L. R. 8 Eq. 514.

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from running against such debts as were not barred in the testator's lifetime (*p*), but a mere charge is not sufficient for this purpose (*q*), though such a trust does not revive a debt on which the statute had taken effect before the Will came into operation, *viz.*, before the testator's death (*r*). But a trust or charge by Will upon the *personal* estate does not prevent the operation of the statute: For the law vests the personal estate of the deceased in his executors or administrators, as a fund for the payment of his debts, and he cannot, by his Will, create a special trust for that purpose: Consequently, such a trust has no legal operation (*s*). Where a testator directed his debts to be paid out of his real and personal estate, and he afterwards provided that if his personal estate should fall short in paying his debts, then he empowered his executors to enter into the receipts of the rents of his freehold, until the same should be wholly paid off; it was held that, notwithstanding the personal estate was sufficient for payment of the debts, a trust had been created for payment of the debts out of his realty, so as to prevent the operation of the statute; and that the real estate remained liable to pay a simple contract debt which had been left unpaid after distribution of the residuary personal estate (*t*).

(*p*) *Burke v. Jones*, 2 V. & B. 275. *Hughes v. Wynne*, 1 Turn. & R. 307. *Hargreaves v. Michell*, 6 Madd. 326.

(*q*) *Dickinson v. Teasdale*, 1 D. J. & S. 52. *Jacquet v. Jacquet*, 27 Beav. 332. *Cunningham v. Foot*, 3 App. Cas. 974.

(*r*) *Burke v. Jones*, 2 V. & B. 275. *Hargreaves v. Michell*, 6 Madd. 326. *O'Connor v. Haslam*, 5 H. L. C. 170.

(*s*) *Scott v. Jones*, 4 Cl. & F. 382, in which case the House of Lords affirmed the judgment of Sir John Leach, and reversed that of Lord Brougham, 1 Russ. & M.

255. See also *Accord. Freake v. Cranefeldt*, 3 M. & Cr. 499. *Evans v. Tweedy*, 1 Beav. 55.

(*t*) *Crallan v. Oulton*, 3 Beav. 1. *Moore v. Petchell*, 22 Beav. 172. Where executors in whom the legal estate is vested are selling real estate charged with debts, a purchaser is not bound or entitled to inquire whether debts remain unpaid, unless twenty years have elapsed from the testator's decease, but after twenty years he should make such inquiry: *Re Tanqueray-Willaine and Landau*, 20 Ch. D. 465. For the rule as to leaseholds, see *Re Whistler*, 25 Ch. D. 561.

Real Property
Limitation
Act, 1874.

By the Real Property Limitation Act, 1874 (*u*), s. 8, it is enacted, that after the 1st January, 1879, "no action or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment (*x*), or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy (*y*), but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment (*z*) of the right thereto

(*u*) 37 & 38 Vict. c. 57.

(*z*) See *Watson v. Birch*, 15 Sim. 523. This section applies to judgments generally, and is not restricted to judgments which operate as charges on land. *Hebblethwaite v. Peever*, [1892] 1 Q. B. 124. *Jay v. Johnstone*, [1893] 1 Q. B. 25. affirmed in C. A. [1893] 1 Q. B. 189.

(*y*) Section 40 of the statute 3 & 4 Will. IV. c. 27, which corresponded to the above provision, was held to apply to legacies payable out of personal estate as well as to legacies charged on real estate: *Sheppard v. Duke*, 9 Sim. 567. *Bullock v. Downes*, 9 H. L. C. 1, 14. A residue bequeathed by Will is clearly within the statute: *Prior v. Horniblow*, 2 Younge & Coll. 200. *Christian v. Deverenz*, 12 Sim. 264. *Portlock v. Gardner*, 1 Hare, 594, 604. *Adams v. Barry*, 2 Coll. 285, 290, 293. But where more than twenty years after the death of the testator, the representative of one of his executors, and the residuary legatee under his Will, filed a bill against the representative of the co-executor to recover residuary assets of the

testator, alleged to have been possessed by the co-executor; it was held that the plaintiffs, though barred by the statute as to assets possessed by the executor more than twenty years before the filing of the bill, were not so barred as to assets possessed by him since that time: *Adams v. Barry*, 2 Coll. 290. See also *Bright v. Archer*, 27 Beav. 130. 4 De G. & J. 608, S. C. And see also *Re Johnson*, 29 Ch. D. 964. Where the right to sue for the legacy as such was barred by the statute, but the executor, who had possessed assets to pay it, died leaving it unpaid, and having charged his estate with his debts, it was held that the legacy could not be claimed under the charge of debts: *Piggott v. Jefferson*, 12 Sim. 26.

A suit to recover a legacy from an executor is within section 8 of the Real Property Limitation Act, 1874, unless the legacy is vested in him on express trusts. A mere constructive trust will not prevent the statute from being a bar. *Re Davis*, [1891] 3 Ch. 119. See also *Re Barker*, [1892] 2 Ch. 491.

(*s*) See *Holland v. Clark*, 1 Y.

shall have whom the entitled the or suit or years after of such pay given" (*a*).

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"No claim any property breach of Statute of 1 Section 1 sec. 25, such inconsistent upon them land charge applies as b

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(*a*) The 40th Will. IV. c. 2 the case of inheritance was extended sect. 13 of the By a strange the 37 & 38 extend to inheritance being that le

shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one was given" (a).

By sect. 10: "After the commencement of this Act no action, suit, or other proceeding, shall be brought to recover any sum of money or legacy charged upon, or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable, and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust."

Money or legacy charged upon land or rent.

"No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations" (b).

36 & 37 Vict. c. 66, s. 25 (2).

Claims by *cestui que trust* against trustee.

Section 10 of the Real Property Limitation Act, 1874, and sec. 25, sub-s. 2 of the Judicature Act, 1873, seem to be inconsistent; but the construction which has been placed upon them is, that the first section applies as between the land charged and the *cestui que trust*, whilst the second one applies as between the trustee and *cestui que trust* (c).

& Coll. Ch. C. 151, as to what is a sufficient acknowledgment. See also Lord St. John v. Boughton, 9 Sim. 219.

(a) The 40th section of the 3 & 4 Will. IV. c. 27, did not extend to the case of intestacy, but the section was extended to intestacies by sect. 13 of the 23 & 24 Vict. c. 38. By a strange omission, sect. 8 of the 37 & 38 Vict. c. 57, does not extend to intestacies, the result being that legatees are barred by

the latter Act after twelve years, and persons claiming under an intestacy will still only be barred by the 23 & 24 Vict. c. 38, after twenty years.

(b) Judicature Act, 1873, s. 25, sub-s. 2. See *Re Davis*, [1891] 3 Ch. 119.

(c) See *Fearnside v. Flint*, 22 Ch. D. 579. *Hughes v. Cole*, 27 Ch. D. 231. Lewin on Trusts, 8th edit. 885.

Claims on a
trust of land
or rent.

"When any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of the Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him" (d).

The benefit of this section is extended to personal estate by virtue of sect. 25, sub-s. 2 of the Judicature Act, 1873.

3 & 4 Will. IV.
c. 27, s. 42.

By sect. 42 of the stat. 3 & 4 Will. IV. c. 27, "After the 31st December 1833, no arrears of rent or of interest, in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy (e), or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment (f) of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid,

(d) 3 & 4 Will. IV. c. 27, s. 25.

(e) An annuity given by a Will, forming no charge upon land, but being personal only, is not within

this enactment: *Roch v. Callen*, 6 Hare, 531. *Re Ashwell's Will*, Johns. 112.

(f) See note (s), *supra*.

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although such time may have exceeded the said term of six years (g).

In the construction of the last-mentioned statute, it was held, that an action to make an executor account for a sum of money which had been bequeathed to him by his testator upon certain trusts, and which had been severed by the executor from the testator's personal estate, and the interest of which had, for a time, been applied upon the trusts of the Will, so that the fund had ceased to bear the character of a legacy, and had assumed that of a trust fund, must be considered not as a suit for a legacy, but as a suit to compel a party to account for a breach of trust; and therefore that it was not within the terms of the Act: And in *Watson v. Saul* (h), Wood, V.-C., observed, that the distinction between mere charges and express trusts pointed out by Lord Eldon in *King v. Denison* (i), was the foundation upon which section 40 of 3 & 4 Will. IV. c. 27 (see now sect. 8 of Real Property Limitation Act, 1874) rested, and that the provisions of that section were never intended to apply to cases of express trusts (k). In the case

Fund severed
from the
general estate.

(g) See *Cunningham v. Foot*, 3 App. Cas. 974.

(h) 1 Giff. 188, 196.

(i) 1 Ves. & B. 260.

(k) *Phillipo v. Munnings*, 2 Mylne & Cr. 309. See also *Accord*, *Dinsdale v. Dudding*, 1 Y. & Coll. Ch. C. 265. *Commissioners of Charitable Donations v. Wybrants*, 2 Jones & L. 182, 196, per Sugden, C. of Ireland. *Jacquet v. Jacquet*, 27 Beav. 332. *Snow v. Booth*, 2 K. & J. 132. *Burrowes v. Gore*, 6 H. L. C. 907. *Dickinson v. Teasdale*, 31 Beav. 511. *Proud v. Proud*, 32 Beav. 234. *Thomson v. Eastwood*, 2 App. Cas. 216. See further as to the statute running against trusts, *Ravenscroft v. Frisby*, 1 Coll. 16. *Lord St. John v. Boughton*, 2 Sim. 219. See also

Roch v. Callen, 6 Hare, 531, 536.

Young v. Lord Waterpark, 13 Sim.

199, 204. *Gough v. Bult*, 16 Sim.

323. *Playfair v. Cooper*, 17 Beav.

187. *Lord Brougham v. Lord*

William Poulett, 19 Beav. 119,

134. *Dix v. Burford*, 19 Beav.

409, 412. See likewise *Francis*

v. Grover, 5 Hare, 39. *Hughes v.*

Williams, 3 Mac. & G. 683. *Hunter*

v. Nockolds, 1 Mac. & G. 640.

Cox v. Dolman, 2 De Gex, M. &

G. 592. *Snow v. Booth*, 2 K. &

J. 132. *Davenport v. Stafford*,

14 Beav. 319, 331. *Bullock v.*

Downes, 9 H. L. C. 1. *Smith v.*

Acton, 26 Beav. 210. *Lewis v.*

Duncombe, 29 Beav. 175. *Round*

v. Bell, 30 Beav. 121. *Tyson v.*

Jackson, 30 Beav. 384. *Hodgson*

v. Bibby, 32 Beav. 221. *Mason v.*

of *Re Blachford* (l), *Pearson, J.*, allowed legatees, who had waited for payment of their legacies until a reversionary interest had fallen in, interest on their legacies from one year after the death of the testatrix, such interest largely exceeding six years' arrears.

Claims against the executor or administrator personally.

In *Webster v. Webster* (m), the testator died in 1786, but the Will was not proved by the executor till 1802: Nevertheless, on a bill filed by the creditor against the executor in 1803, a plea of the Statute of Limitations was allowed, because the bill alleged that the defendant had possessed himself of the personal estate previously to 1792, and might, therefore, have been sued as an executor *de son tort*.

Sect. 8 of the Trustee Act, 1888.

By sect. 8 (1) of the Trustee Act, 1888 (n), "In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded on any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply":—

Trustee to have the benefit of any Statute of Limitations.

(a.) "All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him" (o).

(b.) "If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies (oo), the trustee or person claim-

Broadbent, 33 Beav. 296. *Edmunds v. Waugh*, L. R. 1 Eq. 418. *Gyles v. Gyles*, Cas. Temp. Napier, 257. *Butler v. Carter*, L. R. 5 Eq. 276. A trust created by a testator of his real estate for payment of his debts does not remove from a creditor the consequences arising from his negligence or acquiescence, whether

expressed or implied: *Harcourt v. White*, 28 Beav. 303, 309.

(l) 27 Ch. D. 676.

(m) 10 Ves. 93.

(n) 51 & 52 Vict. c. 59.

(o) *Ibid.*

(oo) For an instance of this, see *Re Swain*, [1891] 3 Ch. 233.

ing through liberty to other property if the claim money has shall run her separate anticipations unless an interest in

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ing through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession."

It appears to be now settled, that if time has once begun to run against a debt in the debtor's lifetime, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal representative is constituted to him: The rule in this respect appears to be the same in equity (*p*) as at law (*q*).

From when
time runs.

In cases of fraud, or mistake, it has always been held by Courts of Equity that the statute runs from the discovery; because the laches of the plaintiff commence from that date (*r*).

It was held by Sir Anthony Hart, V.-C., in *Sterndale v. Hankinson* (*s*), that a bill which had been filed by one creditor on behalf of himself and all other creditors, prevented the Statute of Limitations (21 Jac. I.) from being a bar to the claim of another creditor, who had come in under the decree: And his Honor stated that he entertained no doubt that every creditor had, after the filing of the bill, an inchoate interest in the suit to the extent of its being con-

Creditor's
claims.

(*p*) *Freak v. Craneheldt*, 3 Mylne & Cr. 499. *Boatwright v. Boatwright*, L. R. 17 Eq. 71.

(*q*) *Ante*, p. 1843.

(*r*) *Brooksbank v. Smith*, 2 Younge & Coll. 58. *Ecclesiastical Commissioners v. North Eastern Railway Co.*, 4 Ch. D. 860. An executor cannot protect himself by the Statute of Limitations from

payment of a debt due from himself to his testator by deferring proof of the Will. The probate will be considered to have relation to the testator's death, and the debt will be treated as assets in the executor's hands at that time: *Ingle v. Richards*, 28 Beav. 366. *Ante*, p. 243.

(*s*) 1 Sim. 393.

sidered as a demand, and to prevent his debt being shut out because the plaintiff had not obtained a decree within the six years (t). But in the case of *Re Greaves* (u), Sir George Jessel, M. R., stated that creditors had better not rely upon the above decision in the future, and pointed out that the decision in *Sterndale v. Hankinson* depended upon a variety of circumstances, none of which exist at the present time (x). And it now appears to be settled that an action for administration brought by one creditor (not on behalf of himself and all other creditors) does not save the claim of another creditor which was barred by the Statute of Limitations before judgment (y).

Another creditor will not be permitted in a creditor's action to set up the Statute of Limitations against the party whose claim is the foundation of the judgment (z).

Writ of *ne exeat regno*.

There may be some doubt whether the writ of *ne exeat regno* has not in effect been abolished by the Debtors Act, 1869 (zz), but as the question does not seem to have been finally determined, it is thought better to preserve in this edition some account of the writ and its use.

The writ of *ne exeat regno* has been considered in the nature of equitable bail (a), and it was understood, that a Court of Equity proceeded in respect to it, by analogy to the proceedings at law in cases of legal bail (b).

Object of writ. It has been said, that the object of this writ is to obtain

(t) As to this inchoate interest in an administration action, see *Tollner v. Marriott*, 4 Sim. 19. *Watson v. Birch*, 15 Sim. 523. *Franco v. Alvarez*, 3 Atk. 342. But see *contra*, *Re Hartley*, 34 Ch. D. 742.

(u) 18 Ch. D. 551.

(x) See also *Earrington v. Evans*, 1 Younge & Coll. 434. *Tatham v. Williams*, 3 Hare, 347.

(y) *Re Greaves*, 18 Ch. D. 551.

(z) Dan. Ch. Pr. 1023, vol. ii. pt. i. 6th edit.

(zz) 32 & 33 Vict. c. 62. *Drover v. Beyer*, 13 C. D. 243. *Hands v. Hands*, 43 L. T. 750.

(a) *Haffey v. Haffey*, 14 Ves. 261. And see *Sobey v. Sobey*, L. R. 15 Eq. 200. For forms of order, see *Seton*, 5th edit. 449-451. For practice, see *Dan. Ch. Pr.* 6th edit. p. 1648 *et seq.*

(b) *Pannell v. Taylor*, 1 Turn. & Russ. 103. See *Jenkins v. Parkinson*, 2 M. & K. 5. And see 37 stat. 32 & 33 Vict. c. 62, s. 6.

security from the other party to bail (c). In the Court upon the writ of *ne exeat regno* an account clear affidavit grant the writ.

In *Moore v. Moore* the writ of *ne exeat regno* was granted against a bankrupt in his proper discharge the Lord Hardwicke was executed was gone on alone. *Agar v. Leach*, V.-C. and wife, etc. more than (Feb. 1823) that a writ or administration no reason was the provision Debtors Act.

(c) *Swift v. Swift*, 227.

(d) *Jones v. Jones*, 471. But a writ not have a writ against the executor of the executor Jac. & Walker Bloomfield, 2

security from a person intending to leave the country, when the other party has not a legal remedy, and cannot hold him to bail (c). But it was settled, that, though a plaintiff, swearing to the balance of an account, might have bail at law, yet the Court of Chancery, holding a concurrent jurisdiction upon the head of account, the plaintiff might also have the writ of *ne exeat regno*: And where a creditor files a bill for an account and administration of the assets, if there is a clear affidavit of assets received, the Court of Chancery will grant the writ (d).

In *Moore v. Meynell* (e), Lord Cowper ordered a writ of *ne exeat regno* to issue against a married woman, the administratrix of a former husband, who had come to England to get in his property: And Lord Macclesfield afterwards refused to discharge this order (f). And upon the authority of this case, Lord Hardwicke, in *Jerningham v. Glass* (g), where a wife was executrix of a former husband, and her second husband was gone out of the kingdom, granted the writ against her alone. Again, in *Moore v. Hudson* (h) (July, 1821), Sir John Leach, V.-C., granted writs of *ne exeat regno* against husband and wife, executrix, the plaintiff undertaking not to serve more than one of the writs. But in *Pannell v. Taylor* (i) (Feb. 1823), Lord Eldon, after great consideration, decided that a writ of *ne exeat regno* against a *feme covert* executrix or administratrix could not be sustained. There seems to be no reason why a married woman may not be arrested under the provisions of sect. 4, sub-sect. 3, and sect. 6 of the Debtors Act, 1869 (k).

Writ of *ne exeat regno* against a married woman.

(c) *Swift v. Swift*, 1 Ball & B. 227.

(d) *Jones v. Alephsin*, 16 Ves. 471. But a residuary legatee cannot have a writ of *ne exeat regno* against the executor of the testator, on the ground that he colludes with the executor: *Graves v. Griffith*, 1 Jac. & Walk. 646. *Colverson v. Bloomfield*, 29 Ch. D. 341.

(e) 1 Dick. 30.

(f) 3 Atk. 409, 410.

(g) 3 Atk. 409. S. C. *nomine Ternegan v. Glass*, Amb. 62. S. C. *nomine Jernegan v. Glass*, 1 Dick. 107.

(h) Madd. & Geld. 218.

(i) 1 Turn. & Russ. 96.

(k) It appears, from the decree in *Moore v. Meynell*, that the *feme*

Attachment
against wife
executrix.

In *Bunyan v. Mortimer* (l), a bill was filed against a husband and wife in respect of a demand against the wife as executrix: The husband, who was a bankrupt, had appeared for himself and his wife, and had gone abroad, and an attachment had issued against him for want of an answer: And it was held by Sir J. Leach, V.-C., that such an attachment could not be granted against the wife, until an order had been obtained that she should answer separately, and that she must have notice of the motion for that order.

Defendant can
obtain order of
ne exeat.

Defendants can obtain an order of *ne exeat* against a plaintiff (m).

Practice on
application for
a writ of *ne
exeat*.

The application is made *ex parte* on affidavit (n).

The usual practice is to require the plaintiff to give an undertaking as to damages and to accept short notice of motion (o).

Affidavit in
support of
application.

The defendant may at any time after arrest apply to the Court or a Judge to rescind or vary the order or to be discharged from custody, or for such relief as may be just (p).

Generally speaking, the affidavit, on which the application for a *ne exeat regno* is grounded, must be as positive as to the equitable debt, as an affidavit of a legal debt, to hold to bail (q): but in the case of partners and executors, information and belief is held sufficient (r). The affidavit ought to swear, or aver to the best of the knowledge and belief of the deponent, that assets have come to the hands of the executor

covert in that case had large separate property, and had executed bonds, &c.: And Lord Eldon observed thereupon, that there may be a very great difference between the case of a married woman who has separate property and the case of a married woman who is administratrix, and as administratrix can have no separate property at all: *Pannell v. Taylor*, 1 Turn. & Russ. 96, 103.

(l) *Madd. & Geld*. 278.

(m) *Whitehouse v. Partridge*,

3 Sw. 365.

(n) R. S. C. Ord. LXIX. r. 1. As to furnishing copies of the affidavit to the defendant, see Ord. LXVI. r. 7 (j).

(o) *Seton*, 5th edit. 451.

(p) R. S. C. Ord. LXIX. r. 1.

(q) *Jackson v. Petrie*, 10 Ves. 184. *Amsinck v. Barklay*, 8 Ves. 597.

(r) *Jackson v. Petrie*, 10 Ves. 184. *Rico v. Gualtier*, 3 Atk. 501.

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or administrator (s); and it should appear distinctly that he has a present intention to leave the country (t).

The debt in respect of which a writ of *ne exeat regno* is sought must be actually due and payable and for an ascertained amount (u). The evidence of the debt must be positive and clear (x), as also the defendant's intention to leave the country (y). The plaintiff must also clearly prove that he will be materially prejudiced in the prosecution of his claim by the defendant leaving the kingdom (z).

Proof required:

If the Court be satisfied that the defendant is going abroad to evade payment, it can make an order of *ne exeat*, although an order for payment has been made but the time for payment has not arrived (a).

before time
limited for
payment:

In *Drover v. Beyer* (b), Jessel, M. R., held that a writ of *ne exeat regno* is only to be issued in those cases which fall within sect. 6 of the Debtors Act, 1869. The case went to the Court of Appeal, and that Court decided the appeal on another point, and do not appear to have expressed any opinion on Sir George Jessel's view of sect. 6. In the later case of *Hands v. Hands* (c), Jessel, M. R., followed his decision in *Drover v. Beyer*.

now limited to
cases falling
within sect. 6
of the Debtors
Act, 1869.

Section 6 of the Debtors Act, 1869 (d), provides as follows:—

Sect. 6 of
Debtors Act.

"After the commencement of this Act a person shall not be arrested upon mesne process in any action.

"Where the plaintiff in any action in any of her Majesty's

(s) Anon. 2 Ves. Sen. 483. A present vested interest, though capable of being divested, is a sufficient interest to support a writ of *ne exeat regno*: *Howkins v. Howkins*, 1 Dr. & Sm. 75, 78.

(t) *Darley v. Nicholson*, 1 Dr. & W. 66.

(u) *Colverson v. Bloomfield*, 29 Ch. D. 341. Anon. 5 N. R. 358. *Flack v. Holm*, 1 J. & W. 405.

(z) *Perry v. Dorset*, 19 W. R. 1048.

(y) *Ibid.*

(z) *Drover v. Beyer*, 13 Ch. D. 242. *Vanzeller v. Vanzeller*, 15 Jur. 115. *Boehm v. Wood*, T. & R. 332.

(a) *Sobey v. Sobey*, L. R. 15 Eq. 200. *Whitehouse v. Partridge*, 3 Sw. 385. But see *Colverson v. Bloomfield*, 29 Ch. D. 341, where the order was not served.

(b) 13 Ch. Div. 243.

(c) 43 L. T. 750.

(d) 32 & 33 Vict. c. 62.

Superior Courts of Law at Westminster, in which, if brought before the commencement of this Act, the defendant would have been liable to arrest, proves at any time before final judgment, by evidence on oath to the satisfaction of a Judge of one of those Courts, that the plaintiff has good cause of action against the defendant to the amount of fifty pounds or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he be apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, such Judge may in the prescribed manner order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court.

"Where the action is for a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract, it shall not be necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the defendant will not go out of England) shall be to the effect that any sum recovered against the defendant in the action shall be paid, or that the defendant shall be rendered to prison."

Practice under
Debtors Act.

The practice under sect. 6 of the Debtors Act, 1869, is now regulated by Ord. LXIX. of the Rules of the Supreme Court, 1888.

The exercise of the power of arrest under the section is discretionary (*e*).

Where the defendant is arrested under it, he can only be kept in prison until final judgment (*f*).

Sect. 4, sub-s. 3,
of Debtors Act.

By sect. 4 of the Debtors Act it is provided that:—

"With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or

(*e*) *Haaluck v. Lehman*, 6 Times
Rep. 435.

(*f*) *Hume v. Druff*, L. 11. 8
Ex. 214.

imprisoned
money.

"There shall be
enactment

"(3) Defendant's
capacity and
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(*g*) R. S. C.
(*h*) Dan. C.
vol. ii. pt. i.
Kingdon, 1 C.

imprisoned for making default in payment of a sum of money.

"There shall be excepted from the operation of the above enactment

"(3) Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control."

In an action against an executor or administrator, other than an action for administration of the assets, costs are in the discretion of the Court or Judge (*g*). In such cases the liability to costs will, generally speaking, be governed by the ordinary rule, which throws them on the unsuccessful party: Accordingly, if an executor or administrator is sued in equity by a creditor for a debt of the deceased, and the creditor succeeds in establishing his demand, the Court will direct the payment of the amount due to the creditor, together with his costs, out of the estate (*h*), but unless the estate is insufficient, no order is made with regard to the payment of the costs of the personal representative, it being supposed that he may reimburse himself out of the assets; so that if there be no further fund out of which he may reimburse himself, the costs must come out of his own pocket: And even if it should appear, upon taking the accounts, that there is no such fund, still the Court will not give any directions with regard to his costs (*i*).

Costs.

General rule.

The question whether an executor or administrator who sues or defends, and is unsuccessful, is to be repaid his costs out of his estate, is totally distinct from the question whether he is liable to the other party to the action or not, and will be found dealt with later on in this chapter (*k*).

Question of allowance of costs to executor out of his estate.

But where a suit is instituted, either by creditors or residuary legatees, for a general administration of assets, so that the whole estate of the deceased is necessarily taken from the

Costs in an administration suit:

(*g*) R. S. C. Ord. LXV. r. 1.

(*i*) Dan. Ch. Pr. 1219, vol. ii.

(*h*) Dan. Ch. Pr. 1175, 1219, vol. ii. pt. i. 6th edit. Lyse v. Kingdon, 1 Coll. 184.

pt. i. 6th edit. Morgan & Wurtzburg on Costs, 179.

(*k*) See *post*, pp. 1936, 1937.

of the executor
&c., out of the
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cases in which
the executor,
&c., has to pay
costs person-
ally.

An executor's
or administra-
tor's costs are
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hands of the personal representative, and distributed under the direction of the Court, his costs of suit, as between solicitor and client, are, generally speaking, provided for; and even where the assets are insufficient to pay the creditors of the deceased, these costs, and any other costs, charges, and expenses properly incurred by him, continue the first charge on the estate (*l*).

The above is the general rule, but it is governed by the circumstances of each particular case, and in cases marked by fraud, evasion, or neglect of duty, the Court will not merely refuse to allow the executor his costs out of the assets, but will order him to pay the costs of the suit, or of so much of the suit as is attributable to the breach of duty on his part (*m*); but mere negligence is not sufficient to deprive an executor or administrator of his costs (*n*).

The rule that the costs of all proceedings in the Supreme Court are in the discretion of the Judge does not apply to an executor or administrator who has not unreasonably instituted or carried on or resisted any proceedings, and he is not to be

(*l*) *Tipping v. Power*, 1 Hare, 405, 411. *Gaunt v. Taylor*, 2 Hare, 413. *Ante*, pp. 850, 851. *Jackson v. Woolley*, 12 Sim. 12. *Ottley v. Gilby*, 8 Beav. 602. *Tanner v. Dancey*, 9 Beav. 339. As to the priority of the executor's costs of an administration action over costs in a probate action, see *Re Mayhew*, 5 Ch. D. 596. See also *Re Price*, 31 Ch. D. 485. In an administration suit by a mortgagee who has obtained an order for sale of the real and leasehold estate, the personal representatives are entitled, if the assets are deficient, to payment of their costs, charges, and expenses, in priority to the plaintiff's costs of the sale: *Re Spensley's Estate*, L. R. 15 Eq. 16. But see *Pinchard v. Fellows*, L. R.

17 Eq. 421.

(*m*) *Heighington v. Grant*, 1 Phill. Ch. C. 600. *Hewett v. Foster*, 7 Beav. 348. *Hide v. Haywood*, 2 Atk. 126. See also *Fell v. Lutwidge*, Barnard, Chanc. 322. *Avery v. Osborne*, *ibid.* 352. *Brown v. How*, *ibid.* 358. *Vaughan v. Thurston*, Colles, 175. *Bennett v. Atkins*, 1 Younge & C. 247. *Baker v. Carter*, *ibid.* 250. *Toner v. Thompson*, 7 Sim. 145. *Western v. Chapman*, 1 Coll. 181. *Tickner v. Smith*, 3 Sm. & G. 42. *Boynton v. Richardson*, 31 Beav. 340. See also *Dan. Ch. Pr.* 1208—1218, 6th edit.

(*n*) *Travers v. Townsend*, 1 Moll. 496. See hereon *Morgan & Wurtzburg on Costs*, 179.

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(*o*) Ord. LX
(*p*) *Re Love*,
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(*s*) 46 L. T.
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deprived of any right to costs out of a particular estate or fund to which he would be entitled according to the rules heretofore acted upon in the Chancery Division (o).

The effect of the rule may be stated to be that an executor or trustee is entitled to his costs (including costs, charges, and expenses) in any action to administer his estate unless it is established that he is guilty of such misconduct as justifies the Judge in depriving him of them (p).

It is, of course, impossible to define exactly what will amount to such misconduct; where executors first withheld accounts and then rendered incorrect ones they were ordered to pay the costs of the action (q), and mere non-feasance has been held to amount to such misconduct as in *Re Weall* (r), where executors allowed their solicitor to retain and pay himself some costs which the Court held to be unnecessary, and other costs which should have been charged against *corpus* but which the executors had improperly charged against income.

Misconduct.

In the case of *Re Clabburn* (s), Bacon, V.-C., ordered the plaintiff, who was executor and trustee of the Will, to personally pay the costs of an administration action which was held to be unnecessary. The estate in that case was a very small one, and the defendant beneficiaries had offered to concur in a special case to settle any point of doubt or difficulty arising under the Will.

Executor bringing a useless action.

A trustee is, in an administration action, always entitled to his costs as between solicitor and client, unless a case of misconduct is made out against him such as to justify the Judge in depriving him of them (t).

Trustee entitled to solicitor and client costs unless deprived on account of misconduct.

An order refusing a trustee his costs can always be appealed from (u), as he can only be deprived of them on the ground of

Appeal from an order refusing costs.

(o) Ord. LXV. r. 1.

Re Cope, W. N. 1885, p. 154.

(p) *Re Love*, 29 Ch. D. 348.

(t) *Re Love*, 29 Ch. D. 348. See

(q) *Re Radcliffe*, 50 L. J. Ch. 317.

also *Re Knight's Will*, 26 Ch. D. 83.

(r) 42 Ch. D. 674.

(u) Ann. Pr. 1893, p. 1051, where

(s) 46 L. T. 848. As to an unnecessary action by a legatee, see

the cases will be found conveniently cited.

misconduct, and the question of misconduct or no misconduct is a matter on which an appeal lies (x); but the converse of this rule does not hold good, and if the Judge, notwithstanding charges of misconduct, allows an executor or trustee his costs no appeal will lie, because, if by the misconduct of the executor or trustee he has lost his right to costs, then the discretion of the Judge arises, and under sec. 49 of the Judicature Act, 1873, there is no appeal from such discretion (y).

Defaulting trustee :
one of two only defaulting.

It is a clear rule that no costs are given to an executor or trustee who is a debtor to the estate until his debt is paid. If one of two executors is a debtor to the estate his co-executor is entitled to act by a separate solicitor, and if he does so he will be entitled to his costs (z). If two executors employ one solicitor, and one of the two executors is a debtor to the estate, the taxing-master on taxation finds what is the fair amount of costs to be attributed to the executor who is a debtor to the estate. This amount is deducted from the total costs of the two, and the balance after making such deduction is the amount allowed as costs of the other executor (a).

Principle on which the costs of a defaulting trustee are disallowed.

The principle seems to be that the costs due to the executor, who is indebted to the estate, are set off against his debt, and the proper form of order appears to be to order payment of the costs due to him from the estate, and for the order also to provide that such costs are not to be paid until he makes good the moneys due from him to the estate (b), and it makes no difference for this purpose whether the debt arises from a default of the executor or trustee, or is simply a debt due from him to the testator's estate.

Costs of a defaulting

If an executor who is indebted to the estate becomes bank-

(x) *Re Love, supra*. See also *Re Knight's Will*, 26 Ch. D. 82, 90.

(y) *Charles v. Jones*, 33 Ch. D. 80.

(z) *Jessel, M. R., in Smith v. Dale*, 18 Ch. D. 518.

(a) *Smith v. Dale*, 18 Ch. D.

516. See also *McEwan v. Crombie*, 25 Ch. D. 175. The earlier case of *Watson v. Row*, L. R. 18 Eq. 680, seems now to be overruled.

(b) *Lewis v. Trask*, 21 Ch. D. 864. *Re Basham*, 23 Ch. D. 195.

rapt, his cost against the bankruptcy and whether such to depend ma or trustee is

There are Hall, V.-C. (

Both cases cases the de respect of a b Act, 1869, b incurred by b was not disch incurred after V.-C., followe North, J., de the costs sul good his defa to be consist who, though to an action costs (g).

In the case consideration North, J., and later case (i).

It will be r of 1883 is mo the Bankrupt ruptey Act,

(c) *Smith v. Basham, supra*. D. 243.

(d) *Clare v. 865.*

(e) *Lewis v.*

rupt, his costs incurred prior to the bankruptcy are set off against the debt (c). The costs incurred subsequently to the bankruptcy stand on a different footing, and the question whether such costs will be paid out of the estate seems now to depend mainly on whether the debt due from the executor or trustee is discharged by the bankruptcy or not.

executor who becomes bankrupt.

There are conflicting decisions on the point, one decision of Hall, V.-C. (d), and the other of North, J. (e).

Conflicting decisions.

Both cases arose under the Bankruptcy Act, 1869, in both cases the debt due from the defendant was a debt due in respect of a breach of trust, and by sec. 49 of the Bankruptcy Act, 1869, bankruptcy was not a discharge from a debt incurred by breach of trust. North, J., held that as the debt was not discharged the executor was not entitled to his costs incurred after the bankruptcy unless he paid the debt. Hall, V.-C., followed an earlier case of *Bowyer v. Griffin* (f), which North, J., declined to follow, and held the trustee entitled to the costs subsequently to the bankruptcy without making good his default, it seeming to him (as his Lordship stated) to be consistent with good sense to hold that any person who, though adjudicated bankrupt, was retained as a party to an action, as executor or trustee, should be paid his costs (g).

In the case of *Re Basham* (h), Chitty, J., after a very full consideration of the authorities, followed the decision of North, J., and Pearson, J., also acted on the same rule in a later case (i).

It will be remembered that sec. 30 of the Bankruptcy Act of 1883 is more favourable to the bankrupt than sec. 49 of the Bankruptcy Act, 1869, and under sec. 30 of the Bankruptcy Act, 1883, a bankrupt executor, administrator, or

Sec. 30 of the Bankruptcy Act, 1883.

(c) *Smith v. Dale*, *supra*. *Re* 862.

Basham, *supra*. *Re Vowles*, 32 Ch. D. 243.

(d) *Clare v. Clare*, 21 Ch. D. 865.

(e) *Lewis v. Trask*, 21 Ch. D.

(f) L. R. 9 Eq. 340.

(g) 21 Ch. D. 867.

(h) 23 C. D. 195.

(i) *Re Vowles*, 32 Ch. D. 243.

trustee, only remains liable to the estate for debts incurred by fraudulent breach of trust. The consequence is, that where his debt is for a fraudulent breach of trust he will get no costs at all; if the debt arise on any other ground, he will get his costs subsequently to the bankruptcy.

Costs sometimes given to a defaulting trustee on account of assistance rendered.

In meritorious cases, where the Court has derived assistance in taking the accounts from having the executor represented by solicitors and counsel in the action, it will sometimes order him to have costs out of the estate notwithstanding he remains a debtor to the estate (k), but the solicitor for the defaulting executor should, before incurring costs, point out to the beneficiaries that the executor can only attend and assist in the proceedings if his costs are paid out of the estate, and obtain their sanction to his attending on those terms before the costs are incurred.

Trustee making good his default: right to costs.

A trustee who has not been guilty of dishonesty, and who has made good to the estate the deficiency arising from an improper investment made by him, will not be ordered to pay costs (l).

Executors' and trustees' priority as to costs.

Where the estate is insufficient for payment of costs executors and trustees are entitled to payment of their costs, charges, and expenses, in priority to all other parties to an administration action (m).

Executor of a defaulting trustee.

The executor or administrator of a defaulting trustee who accounts fairly for the assets come to his hands, is entitled to deduct his costs of the action out of the assets of his testator or intestate, even although they may be insufficient to repair the breach of trust (n).

In the case of *Re Griffiths* (o), an action was brought against the executor of a deceased executor for the ad-

(k) See remarks of Chitty, J., in *Re Basham*, *supra*.

(l) *Peacock v. Colling*, 54 L. J. Ch. 743. *Re Whiteley*, 33 Ch. D. 347.

(m) *Dodds v. Tuke*, 25 Ch. D. 617. *Wetenhall v. Dennis*, 33

Beav. 285. *Henderson v. Dodds*, L. R. 2 Eq. 532.

(n) *Haldenby v. Spofforth*, 9 Beav. 195. *Horne v. Shepherd*, 3 Jur. N. S. 806.

(o) 26 Ch. D. 465.

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(p) See also
1 Coll. 184, 189.
43 L. J. Ch. 2
W. R. 411.

(q) *Re Davis*,
(r) *Stirling, J.*

ministration of the estate of the original testator. The defendant properly accounted for all assets which had come to his hands. A balance was found due from the estate of the original executor to the estate of the original testator, which balance the estate of the original executor was insufficient to pay. Cotton, L. J., said that the strict order would be to allow the defendant out of the estate of the original testator all the costs incurred solely with reference to the original testator's estate, but as to the costs incurred by the defendant solely as representative of his own testator, the defaulting executor, he ought to be allowed them solely out of the estate of the defaulting executor. Fry, L. J., in the same case, pointed out that there was a third class of costs, coming under neither of the above heads, and they ought to be divided between the two funds (p).

The following payments have been held to be included in costs, charges, and expenses; costs of proceedings by an administrator against a defaulting solicitor, taken *bonâ fide* for the benefit of the estate (q), the costs of an action properly defended by a trustee (r), costs of a sale rightly made by trustees under a power (s), costs of former trustees paid to the executor of the survivor in consideration of his transferring the trust property (t).

An order giving trustees their costs, charges, and expenses, gives them something more than their costs of the action, and can be appealed from (u).

A trustee in passing his accounts is not allowed without question sums paid by him to his solicitor for costs; and the bill, although not submitted to a regular taxation, can be submitted to the taxing-master to be "moderated," i.e. for

Payments allowed as costs, charges, and expenses.

Order giving "costs, charges, and expenses."

"Moderation" of bill of costs.

(p) See also *Lyse v. Kingdon*, 1 Coll. 184, 189. *Palmer v. Jones*, 43 L. J. Ch. 249. *Re Kitto*, 23 W. R. 411.

37 Ch. D. 317, 327.

(s) *Re Mansel*, 54 L. J. Ch. 883.

(t) *Harvey v. Olliver*, 57 L. T. 239.

(q) *Re Davis*, 57 L. T. 755.

(u) *Re Chennell*, 8 Ch. D. 482.

(r) *Stirling, J.*, in *Re Llewellyn*,

the taxing-master to disallow such items as are irregular and excessive (x).

Costs of a solicitor-trustee.

A solicitor-trustee is only entitled to charge his costs and expenses out of pocket found by the taxing-master to have been properly incurred (y), unless he is specially authorized by the instrument creating the trust to make further charges (z), and although he be empowered to charge professional charges he is not entitled to charge for services which are not strictly professional, and not for matters which an executor ought to do without the intervention of a solicitor, such as for attendances to pay premiums on policies, attendances at the bank to make transfers, attendances on proctors, auctioneers, legatees, and creditors (a); but where an executor was authorized to make the usual professional or other proper and reasonable charges he was held entitled to charge for business not strictly of a professional nature transacted by him in relation to the trust estate (b). A solicitor should not in a Will appointing him executor or trustee insert an authority to himself to charge for business not strictly professional, unless the testator has expressly instructed him to insert such a power (c).

Duty of a solicitor inserting a power in a Will authorizing him to charge.

Effect of the solicitor attesting the Will.

A power authorizing a solicitor-trustee to charge for professional services is inoperative if the solicitor himself attests the Will (d).

A solicitor-trustee acting for other parties to the action.

A solicitor-trustee who acts as solicitor for other parties in an action will be allowed his costs, and this none the less that he acts for himself as well, unless and except so far as the costs are increased by acting for himself as well as the others (e); but this does not apply to his costs in the

(x) *Johnson v. Telford*, 3 Russ. 477. *Allen v. Jarvis*, L. R. 4 Ch. 616. *Aylesford v. Poulett*, 63 L. T. 619.

(y) *Robinson v. Pett*, 2 Lead. Cas. Eq. 214, 6th edit.

(z) *Re Shearwood*, 2 Beav. 338. *Moore v. Frowd*, 3 My. & Cr. 45. *Re Wyche*, 11 Beav. 209.

(a) *Harbin v. Darby*, 28 Beav. 325.

(b) *Re Ames*, 25 Ch. D. 72. But see *Re Chapple*, 27 Ch. D. 554.

(c) *Kay, J.*, in *Re Chapple*, 27 Ch. D. 587.

(d) *Re Barber*, 31 Ch. D. 665. *Re Pooley*, 40 Ch. D. 1.

(e) *Cradock v. Piper*, 1 M. & G.

administrative principle that a trustee is to place himself in a position to deal with the estate as it is held to apply the principle is difficult to

Chitty, J., in *Pipock v. Piper*, to the general long established

After the testator is satisfied, the personal estate incurred in

One consequence of the suit is that the executor, after view to be made, be so reimbursed

plaintiff's costs not being satisfied him (l). And there are either administered

costs of suit be the hardship demand on creditors of

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664. *Re Barber*. But see *Re Chapple*, 27 Ch. D. 554.

(f) *Lincoln v. Lincoln*, 158. *Re Barber*.

(g) In *Re Corbellis*, *supra*.

(h) 1 M. & G.

administration of the trusts outside a suit, the general principle that a trustee is not permitted to profit by his trust, or to place himself in a situation in which he may be tempted to deal with his trust with a view to his own profit, being held to apply to the latter case and not to the former (*f*). It is difficult to see the distinction between the two cases, and Chitty, J., and the Court of Appeal, in following (*g*) *Cradock v. Piper* (*h*), seem to have considered that the exception to the general rule made by *Cradock v. Piper* had been too long established to be disturbed (*i*).

After the costs of the executor or administrator are satisfied, the next claim on the fund arising from the personal estate is that of the plaintiff in the suit for his costs incurred in it (*k*).

Of the plaintiff
in the action
out of the
fund.

One consequence of this right of the plaintiff to his costs of the suit appears to be, that if the executor or administrator, after the decree, makes payment of a debt with a view to be reimbursed out of the fund in Court, his right to be so reimbursed must be postponed to the payment of the plaintiff's costs: that is, he must run the risk of the fund not being sufficient to pay the costs and also to reimburse him (*l*). Again, if the suit has been properly instituted and there are either assets in Court or outstanding assets to be administered, it seems to have been held that the plaintiff's costs of suit must be paid out of those assets, whatever may be the hardship on the executor or administrator as to his demand on them in respect of having, before suit, paid other creditors of the estate with his own money (*m*).

But the personal representative's right of retainer for his

664. *Re Barber*, 34 Ch. D. 77.

But see *Re Corsellis*, 34 Ch. D.

675.

(*f*) *Lincoln v. Windsor*, 9 Hare,

158. *Re Barber*, *supra*.

(*g*) In *Re Barber*, *supra*, and *Re*

Corsellis, *supra*.

(*h*) 1 M. & G. 664.

(*i*) As to a solicitor-trustee employing his partner, see *Clack v. Carlon*, 30 L. J. Ch. 639.

(*k*) *Hearn v. Wells*, 1 Coll. 323.

(*l*) *Jackson v. Woolley*, 12 Sim.

16, 17.

(*m*) *Hearn v. Wells*, 1 Coll. 323,

332, 333.

own debt will prevail, as there has already been occasion to show (n), against the plaintiff's right to his costs.

Costs of persons taking proceedings against an executor or administrator discretionary.

No appeal from an order refusing a legatee costs.

Legatee plaintiff not entitled as of right to costs.

Old rule did not apply to hostile actions.

Costs of beneficiary who has mortgaged his legacy.

Creditor's right to solicitor and client costs.

The costs of a person (beneficiary or creditor) bringing proceedings against an executor or administrator are now always in the discretion of the Court (o), and an order refusing a beneficiary or creditor plaintiff his costs in an administration action, or making him pay costs, is an order within the discretion of the Judge, under Ord. LXV. r. 1, and cannot be appealed from (p). And the same rule will apply to a creditor bringing the action.

Prior to the Rules of 1883, the rule was that a residuary legatee filing a bill for administration had a right to have his costs out of the estate, unless that right was displaced by some special ground for depriving him of them (q). But under Ord. LXV. r. 1, the costs of a plaintiff legatee are absolutely in the discretion of the Judge (r).

Hostile actions against executors or trustees, for instance, an action seeking to charge them with costs on the ground of misconduct (s), did not come under the above rule.

Where a beneficiary has mortgaged his legacy or share one set of costs only is allowed to him and his incumbrancer attending the proceedings, that set of costs is payable to the incumbrancer so far as may be necessary to satisfy the incumbrancer's costs of action, and after such payment the balance of costs is payable to the plaintiff (t).

A creditor bringing an administration action is entitled to solicitor and client costs if the estate proves insufficient for payment of the debts (u), at any rate where he sues on behalf of himself and the other creditors of the deceased (x), the

(n) *Ante*, pp. 884, 887.

(o) See R. S. C. 1883, Ord. LXV. r. 1.

(p) *Re McClellan*, 29 Ch. D. 495.

(q) *Farrow v. Austin*, 18 Ch. D. 58.

(r) *Re McClellan*, 29 Ch. D. 495.

(s) *Williams v. Jones*, 34 Ch. D.

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(t) For form of order, see order in *Higham v. Higham*, Seton, vol. ii. p. 869, 4th edit. See also *L. & Goss*, W. N. 1884, p. 192.

(u) *Thomas v. Jones*, 1 Dr. & Sm. 134.

(x) As to this, see *ante*, pp. 1906, 1907.

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reason given being that it would be unreasonable that the general body of creditors should take advantage of the exertions of the particular creditor through whose instrumentality the fund has been recovered without paying him all his costs (y); and this rule applies equally to a creditor who obtains conduct of an action originally commenced by a legatee or next of kin (z).

A plaintiff in a legatee's administration action is entitled to costs as between solicitor and client where the estate is sufficient to pay debts but insufficient to pay legacies in full (a); and it makes no difference that there has been a contest between the plaintiff and another legatee as to the proper mode of dividing the fund (b).

The principle that a creditor plaintiff against an insolvent estate is entitled to his costs as between solicitor and client was extended by Kay, J. (c), to the case of a separate creditor suing on behalf of himself and all the other creditors of the testator, the testator being one of a firm of traders. The testator's private estate was solvent, and the separate creditors were paid in full, but the estate of the firm was insolvent.

In the case of *Re Watson* (d), a residuary legatee who brought an action to establish his identity was allowed costs out of the estate.

It was an established rule that creditors were not to be allowed any of the costs which they were put to, either in the first instance, or in any stage of the proof of their claims before the Master under the decree (e). But now by Ord. LV.

Legatee plaintiff.

Of creditors coming in under the decree :

(y) Jessel, M. R., in *Re Richardson*, 14 Ch. D. 611, 612. See also the reason given by Kindersley, V.-C., in *Thomas v. Jones*, *supra*.

(z) *Re Richardson*, *supra*.

(a) *Re Hervey*, 26 Ch. D. 179.

(b) *Re Wilkins*, 27 Ch. D. 703. See also *Henderson v. Dodds*, L. R. 2 Eq. 532, where the action was to administer the realty, there being no personality.

(c) *Re McRea*, 32 Ch. D. 613.

(d) 53 L. J. Ch. 305.

(e) Nor was a creditor entitled to costs, whose debts had been disallowed by the Master, and allowed by the Court on petition: *Watkins v. Maule, Jacob*, 105. But if his proof was beneficial to the estate, as where he saved by it the expense of a suit, and there were extraordinary costs, the Court

r. 58, of the Rules of the Supreme Court, 1883, it is provided, that "a creditor who has come in and established his debt in the Judges' Chambers under any judgment or order shall be entitled to the costs of so establishing his debt, and the sum to be allowed for such costs shall be fixed by the Judge, unless he shall think fit to direct the taxation thereof: and the amount of such costs, or the sum allowed in respect thereof, shall be added to the debt so established" (*f*). Where the creditor fails to establish his debt, he may be ordered to pay the costs of the inquiry consequent upon his claim, though he is not a party to the action (*g*).

The question out of what particular fund costs are to be paid scarcely comes within the scope of this work, but it will perhaps be well to refer to the general principles governing the subject.

Whether the costs are to be paid out of the particular fund or out of the general estate.

Where next of kin, or other persons claiming as a class under the Will, succeed in establishing their title, their costs, as above defined, incurred in so doing, are paid out of the general estate before any apportionment of it takes place (*h*). So where a legacy is claimed, in an administration suit, by two legatees adversely to each other, the costs must be borne by the testator's estate (inasmuch as the question arises on his Will) and not by the legacy (*i*). But where a residuary estate was divisible amongst several persons, and an account was made up, and the adults received their shares: and the

would give them on petition: *Harvey v. Harvey*, 6 Madd. 91.

(*f*) Usually a sum is named for costs of proof at the time the debt is allowed: *Ann. Ch. Pr.* 1893, p. 947. Under the General Order of 27th May, 1865, a fixed sum of 1*l.* 13*s.* 4*d.* if the debt was under 5*l.*, and 2*l.* 2*s.* if above, was usually allowed: *Seton*, 4th edit. 832. *Morgan & Wurtzburg on Costs*, 191. These costs are not added to the debt, but are costs in the action: *Dan. Ch. Pr.* 1034, 6th

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(*g*) *Hatch v. Searles*, 2 Sm. & G. 147. *Yeomans v. Haynes*, 24 Beav.

127. It appears that a special summons must be taken out to obtain payment: *Dan. Ch. Pr.* 1035, 6th edit.

(*h*) *Shuttleworth v. Howarth*, 1 Cr. & Ph. 228.

(*i*) *Wilson v. Squire*, 13 Sim. 212. See also *Jolliffe v. East*, 3 Bro. C. C. 25. *Ripley v. Moysey*, 1 Keen, 578. *Eyre v. Marsden*, 4 M. & Cr. 231.

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infants filed a bill for an account against the executors and the other residuary legatees, who, being satisfied, deprecated the proceedings, and the accounts turned out to be substantially correct; it was held, that the costs of the suit were payable out of the plaintiff's share alone (*k*). The rule has been laid down to be, that if the executors, admitting a legacy to be payable, sever it from the estate, and a dispute arises between the persons or some of the persons to whom the legacy belongs, and the Court has to decide to whom it belongs, there the particular fund bears the costs; *secus*, if the dispute arises between the persons claiming the residue and the residuary legatee whether it is payable (*l*). Where there are no other assets, the costs must be paid out of the specific legacies *pari passu* (*m*). It is now settled that the costs of an administration action, so far as they have been increased by the administration of the real estate, are to be borne by that real estate (*n*). It would seem that where real estates are sold under a decree in an administration suit, the costs incurred by such sale will be payable out of the estates sold (*o*). If the costs of an administration suit are increased by its being also a suit for the execution of the trusts of a settlement, the Court has held that the additional costs must be borne by the settlement fund (*p*).

A legacy severed from the rest of the estate.

Administration of real estate.

The costs of a suit for the administration of a testator's estate are payable out of the residue generally and not primarily out of a lapsed share, as there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and costs of the administration of the

(*k*) Mackenzie v. Taylor, 7 Beav. 467. Thompson v. Clive, 11 Beav. 475. Compare Hilliard v. Fulford, 4 C. D. 389.

(*l*) Atty.-Gen. v. Lawes, 8 Hare, 43, by Wigram, V.-C. See also Morgan & Wurtzburg on Costs, 169, 170.

(*m*) Bristow v. Bristow, 5 Beav.

289. Cookson v. Bingham, 17 Beav. 262.

(*n*) *Re* Middleton, 19 Ch. D. 552. Patching v. Barnett, 51 L. J. Ch. 74. *Re* Roper, 45 Ch. D. 126.

(*o*) Barnwell v. Iremonger, 1 Dr. & Sm. 242, 255.

(*p*) Irby v. Irby, 24 Beav. 525. Skirrow v. Skirrow, 17 W. R. 759.

estate of the testator (*q*). And real estate which has descended to the testator's heir at law, not because it was not originally disposed of by the Will, but by reason of a subsequent forfeiture by the devisee under the provisions of the Will, is not liable to pay the costs of an action to administer the estate in priority to specifically devised and bequeathed freehold and leasehold estates (*r*).

In what cases
the plaintiff
shall pay the
executor costs.

It remains to consider in what cases the executor or administrator is entitled to receive his costs from the plaintiff. If a creditor plaintiff brings or continues an action after he has been correctly informed that there are no assets applicable to the payment of his debt, he will be ordered to pay the costs, wholly or from the time he receives the information (*s*). In *Robinson v. Elliott* (*t*), a creditor filed a bill against an executrix, and she stated, by her answer, that there were no assets for the payment of his debt; he, however, persisted in the suit; and the result of the account in the Master's office was, that there were no assets unadministered, though the executrix was charged with more than she had admitted: And it was held, that the bill should be dismissed without costs as against the executrix. In another case (*u*), on further directions, the case appeared to be, that application had been made to an executor for an account, but that he gave no account: The bill was then filed; and by his answer, the defendant stated the accounts; but the plaintiff took a decree for an account: It turned out, on the Master's report, that the account given by the answer was correct: and the question then was, as to costs: The Vice-Chancellor gave the plaintiff the costs of the suit up to the decree; and the defendant the costs of the subsequent proceedings.

(*q*) *Trethewy v. Helyar*, 4 C. D. 53, Jessel, M. R., dissenting from *G. wan v. Broughton*, L. R. 19 Eq. 77. See also *Fenton v. Wills*, 7 C. D. 33.

(*r*) *Hurst v. Hurst*, 28 Ch. D. 159. But see *Scott v. Cumberland*,

L. R. 18 Eq. 578.

(*s*) *Bluett v. Jessop*, Jacob, 240. *King v. Bryant*, 4 Beav. 460, 462. *Fuller v. Green*, 24 Beav. 217.

(*t*) 1 Russ. Chanc. Cas. 599. See *Dan. Ch. Pr.* 1220, 6th edit.

(*u*) *Anon.* 4 Madd. 373.

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Where the proceedings brought by a legatee are unnecessary or improper, he will not be allowed his costs out of the estate, as, for instance, where the plaintiff, a residuary legatee, suing by his next friend, sought to charge the defendant with costs on the ground of misconduct and failed in making out the misconduct (*x*), and the legatee will be ordered to pay the costs of such improper proceedings, as, for instance, the costs of taking unnecessary accounts (*y*), or an abortive attempt to remove a trustee (*z*), and the Court will not permit the costs occasioned by improper litigation to be paid out of the estate (*a*).

Useless proceedings by a legatee.

In the case of *Ackers v. Ackers* (*b*), North, J., ordered a useless administration action to be stayed, and the plaintiff to pay the costs of the action; the defendant being at liberty to take out of the estate any costs in default.

(*x*) *Williams v. Jones*, 34 Ch. D. 120.

(*y*) *Croggan v. Allen*, 22 Ch. D. 101. *Re Blake*, 29 Ch. D. 913.

(*z*) *Fane v. Fane*, 13 Ch. D. 228.

(*a*) *Brown v. Burdett*, 40 Ch. D. 244.

(*b*) W. N. 1884, p. 82. See also *Re Ormston*, 58 L. T. 74. Affirmed on appeal, 59 L. T. 594.

CHAPTER THE THIRD.

OF REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS IN
THE PROBATE DIVISION OF THE HIGH COURT OF JUSTICE.

AN executor, upon taking probate, as well as an administrator on taking out letters of administration, makes oath that he will (amongst other things) render a true and just account of the estate and effects of the deceased whenever required by law so to do (a). An administrator under the Court of Probate Act, 1857 (b), must also give a bond conditioned (*inter alia*) to make a "just and true account" of his administration whenever required by law so to do (c).

An executor or administrator may be compelled to exhibit an inventory, and render an account of his administration of the personal estate of his testator or intestate in the Probate Division at the instance of a legatee or next of kin, or of a creditor (d); but neither an executor nor administrator can be cited by the Probate Division *ex officio* to account (e).

The subject of the making of an inventory by an executor or administrator, together with the various questions relating thereto, *e.g.* the form and contents of the inventory (f), the

(a) For forms of executors' and administrators' oaths, see Tristram and Coote's Probate Practice, 10th ed., pp. 689, 700 *et seq.*

(b) Section 81. *Ante*, p. 454.

(c) For form of administration bond, see Tristram and Coote's Probate Practice, 10th ed., p. 673.

(d) This jurisdiction was preserved to the Court of Probate by section 23 of the Court of Probate Act, 1857. See *ante*, p. 238.

(e) In the case of *Bouverie v.*

Maxwell, L. R. 1 P. & D. 272 it was decided that the Court of Probate had no jurisdiction to compel administrators who had taken out administration in an Ecclesiastical Court to file inventories and accounts in the Registry of the Court, as such inventories and accounts were by virtue of the 87th section of the Probate Act returnable only into the Court of Chancery. See *ante*, p. 457.

(f) *Ante*, p. 846.

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cases in which, and the persons from whom, the Court will compel the exhibiting of an inventory (*g*), and the effect of lapse of time in exhibiting the inventory (*h*), has been discussed in an earlier part of this Treatise.

The order of the Court requiring the executor or administrator to bring in an inventory and account is obtained according to the present practice by summons (*i*).

Whether the Probate Division can entertain objections made by a legatee or creditor against the inventory exhibited by the accountant, is a question on which the decisions of the Court of Queen's Bench and the practice of the Prerogative Court of Canterbury, were at variance: The principal authorities on the point have been collected in an earlier part of this Treatise (*k*).

The executor or administrator shall be allowed, in the Probate Division, all his reasonable expenses, as well in law-suits as for other honest purposes: and this reasonableness of expenses is to be such, that he may receive thereby neither profit nor loss (*l*). And therefore he shall be allowed his expenses in secular courts over and above such costs as were allowed there (*m*). It should seem that the decisions which have been elsewhere pointed out (*n*), respecting the accounts and allowances of executors or administrators in Equity, would be regarded as authorities in those matters in the Probate Division also.

After the investigation of the account, if the Court finds it true and perfect, it shall pronounce for its validity; and in case all parties interested have been cited, such sentence shall be final, and the executor or administrator shall be subject to no further suit (*o*).

With respect to legatees and next of kin, they might formerly proceed against the executor or administrator in the

Suit for a legacy.

(*g*) *Ante*, pp. 841, 845.

(*h*) *Ante*, p. 844.

(*i*) See Tristram and Coote's Probate Practice, 10th ed., p. 342.

(*k*) *Ante*, pp. 847, 848.

(*l*) 4 Burn, E. L. 489, 8th edit.

(*m*) *Ibid*.

(*n*) *Ante*, p. 1759 *et seq*.

(*o*) 4 Burn, E. L. 487, 8th edit.

Ecclesiastical Court to recover their legacies, or distribute shares under the statute (*p*).

Indeed, in respect of legacies the cognizance of them in former times belonged exclusively to the Ecclesiastical jurisdiction; the Court of Chancery, till Lord Nottingham extended the system of equitable jurisprudence, administered no relief to legatees (*q*).

20 & 21 Vict.
c. 77, s. 23:
no suits for
legacies to be
entertained by
the Court of
Probate.

Suits by next
of kin for a
distribution.

But it is provided by the Court of Probate Act (20 & 21 Vict. c. 77, s. 23), that the Court of Probate, to which the jurisdiction of the Ecclesiastical Courts has been transferred, shall entertain no suit for legacies (*r*).

According to the Statute of Distributions, the Ecclesiastical Court had authority to enforce the distribution of an intestate's effects: And as the Act of Parliament contains no negative words, equity had, in this matter also, a concurrent jurisdiction with the Ordinary (*s*).

20 & 21 Vict.
c. 77, s. 23:
no suits for dis-
tribution of
residues to be
entertained by
the Court of
Probate.

But it is provided by the Court of Probate Act (20 & 21 Vict. c. 77, s. 23), that the Court of Probate, to which the jurisdiction of the Ecclesiastical Court was transferred, shall entertain no suits for the distribution of residue (*t*).

Now by the Judicature Acts, the jurisdiction of the Court of Probate has been transferred to the Probate Division of the High Court of Justice (*u*).

Proctor's fees.

The Ecclesiastical Court could not entertain a suit for proctor's fees; since they are a temporal duty, for which an action may be maintained in the Temporal Courts (*x*).

Injunctions:
Receivers.

The Probate Division, in common with the other Divisions of the High Court of Justice, has power to grant injunctions and to appoint receivers by virtue of sect. 25 (sub-s. 8) of the

(*p*) *Glen v. Webster*, 2 Cas. Ch. 3, s. 2, note (*d*).

temp. Lee, 31.

(*t*) See *ante*, pp. 238, 239.

(*q*) *Deeks v. Strutt*, 5 T. R.

(*u*) See *ante*, p. 240.

692.

(*x*) *Pollard v. Gerard*, 1 Lord

(*r*) See *ante*, pp. 238, 239.

Raym. 703. *Johnson v. Oxenden*,

(*s*) *Matthews v. Newby*, 1 Vern.

4 Mod. 255. *Toller*, 496.

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Judicature Act, 1873, by which it is provided that "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made: and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just: and if an injunction is asked either before or at or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Court shall think fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title: and whether the estates claimed by both or by either of the parties are legal or equitable."

In a case where an executor had before probate, and without the assent of his co-executor, intermeddled in the estate and made preparations to dispose of a portion of it, the Court gave leave to the co-executor to issue a writ against him, claiming an injunction to restrain him from dealing with the estate before probate, and praying for the appointment of a receiver (y).

Injunction by executor against a co-executor before probate.

(y) In the goods of Moore, 13 P. D. 36. The Court in this case followed the case of *Re Parker*, 54 L. J. Ch. 694, in which it was decided that by sect. 25 (sub-s. 8) of the Judicature Act, 1873, any Judge of the High Court is enabled to appoint a receiver of a deceased's

estate (before grant of probate or administration) notwithstanding the absence of *his pendens*: but that applications for any such order being on the way to probate proceedings are properly made in the Probate Division, and if made elsewhere will not be encouraged.

CHAPTER THE FOURTH.

OF EQUITABLE REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS IN THE COUNTY COURT.

Jurisdiction
of the County
Court in
Equity.

By stat. 51 & 52 Vict. c. 43, s. 67, it is enacted that the County Courts shall have and exercise all the powers and authority of the High Court in the actions or matters hereinafter mentioned; (that is to say,)

1. By creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law, or next of kin, in which the personal or real or personal and real estate against or for an account or administration of which the demand may be made shall not exceed in amount or value the sum of five hundred pounds.
5. Under the Trustees Relief Acts, or under the Trustee Acts, or under any of such Acts, in which the trust estate or fund to which the action or matter relates shall not exceed in amount or value the sum of five hundred pounds.

The section having enumerated other actions and matters proceeds :

"In all such actions or matters the Judge shall, in addition to the powers and authorities possessed by him, have all the powers and authorities, for the purposes of this Act, of a Judge of the Chancery Division of the High Court; and the treasurer, registrar, and high bailiff respectively shall in all such actions or matters discharge any duties which an officer of the said division can discharge, either under the order of a Judge of the said division, or under the practice thereof, and all officers of the Courts shall, in discharging such duties,

conform to any rules or orders made in that behalf under this

By sect. 68, "If during the progress of any action or matter under the last preceding section it shall be made to appear to the Judge that the subject-matter exceeds the limit in point of amount to which the jurisdiction of the Court is therein limited, it shall not affect the validity of any order already made, but it shall be the duty of the Judge to direct the action or matter to be transferred to the Chancery Division of the High Court; and the whole of the procedure in the said action or matter when so transferred shall be regulated by the rules of the Supreme Court: Provided always, that it shall be lawful for any party to apply to a Judge of the said division at Chambers for an order authorizing and directing the action or matter to be carried on and prosecuted in the County Court, notwithstanding such excess in the amount of the limit to which equitable jurisdiction is given by the said section; and the Judge, if he shall deem it right to summon the other parties, or any of them, to appear before him for that purpose, after hearing such parties, or on default of the appearance of all or any of them, shall have full power to make such order."

Where amount of subject-matter of suit exceeds the limit of the jurisdiction of County Court, suit may be remitted to Court of Chancery, &c.

By sect. 69, "Where any action or matter is pending in the Chancery Division of the High Court which might have been commenced in a Court under this Act, it shall be lawful for any of the parties thereto to apply at Chambers to the Judge of the said division to whom the said action or matter is attached to have the same transferred to the Court or one of the Courts in which the same might have been commenced, and such Judge shall have power upon such application, or without such application, if he shall think fit, to make an order for such transfer, and thereupon such action or matter shall be carried on in the Court to which the same shall be ordered to be transferred, and the parties thereto shall have the same right of appeal as they would have had if the action or matter had been commenced in such Court."

Transfer to County Courts of equitable actions or matters.

By sect. 70, "Any moneys, annuities, stocks, or securities Trustees may

before the time of commencement, or, with the like
 in the Court in the district of which the cause of action
 claim wholly or in part arose."

By sect. 75, "The provisions of the next preceding section
 shall not apply to any of the following proceedings; but

In what Courts
 proceedings in
 equity shall be
 taken.

"(2) Proceedings under the Trustee Acts, 1850 and 1852,
 shall be taken in the Court within the district of
 which the persons making the application, or any
 of them, reside or resides :

"(3) Proceedings for the administration of the assets of a
 deceased person shall be taken in the Court within
 the district of which the deceased person had his
 last place of abode in England, or in which the
 executors or administrators, or any one of them,
 shall have their or his place of abode :

"Provided that if during the progress of any such proceed-
 ings it shall be made to appear to the Court that the same
 could be more conveniently heard in some other Court, it
 shall be competent for the Court to transfer the same to such
 other Court, and thereupon the proceeding shall be taken in
 such other Court."

By County Court Rules, 1889, Ord. VI. r. 6, "Where any
 person entitled to bring or maintain an action for the adminis-
 tration of the estate of any deceased person or the execution
 of any trust desires to submit for the determination of the
 Court any of the following questions or matters :

In action for
 administration
 plaintiff may
 ask that only a
 certain
 question may
 be decided.

"(a.) Any question affecting the rights or interests of
 any person claiming to be creditor, devisee,
 legatee, next of kin, or heir-at-law, or *cestui que*
trust :

"(b.) The ascertainment of any class of creditors, lega-
 tees, devisees, next of kin, or others :

"(c.) The furnishing of any particular accounts by the
 executors or administrators or trustees, and the
 vouching (when necessary) of such accounts :

"(d.) The payment into Court of any money in the hands
 of the executors or administrators or trustees :

"(e.) Directing the executors or administrators or trus-

tees to do or to abstain from doing any particular act in their character as such executors or administrators or trustees :

“(f.) The approval of any sale, purchase, compromise or other transaction :

“(g.) The determination of any question arising in administration of the estate or trust :

he shall in his particulars specify concisely the question upon which the decision of the Court is required : that he is willing to renounce his right to an order for general administration of the estate or trust.”

Partial administration.

Such question may be determined without general administration, under Ord. XXII. r. 11.

Injunction.

By Ord. XXII. r. 12, “In any action or matter in which an injunction has been, or might have been claimed, the plaintiff may, before or after judgment, apply for an injunction to restrain the defendant or respondent from the repetition or continuance of the wrongful act or breach of contract complained of, or from the commission of any wrongful act or breach of contract of a like kind relating to the same property or right, or arising out of the same contract ; and the Judge may, in addition to giving judgment for such damages and costs as the plaintiff may be entitled to, grant the injunction either upon or without terms, as may be just.”

Parties aggrieved may appeal.

By sect. 120, “If any party in any action or matter shall be dissatisfied with the determination or direction of the Judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the Judge may appeal from the same to the High Court, in such manner and subject to such conditions as may be for the time being provided by the Rules of the Supreme Court regulating the procedure for appeals from inferior Courts to the High Court” (a).

For the Orders and Rules made for the County Courts, and the procedure therein, the reader is referred to the Annual County Courts Practice.

(a) See R. S. C. 1883, Ord. LIX. r. 10 to 17.

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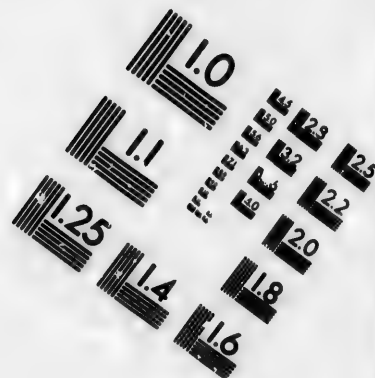
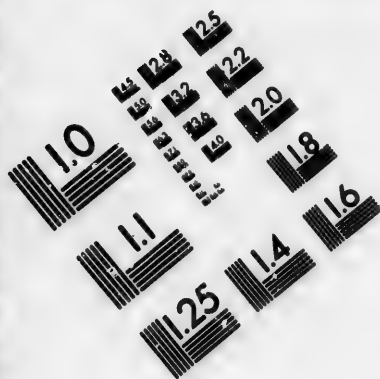
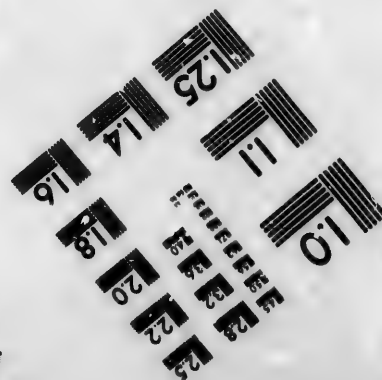
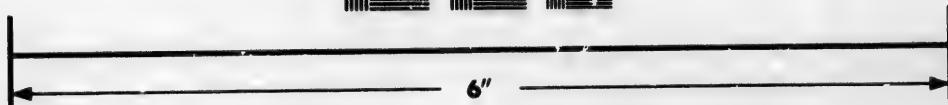
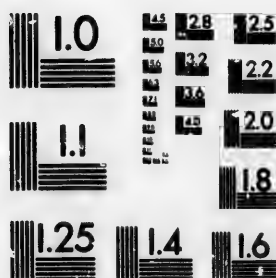


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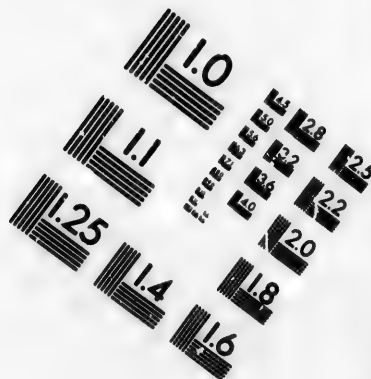
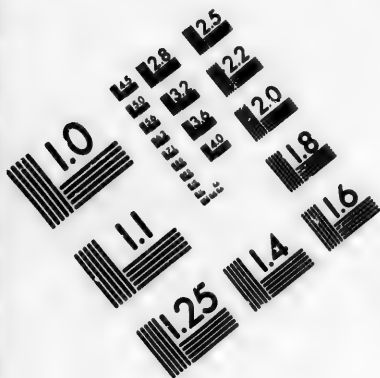
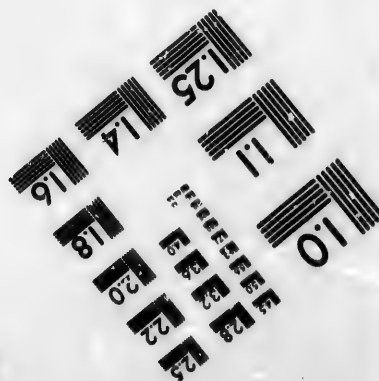
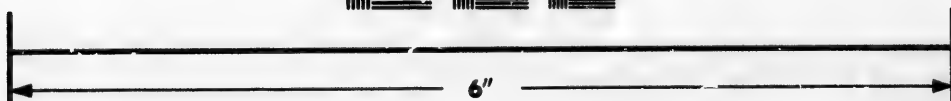
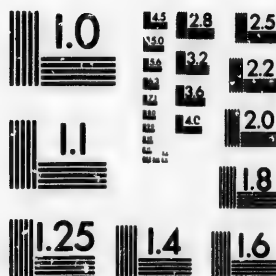


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